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PACIFIC REPORTER

203 P.—205 P.

Cite by Volume and Page
of the
PACIFIC REPORTER

Thus:
203 P. 78

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

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Pacific Reporter, Vol. 203, Nos. 1-4; Vol. 204, Nos. 1-6; Vol. 205, Nos. 1-5.

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Cal.Rep. 203-205 P.
2-1967

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(187 Cal. 361)

PEOPLE v. STEELIK. (Cr. 2348.)

(Supreme Court of California. Nov. 12, 1921. Rehearing Denied Dec. 12, 1921.)

1. Criminal law 🔑13—Criminal syndicalism statute is not invalid as uncertain.

The Criminal Syndicalism Act is not invalid as uncertain because it includes accomplices, and defines carefully numerous acts constituting aiding and abetting, or because it punishes aiders and abettors where the crime advocated is not committed.

2. Criminal law 🔑1186(4)—Unfair trial is miscarriage of justice within Constitution, though defendant be guilty.

That the record may show that a defendant is guilty does not conclusively establish that there has been no miscarriage of justice within Const. art. 6, § 4½, for there has been miscarriage of justice if defendant has not had a fair trial.

3. Criminal law 🔑1167(6) — Accused not harmed by failure to separate charge into separate counts.

If the indictment is sufficiently definite and certain in charging several different offenses, no injury resulted to the accused by failure to separate the charge into separate counts, he being rather the gainer, as but one penalty could be imposed.

4. Criminal law 🔑1186(4)—Defendant held not harmed by indictment charging more than one offense on proof of one.

Though an indictment charged more than one offense under the Criminal Syndicalism Act, defining several offenses, and but one of the offenses charged was proved or offered to be proved, the surplusage was not cause for reversal under Const. art. 6, § 4½, forbidding reversal save for miscarriage of justice.

5. Criminal law 🔑1167(6)—Uncertainty in indictment held beneficial to defendant under rule as to former jeopardy.

That an indictment was not sufficiently certain to prevent subsequent jeopardy for a separate offense was more apt to be beneficial than prejudicial where the evidence and verdict on the trial were directed to but one of the offenses, to which it was sufficiently certain.

6. Constitutional law 🔑42—One convicted of an offense under the statute cannot complain that it is uncertain in its definition of other offenses.

Defendant, convicted under St. 1919, p. 281, of advocating criminal syndicalism, is not entitled to have determined the question as to whether other subdivisions of the act sufficiently defined other offenses.

7. Insurrection and sedition 🔑2—Criminal syndicalism statute not invalid because not defining the offenses which one may be convicted of advocating.

St. 1919, p. 281, punishing as criminal syndicalism the advocating, teaching, or aiding and abetting the commission of crime, sabotage meaning the willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence, was not invalid because it did not define the particular offenses which one might aid or abet.

8. Constitutional law 🔑90—Criminal syndicalism statute does not violate right of free speech.

St. 1919, p. 281, defining criminal syndicalism as advocating, teaching, or aiding the commission of crime, sabotage, etc., does not violate the right of free speech.

9. Constitutional law 🔑42—Defendant, convicted of syndicalism in belonging to organization formed to commit crime, could not complain that other portions of statute forbade free speech.

Defendant, convicted under that portion of the Criminal Syndicalism Act against organizing or joining organizations formed for the purpose of committing crimes denounced, could not complain that the parts of the statute directed against the advocacy of doctrines urging criminal acts towards persons and property violated the right of free speech.

10. Insurrection and sedition 🔑2—Criminal syndicalism statute not invalid because denouncing acts which might have been punished as treason.

The definitions of treason in the federal and state constitutions are merely to limit the number of offenses punishable as such, and the act denouncing criminal syndicalism (St. 1919, p. 281), was not invalid because including offenses which might have been punished as constructive treason.

11. Constitutional law 🔑202 — Syndicalism statute not given ex post facto effect by admitting evidence of crimes by members of organization before joined by defendant.

In prosecution of a member of the I. W. W. under St. 1919, p. 281, for belonging to an organization formed to commit crimes denounced, the statute was not given the effect of an ex post facto law by admitting evidence of crimes by members of the I. W. W., prior to the time defendant joined.

12. Insurrection and sedition 🔑2—Evidence of crimes by members of the I. W. W. before defendant joined held admissible in prosecution against him.

In prosecution of a member of the I. W. W. under St. 1919, p. 281, for criminal syndicalism in belonging to an organization formed for committing crimes denounced, evidence of crimes committed by members of that organization before defendant joined it, was admissible as characterizing the organization after the passage of the act during the time defendant belonged.

13. Criminal law 🔑427(2)—Testimony of members of I. W. W. to offenses by members before defendant joined held not within rule as to declarations of coconspirators.

In a prosecution of a member of the I. W. W. under St. 1919, p. 281, for criminal syndicalism in being a member of the I. W. W., an organization formed to commit crimes denounced, evidence of members of such organization of offenses committed by members prior to the time defendant joined it was direct testimony to the facts, and not declarations of coconspirators within the rule that it should not be permitted until the conspiracy was established by other evidence than such declarations.

14. Criminal law ⚷1037(1)—Appellate court cannot consider misconduct of counsel not objected to.

An appellate court will not consider misconduct of counsel in argument unless objection is made at the time on contention that the conduct was so prejudicial as to have precluded any possible curative action had the court's attention been directed thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

N. Steelik was convicted of criminal syndicalism, and appeals. On hearing in bank after judgment in the District Court of Appeal, Second District, affirming the judgment below. Judgment of superior court affirmed.

J. H. Ryckman, and S. P. Pandit, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Thomas Lee Woolwine, Dist. Atty., Asa Keyes, Deputy Dist. Atty., and Raymond I. Turney, all of Los Angeles, for the People.

WILBUR, J. The defendant was charged with the crime of criminal syndicalism under a statute enacted in 1919 (Stats. 1919, p. 281). The indictment in the main follows the language of the statute, and the defendant claims that the indictment is not sufficiently specific, and that the statute is void for uncertainty, while the respondent relies upon the rule that an indictment in the language of the statute sufficiently charges a statutory offense. As the main contentions of the appellant are based upon the form of the indictment and the uncertainty of the statute, we will set out the charging part of the indictment. The indictment is as follows:

"The said * * * N. Steelik * * * are accused by the grand jury of the county of Los Angeles, state of California, by this indictment, of a felony, to wit, criminal syndicalism, committed at and in the county of Los Angeles, state of California, and before the finding of this indictment, as follows, to wit:

"That on or about the 29th day of September, 1919, and before the finding of this indictment, at the county and state aforesaid, the said defendants did then and there willfully, unlawfully, and feloniously, by spoken and written words and personal conduct, advocate, teach, aid, and abet criminal syndicalism, and the duty, necessity and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and effecting political changes, and did then and there willfully, unlawfully, feloniously, and deliberately, by spoken and written words, justify and attempt to justify criminal syndicalism and the commission of and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism, with intent to approve, advocate, and further the doctrine of criminal syndicalism as a means of accomplishing a change in industrial ownership and control and effecting political changes; and did then and there willfully, unlawfully and feloniously publish, issue, circulate and publicly display certain books, papers, pamphlets, documents, posters, and written and printed matter in other forms containing and carrying written and printed advocacy of teaching and aid and abetment of and advising criminal syndicalism, to wit: Advocating terrorism and advising the commission of crime, sabotage, and other willful and malicious damage and injury to property and unlawful acts of force and violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and effecting political changes; and did then and there willfully, unlawfully, and feloniously organize and assist in organizing, and they are, and each of them is, and each of them knowingly became, a member of an organization, society, group, and assemblage of persons known and designated as the 'Industrial Workers of the World' and sometimes known and referred to as the 'I. W. W.,' and sometimes known and referred to as the 'One Big Union,' and which said organization, society, group, and assemblage of persons was then and there organized and assembled to advocate, teach, aid, and abet criminal syndicalism as a means of accomplishing a change in industrial ownership and control and effecting political changes.

"All of which is contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

The statute which we will hereinafter refer to as the criminal syndicalism act in section 1 defines criminal syndicalism and sabotage as follows:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

Subdivisions 1, 2, and 3 of section 2 punish one who advocates or encourages or justifies criminal syndicalism. Subdivision 4 punishes one who assists in organization of a society to teach, aid, or abet criminal syndicalism; and subdivision 5 prohibits the commission of crime in furtherance of criminal syndicalism. Section 2, inserting therein the definition of "criminal syndicalism" and "sabotage" contained in section 1 in lieu of the words "criminal syndicalism" and "sabotage" contained in section 2, reads as follows:

"1. By spoken or written words or personal conduct advocates, teaches or aids and abets any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, or the duty, necessity or propriety of committing crime, willful and malicious physical damage or injury to physical property, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Willfully and deliberately by spoken or written words justifies or attempts to justify any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, or the commission or attempt to commit crime, willful and malicious physical damage or injury to physical property, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"5. Willfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept advocating, teaching or aiding and abetting the commission of crime, willful and malicious physical damage or injury to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years."

Thus it will be observed, the criminal syndicalism act prohibits the advocacy of crime, the organization of conspiracies to commit crime, and the commission of crime, having for its object the bringing about of political or industrial changes.

In considering the sufficiency of the statute and of the indictment, it should be noted that the language is unusually broad and comprehensive, as well as tautological, partly because the statute expressly includes accomplices and those who engage in conspiracies to commit the crime denounced.

[1] In defining crime it is not usual for the Legislature to include in the definition those who are accomplices. In this state accomplices are liable as principals, and may be charged as such. Section 31 of the Penal Code provides as follows:

"Sec. 31. *Who Are Principals.* All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion compel another to commit any crime, are principals in any crime so committed."

Thus, every act in defining a crime under our system of law includes those who aid and abet its commission, and such accomplices may be punished as principals for the perpetration of the crime which they aid and abet. The fact that in the criminal syndicalism act the statute ex industria includes accomplices and defines with meticulous care numerous acts constituting such aiding and abetting of the principal crime does not render the act uncertain, nor is the fact that the act punishes aiders and abettors of the crime where the crime advocated is not committed a reason for holding the law uncertain. On the contrary, such definition is for the purpose of making the law more certain and explicit.

In the case of Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, we have an instance where those who were responsible for anarchistic propaganda were found guilty and executed for the resultant murder of policemen by a bomb at the Haymarket meeting in Chicago. Our Criminal Syndicalism Act, however, differs from the implied legislation contained in the definition of every crime, in that it punishes aiders and abettors of the crime denounced for their efforts to bring about such crime, even before the criminal act they seek to bring about has actually been accomplished.

Section 5 provides punishment for those who commit the crime, and section 4 for those who organize or join organizations formed for the purpose of committing such crimes. The members of such an organization would, at common law, be punishable for conspiracy to commit crime.

It seems clear that not more than three crimes are described in the statute: First, the commission of a crime for the purpose of effecting the desired change; second, advocating the commission of such a crime, although it might not have occurred, and where the advocates would not therefore be accomplices in the crime; this would include those who print or write documents in furtherance of such crime; and, third, forming a criminal conspiracy for the purpose of committing such a crime.

The aiding and abetting of a contemplated crime, where it is an individual act, is not ordinarily punishable until the crime has been committed. But, if two or more join in the purpose, they become liable as conspirators under our statute (section 182, Penal Code), punishable without any overt act, if the offense agreed to be committed is a felony upon the person of another or to commit arson or burglary. In all other cases it is essential that some overt act in furtherance of the conspiracy occur (section 184, Penal Code).

Under our system a person charged with a crime as principal may be convicted of aiding and abetting in that crime (section 31, Penal Code). So that an indictment charging a person with committing the crime of criminal syndicalism, and also with aiding and abetting the same, would be duplicative, if at all, only because aiding and abetting criminal syndicalism is punishable as such under this act where the criminal act advocated is not consummated. The only purpose of charging the defendant with aiding and abetting and advocating crime, as well as the crime itself, is to charge that advocacy as a crime, distinct from the commission of the crime so advocated. It would seem clear that an indictment so framed as to permit a conviction for the crime advocated and for the advocacy of the crime, if not committed, would charge two separate offenses, and that the law framed so as to cover both would also define two offenses. That subdivisions 1, 2, and 3 of section 2 do define a separate crime is well illustrated by the fact that the justification of crime denounced in section 2, subd. 2, supra, would apply to crimes to be committed and those already committed. Both are covered by section 1, as teaching or advocating crime, and both are punishable because of their tendency to cause new crimes of a similar nature.

The conspiracy denounced in subdivision 4, § 2, is also a separate and distinct crime, which may result in the commission of the crime advocated, in which event the conspirators can be charged as principals in the crime. If no such crime is committed, the conspiracy to commit the crime is a separate offense from the crime, and from aiding and abetting the crime, where the latter is by an individual, and not by a combination or organization. If, as a result of a conspiracy, crime is committed, section 2, subd. 5, alone need be invoked.

In the case at bar no evidence was introduced of the consummation of any crime by the defendant or his associates for the purpose of effecting political or industrial changes. The evidence relied upon in this case for conviction was to the effect that the Industrial Workers of the World, hereinafter referred to as the I. W. W., was an organization which came within the provisions of section 4, and that the defendant was a member thereof. The defendant testified that he was a member of the I. W. W., having joined before the passage of the Criminal Syndicalism Act, and that he remained such member thereafter, and that he participated in the meetings of the organization. There was evidence to the effect that he was an authorized organizer thereof, and acted in such capacity, and personally advocated revolution and preached some of the doctrines denounced as criminal in the act. There was thus evidence before the jury that the defendant had violated section 2, subdivision 4, of the statute; that is, he knowingly belonged to a conspiracy to commit crimes in furtherance of industrial and political control.

[2] There is overwhelming evidence in the case at bar to justify a conclusion by the jury that the I. W. W. is an organization as clearly denounced by the statute as unlawful as though it was mentioned by name. It therefore clearly appears from the evidence that the defendant has committed a crime denounced by the statute, and is thus justly liable to suffer the penalty imposed by the statute, and there has been no miscarriage of justice in imposing upon him the penalty prescribed by law for the offense committed by him. Section 4½ of article 6 of the Constitution provides that no judgment shall be set aside in any cause for any error in pleading or procedure "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Of course, the mere fact that the record shows the defendant to be guilty of a crime does not conclusively determine that there has been no miscarriage of justice in imposing upon him the penalty prescribed by law therefor, for, if the defendant has not had a fair trial, there has been a miscarriage of justice.

The indictment must contain a statement

of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended (Penal Code, § 950) and "it must be direct and certain, as it regards: * * * The particular circumstances of the offense charged, when they are necessary to constitute a complete offense" (Penal Code, § 952), and the indictment is sufficient in that regard if "the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended" (Penal Code, § 959, subd. 6).

> "The indictment * * * may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts. * * *" Penal Code, § 954.

[3] Assuming that the indictment is sufficiently definite and certain in charging several different offenses, no injury resulted to the defendant by reason of a failure to separate the charge into separate counts. Indeed, he is the gainer thereby, as only one penalty can be imposed.

[4] It is claimed that the indictment in this case is so broad and comprehensive in its allegations, so indefinite and uncertain in its specifications, that the defendant was not properly advised of the nature of the charge against him, and was thus convicted without that due process of law guaranteed to him by the federal and state Constitutions. It is true that the language of the indictment is very comprehensive, and would justify the proof of a multitude of acts which would be comprehended within the terms of the statute and the indictment thereunder. On the other hand, it is specifically alleged in the indictment that the defendant was a member of the I. W. W., knowing its alleged purposes. As to that charge, he was therefore fully advised, and the evidence clearly shows his guilt. The evidence introduced against the defendant was all germane to that charge. The evidence as to the character of the organization and his membership was admissible to support the charge, and the testimony as to his statements and activities were admissible to show his knowledge of and sympathy with the purposes of the organization. No evidence is called to our attention which was not pertinent to this specific charge.

We are thus confronted with the question as to whether or not we should reverse this case because the indictment was comprehensive enough to charge in too general terms, acts and offenses, not in fact proved, where it clearly and specifically charged the offense proved on the trial, and no other offense or acts were proved or offered to be proved. The general rule is that surplusage may be rejected if sufficient remains in the indictment to charge the offense proved, and that uncertain and duplicitous averments may be treated as surplusage, and rejected. 22 Cyc. 367-369. Under this rule, the indictment was sufficient to support the judgment.

If we are correct in holding that the only just criticism of the indictment is that it included other offenses than the specific one of knowingly remaining a member of the I. W. W., and that the evidence was in fact confined to that issue, then we are directed by the Constitution not to reverse the judgment against the defendant for any error as to any matter of pleading, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." It is clear that mere surplusage in the indictment would not result in any miscarriage of justice as to a crime specifically charged and upon which upon proper evidence the defendant was found guilty.

[5] The defendant also complains of the trial for the reason that he is entitled to have the allegations against him reduced to such form that, in the event of either an acquittal or conviction, he cannot be again tried for the same offense, and that the indictment is not sufficiently certain to protect him in that regard. The rule invoked by the defendant is one for the testing of the sufficiency of an indictment (People v. Mahony, 145 Cal. 104, 106, 78 Pac. 354), and is entitled to consideration under the rule which limits the power of this court on appeal (article 6, § 4½). We think it clear, however, that the evidence and verdict are directed to the membership of the defendant in the I. W. W., and that this prosecution would bar another on that issue. It is therefore unnecessary to consider whether it would bar a prosecution for some other act included therein. If so, he is to that extent benefited by the unnecessary averments of the indictment, and is not prejudiced in this case thereby.

[6] We are not required in the case at bar to determine whether or not the general language of subdivisions 1, 2, and 3 is sufficient, when used in a statute, to define an offense, or in an indictment, to charge an offense, for the reason that the defendant is specifically charged with belonging to the I. W. W., and thus an offense is charged under subdivision 4, § 2, of the act.

[7] Appellant attacks the constitutionality of the statute because it denounces acts and conduct "as a means" of accomplishing political change or change in industrial ownership, thus leaving to a court or jury to determine whether or not the particular act or conduct of the defendant is adapted to the result denounced by the statute. In considering that question it should be noted that the Criminal Syndicalism Act does not un-

dertake to define the various acts, the advocacy of which is punishable under the statute. Such acts are already denounced as wrongful under existing laws. They are: (1) The "commission of crime;" (2) "willful and malicious physical damage to physical property;" (3) "unlawful acts of force and violence;" (4) "unlawful methods of terrorism." We must look to the general law of the state to determine what are "unlawful acts of force and violence," and what are "unlawful methods of terrorism," and to ascertain what acts are crime. The "malicious physical damage to physical property" is evidently synonymous with malicious mischief and arson, and other unlawful acts resulting in the damage to or destruction of physical property. These wrongful acts, most of them already punishable by the criminal law, are denounced by the statute and made felonious when done or advocated as a means of political or industrial change. The criminal syndicalism act might be summarized as an act to punish the advocacy of crime or wrong, engaging in conspiracies to commit crime or unlawful acts, or the commission of crime or unlawful acts, as a means of changing industrial or political control. It is proper to seek desired changes in political and industrial control; but, when criminal or unlawful means are used to effect political control, the means is punishable under the act defining and prohibiting criminal syndicalism, as well as under the act defining the crime. The latter act is no more uncertain than the one denouncing criminal conspiracy as a conspiracy to commit any act "injurious to the public health," "or to public morals," or the "perversion and obstruction of justice," "or due administration of the laws." Section 182 Penal Code.

This same question was considered by the Supreme Court of the state of Washington in State v. Hennessy, 195 Pac. 211, 215, and in State v. Fox, 71 Wash. 185, 127 Pac. 1111. An act defining criminal syndicalism was sustained in the former case, and an act defining criminal anarchy in the latter case. Both acts were couched in much the same language as our Criminal Syndicalism Act. Without further discussion we accept the conclusions of the Supreme Court of Washington in State v. Hennessy, supra; and, although the statute there under consideration is somewhat different in terms from ours, the principle there announced is fully applicable here.

We have twice had before us the question of the validity of this act. In re McDermott, 180 Cal. 783, 183 Pac. 437, where an application for a writ of habeas corpus was denied, and in Whitney v. Superior Court, 182 Cal. 114, 187 Pac. 12. In the case of In re McDermott, supra, the application for a writ of habeas corpus, after defendant had been held to answer, was based upon the grounds that the defendant had been held to answer without probable cause, and that the law was unconstitutional. It appears from an examination of the petition therein that the points specified by the petitioner in that case as the basis for the claim of the unconstitutionality of the statute were—

> "the ambiguity of the statute, in that a person of common intelligence cannot understand just what not to do in order not to violate any of its five subdivisions of section 2, in this, to wit: That it cannot be ascertained by reading said law whether it is a crime and a violation of said act for any person to read in public any book, paper, pamphlet, document, poster, or written or printed matter in any other form—to use the language of the act—containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising 'criminal syndicalism' as set out in subsection 3 of said act, if in said reading the person publicly displays said book, pamphlet, or other written or printed matter, no matter how innocent of violating said law said person might be; that the act was ambiguous, in that it cannot be ascertained therefrom just what is meant by 'unlawful methods of terrorism,' as contained in section 1 of said act and elsewhere as a person of common intelligence would reasonably conclude after reading said act that there is such a thing as 'lawful methods of terrorism'; that the complaint under which the petitioner was held was also defective and void, in that it did not state a public offense because it is not sufficiently direct and certain," etc.

The petition was filed July 25, 1919, and was denied July 31, 1919, without argument, because the court was thoroughly satisfied that the law was immune from the attack against it. The evidence upon which the petitioner was held to answer in that case, as in this, showed that the defendant was a member of the I. W. W., and had knowledge of its character. The decision in the McDermott Case upholds the constitutionality of the criminal syndicalism act in so far as it defines the crime mentioned in subdivision 4, § 2. We have considered the arguments made here attacking the constitutionality of the law, and see no reason to change the conclusion reached in the McDermott Case, supra.

In the case of Whitney v. Superior Court et al., supra, an application was made for writ of prohibition to prevent the superior court of Alameda county from proceeding with the trial of the petitioner upon an information charging the petitioner with violating the Criminal Syndicalism Act. This court, in denying the petition, said:

> "We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of provisions of our federal and state Constitutions."

The point of attack in that case as to the constitutionality of the law was that it violated section 24 of article 4 of the Constitution prohibiting a legislative act embracing more than one subject.

Notwithstanding these decisions in general terms approved the constitutionality of the statute, the defendant argues with great learning that the statute under consideration violates the right of free speech guaranteed in the federal and state Constitutions, and for that reason is unconstitutional and void.

[8, 9] The right of free speech was guaranteed to prevent legislation which would, by censorship, injunction, or other method, prevent the free publication by any citizen of anything that he deemed it was necessary to say or publish. See notes, 15 Ann. Cas. 3, 4; 6 R. C. L. § 239 et seq. The right of free speech does not include the right to advocate the destruction or overthrow the government or the criminal destruction of property. The Criminal Syndicalism Act does not violate the right of free speech. State v. Hennessy, supra; People v. Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509. It is expressly provided in our Constitution that the publisher is liable for an abuse of this power and for any unlawful publication. This statute does not prevent the publication; it punishes the publisher, and declares punishable the character of publication denounced by the act as illegal. The Legislature has power to punish propaganda which has for its purpose the destruction of government or the rights of property which the government was formed to preserve. People v. Most, supra. It is clear that the statute does not violate the right of free speech as defined by law. The defendant, however, is not in a position to raise the point, for he is not charged with or convicted of a violation of the criminal syndicalism act involving anything that he said or published, as hereinbefore indicated.

[10] Appellant contends that the offense with which he is charged comes under the common-law definition of constructive treason, and that therefore he cannot be punished because of the definition of treason contained in the federal and state Constitutions. These definitions are merely for the purposes of limiting the number of offenses which can be punishable as treason under the common law, and in no wise limit the power of the Legislature to provide for the punishment of acts inimical to the public welfare which theretofore might have been punished as constructive treason. State v. Hennessy, supra; Ex parte Bollman, 8 U. S. (4 Cranch) 75, 2 L. Ed. 554.

On the whole, therefore, we hold that the record justifies the conviction of the defendant of the offense of criminal syndicalism, in that he knowingly belonged to an organization which in its nature was a criminal conspiracy to change industrial control and government by unlawful and criminal methods.

[11] It remains to consider the various objections to the evidence presented by the defendant. The principal one is to the testimony of two members of the I. W. W. as to various criminal acts committed by members of that organization before the defendant joined the organization, and before the passage of the Criminal Syndicalism Act. It is urged that the defendant is not bound by the conduct of his associates before he joined with them, and that to convict him in this proceeding with a violation of a statute subsequently passed would make the law, in effect, an ex post facto law.

[12] In this case, the only question the defendant can be heard upon is whether or not the evidence of the conduct of members of the I. W. W. before the passage of the act is admissible as tending to establish the character of the organization after the passage of the act and during the time the defendant belonged thereto. It seems too clear for discussion that, where the issue involves the character of an organization, it is proper to determine the character of the organization from the conduct of its members and officers, including the propaganda which it publishes. It is no doubt true, that the presumption of innocence would overcome the legal presumption that, when the nature of a thing is once shown, it is presumed that it continues thereafter as long as such thing usually continues. Code Civ. Proc. § 1963, subd. 32. But where such proof is fortified by actual proof that, subsequent to the passage of the act, the organization continued to publish the same sort of propaganda, it is proper to consider the evidence of the conduct of the organization both before and after the passage of the statute in order to determine whether or not it is such an organization as is denounced by the statute. As the defendant knowingly continued his membership in the organization after such conduct had been denounced by the statute as criminal, he is liable, not for what the organization did before he joined it, or for its character before the statute was passed, but because after the statute was passed he violated the terms thereof by knowingly remaining a member thereof.

[13] It is contended that the evidence of these members of the I. W. W. was inadmissible, for the further reason that it consisted of declarations of coconspirators, and was not admissible until the conspiracy was established by other evidence than such declarations. In making this contention the appellant wholly misconceives the applicability of the rule with reference to the declarations of coconspirators. The evidence adduced in court by the coconspirators as witnesses are not declarations of conspirators, but direct testimony to the facts to which they testify. Aside from the discredit which attaches to them as accomplices, their evidence is entirely competent to establish the facts to which they testify. The rule for which counsel contends is applicable only when it is sought to introduce extrajudicial declarations and statements of coconspirators.

[14] Probably the most serious complaint made by appellant is that of misconduct on

the part of the district attorney in his argument to the jury. It was partly because of the character of the argument, portions of which were set out in the opinion of the District Court of Appeal of the Second District, Second Division, that we ordered a transfer to this court. The misconduct alleged consisted of vigorous and scathing denunciation of the defendant, and particularly of his counsel. During this denunciation the defendant made no objection. He neglected to call the attention of the court to the character of the argument and statements or the prejudicial effect anticipated therefrom. The court, however, instructed the jury that it must disregard the remarks of the counsel, and not consider them as evidence, and would only be justified in convicting upon the evidence upon the trial of the case. It is well settled that an appellate court will not consider a claim as to the misconduct of counsel in argument unless objection is made at the time. People v. Fleming, 166 Cal. 357, 371, 377, 136 Pac. 291, Ann. Cas. 1915B, 881.

Appellant claims that the remarks of the district attorney were of such a prejudicial character as to have precluded any possible curative action by the trial judge, and for that reason asks us to reverse the judgment. Assuming that the remarks of the district attorney were as prejudicial as counsel claim them to be, we must also assume that, if seasonable objection had been made to that course of argument or conduct, the district attorney would have refrained from other and further improprieties in his argument, failing in which the judge would have promptly and emphatically prohibited further violation of the proprieties by the district attorney. This being true, we have no means of ascertaining whether or not the more flagrant violations complained of and the most prejudicial remarks of the district attorney would have ever occurred if, at the beginning, the defendant, instead of sitting silently by, had made seasonable objection thereto. In any event, we cannot properly disregard the rule requiring that objection be made to prejudicial misconduct of the district attorney, as a basis for a complaint in this court.

Judgment affirmed.

We concur: SLOANE, J.; SHAW, J.; LENNON, J.

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187 Cal. 378

PEOPLE v. TAYLOR. (Cr. 2358.)

(Supreme Court of California. Nov. 12, 1921.
Rehearing Denied Dec. 12, 1921.)

1. Insurrection and sedition 🔑2—Acts alleged to constitute criminal syndicalism should be specified in indictment.

A count under Criminal Syndicalism Act, § 2, subd. 5, charging defendant with committing acts in furtherance of political and industrial change, should specify such acts.

2. Criminal law 🔑1186(4)—Failure of indictment to specify acts of criminal syndicalism held harmless.

Though an indictment under Criminal Syndicalism Act, § 2, subd. 4, for organizing or belonging to an organization advocating commission of crime to effect political change, was defective in not specifying the organization, such error did not constitute miscarriage of justice within Const. art. 6, § 4½, where defendant on voir dire of the jury asked the district attorney to state what organization was referred to, and was told the "Communist Labor party," and trial was had on that issue.

3. Insurrection and sedition 🔑2—Publications found at headquarters of society to which defendant belonged held properly admitted.

In prosecution of a member of the Communist Labor party under Criminal Syndicalism Act, for belonging to an organization advocating crime to effect political change, publications found at the headquarters of the party were properly admitted to show the character of the organization.

4. Constitutional law 🔑90—Statute denouncing advocacy of crime to effect change of government held not to violate right of free speech.

Though the right of free speech is violated by statutes denouncing organizations promoting or encouraging hostility or opposition to the government, such principle does not apply to statutes denouncing organizations formed for the purpose of committing crimes against persons and property in furtherance of political or industrial change.

5. Insurrection and sedition 🔑2—Whether a party was organized to abet criminal syndicalism was for the jury, and not for the court.

In a prosecution under Criminal Syndicalism Act, § 2, subd. 4, question whether or not the Communist Labor party, to which the defendant belonged, was organized to advocate and abet criminal syndicalism, was for the jury, and not for the court, on evidence as to the nature and character of such party.

6. Insurrection and sedition 🔑2—In prosecution of member of Communist Labor party, literature of I. W. W. held admissible.

In a prosecution of a member of the Communist Labor party for criminal syndicalism under St. 1919, p. 281, § 2, subd. 4, it was not error to admit in evidence literature and propaganda of the I. W. W. taken with other literature at the headquarters of the Communist Labor party, in view of the approval in its platform, of the I. W. W., and what it had accomplished.

7. Insurrection and sedition 🔑2—Evidence held sufficient to justify conviction for criminal syndicalism.

In prosecution for criminal syndicalism under St. 1919, p. 281, evidence *held* sufficient to sustain conviction of belonging to a party organized to advocate crime in furtherance of effecting political change, denounced by section 2, subd. 4, but insufficient to sustain a conviction under section 2, subd. 5, charging commission of crimes against persons and property.

8. Criminal law ⚷829(4)—Instructions covered by those given held properly refused.

In prosecution for criminal syndicalism, in which the issue was whether the Communist Labor party, to which defendant belonged, was an organization furthering crime as a means of effecting political change, instructions on the general rights of the masses to strike, and the propriety or impropriety to sympathize with the Soviet Russia, were properly refused, any relevant matter therein being covered by other instructions.

9. Indictment and information ⚷110(3)—Following language of Criminal Syndicalism Act insufficient.

Indictment for criminal syndicalism under St. 1919, p. 281, couched in the language of the statute, is insufficient where the charge made relates to advocacy of doctrines or publication and circulation of books, etc., as each separate act and publication would constitute a separate offense; and the specific acts charged should be designated.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

John C. Taylor was convicted of criminal syndicalism, and appeals. On hearing after judgment in the District Court of Appeal. Judgment affirming conviction on one count and reversing as to conviction on another.

Austin Lewis, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WILBUR, J. The defendant was convicted by a jury of the crime of criminal syndicalism. The indictment contained four counts, based upon subdivisions 1, 2, 4, and 5 of section 2 of the Criminal Syndicalism Act of 1919 (Stats. 1919, p. 281). He was convicted upon the first and fourth counts. The first count charged the defendant with the offense of knowingly belonging to an organization advocating sabotage, etc., and the fourth count with committing certain lawless acts defined in subdivision 5 of section 2 of the Criminal Syndicalism Act. The District Court of Appeal, First District, Division 1, sustained the conviction as to the first count, charging an offense under subdivision 4 of section 2 of the Criminal Syndicalism Act, and reversed the case as to count 4, charging an offense under subdivision 5. The defendant petitioned for a transfer to this court on the ground of the insufficiency of the indictment. The petition was granted because at the time we had under consideration a similar question in the case of People v. N. Steelik, since decided, 203 Pac. 78, in which the constitutionality of the statute and the sufficiency of an indictment thereunder were under consideration. It was desired that the matter should be fully considered in that case, and that the ruling therein might be applied in this case. If we agree with the holding of the District Court of Appeal that the evidence is insufficient to sustain the verdict of the jury on the fourth count, then this case becomes almost identical with that of People v. N. Steelik, with the single exception that, in the indictment in this case, the name of the organization to which the defendant belonged is not stated. That organization is the Communist Labor party. On the consideration of the petition for a transfer we were inclined to the opinion that, where a defendant was charged with advocating a certain doctrine or printing a certain book or pamphlet, or circulating the same, it was essential that the name and description of the book, document, etc., should be contained in the indictment for the information of the defendant. If there had been a conviction under counts 2 and 3 of the indictment in this case, that question would be directly involved here; but, in view of the fact that the jury disagreed upon these two counts, they have been dismissed, and the question is not now involved in the case.

[1] As to the fourth count of the indictment, in which the defendant is charged with committing acts in violation of the Criminal Syndicalism Law in furtherance of political and industrial change, it is clear that these acts should have been specified in the indictment. The fact that the jury, in the absence of such specifications, found the defendant guilty of committing such acts, and that the District Court of Appeal was unable to find any evidence in the case which justified such a conviction, merely emphasizes the fact that the acts charged to have been committed should have been specified. If the crime of arson, or murder, or larceny, or malicious mischief was intended to be charged by the indictment, that charge should have been made specifically, so that the defendant would be advised as to the particular charge he was called upon to meet in his defense. Inasmuch as we agree with the conclusion of the District Court of Appeal that there was no evidence upon which to justify a conviction upon this count, and therefore concur in the conclusion of that court that the judgment must be reversed upon that count, the only question remaining in the case with reference to the sufficiency of the indictment, in view of our decision in People v. Steelik, supra, is the question as to whether or not a charge that the defendant was a member of an organization denounced in subdivision 4 of section 2 of the Criminal Syndicalism Act is sufficient where it states the offense in the

language of that subdivision without naming the specific party or organization to which the defendant is alleged to have belonged.

[2] If, however, the indictment is broad enough in its terms to include the Communist Labor party, as is the case here, in testing the sufficiency of the indictment we are confronted with the provisions of article 6, section 4½, of the Constitution, which admonishes us not to reverse cases for mere defects in the pleadings. As the indictment was sufficient to charge the offense specified in subdivision 4 of section 2 of the Criminal Syndicalism Act in general terms, we are called upon to determine in this case whether the failure to name the organization to which the defendant was alleged to belong resulted in a miscarriage of justice.

The defendant in this case acted as his own counsel, and upon the voir dire of the jury asked the district attorney to specifically state what organization or party was referred to in the indictment for which it was intended to prosecute him. The district attorney replied, "Communist Labor party," so that during the actual trial of the case there was no doubt in the mind of the defendant as to the organization with which he was charged with affiliating. The defendant testified on his own behalf not only that he was a member of the Communist Labor party, but also that he had participated in its organization thereof at Chicago, Ill., and also of the local branch in Oakland, Cal., and was the secretary of the local organization. In his brief on appeal he states:

> "One question is presented by the evidence, 'Is the Communist Labor party of California an organization within the scope of subdivision 2[4], section 2, of the act?' "

He also states in his brief:

> "There is evidence, and we admit, that defendant went to Chicago and was in a minor capacity one of the organizers of the Communist Labor Party of America, all of which is material, if at all, for the sole reason that it shows that he knew of the purposes and objects of the party. There is evidence and we admit that the defendant took a prominent part in the organization of the Communist Labor Party of California, and the latter party affiliated with the Communist Labor Party of America. These facts could have been presented to the jury in 10 minutes and the defendant never denied them."

The defendant was thus fully advised, by the statement of the district attorney in response to his question, that the organization intended to be designated by count 1 of the indictment was the Communist Labor party. In the absence of some indication in the record or some claim on appeal that the defendant was surprised by the method in which the charge against him was made and proven, we cannot see that the defendant was prejudiced by the failure to mention the name of the organization to which it is charged he belonged. He was fully advised by the indictment that he was charged with belonging to an illegal organization, and fully advised by the statement of the district attorney that the particular organization intended was the one in which his membership was admitted. There was no miscarriage of justice in this case resulting from the failure to specify the organization intended, and this court cannot reverse the judgment of conviction, even though it is clear that the indictment should have stated the name of the organization to which it was claimed defendant belonged.

[3] Error is assigned in the admission of testimony offered by the people consisting of books, pamphlets, and publications found at the headquarters of the Communist Labor party in Oakland. This testimony was all received for the purpose of showing the character of the organization to which the defendant belonged, and his knowledge of that character. It is true, as the defendant contends, that the mere possession of books and documents advocating criminal syndicalism and sabotage would not be sufficient evidence to convict of the crime of criminal syndicalism. Such evidence, however, was admissible as tending to show the character of the organization, and was supplemented by other proof with reference to the nature and character of the organization, including debates over the policy of the organization in which the defendant participated, the constitution of the organization and propaganda prepared for its use, coupled with evidence that it indorsed the I. W. W. and had possession of literature used by that organization. The possession of the documents and pamphlets in question, taken alone, would be insufficient to characterize the organization, but it was one item in the evidence tending to show the nature of the organization, the weight and effect of which under the circumstances was to be determined by the jury.

[4] The defendant calls attention to the ruling of the Supreme Court of the state of New Jersey in the case of State v. Gabriel, 112 Atl. 611, and also to the opinion of Judge Anderson in Colyer v. Skeffington (D. C.) 265 Fed. 17. The New Jersey case is cited as authority for the proposition that subdivision 4 of section 2 of the Criminal Syndicalism Act of this state is unconstitutional, as violating the right of free assembly. The court in that case carefully distinguished the statute there held unconstitutional from one previously held valid by the Supreme Court of New Jersey in the case of State v. Tachin, 92 N. J. Law, 269, 106 Atl. 145. The statute held unconstitutional denounced an organization "promoting or encouraging hostility or opposition to the government of the United States or to the state of New Jersey." This was held to violate the constitutional right of the people to freely assemble and consult

together for the common good, etc. This decision has no application to a statute such as ours, which denounces organizations formed for the purpose of committing crimes against persons and property in furtherance of political or industrial changes. Our statute, on the contrary, is similar to that held constitutional in State v. Tachin, supra, and carefully distinguished in the later case of State v. Gabriel, supra. The decision by Judge Anderson in Colyer v. Skeffington, supra, represents the conclusion of that judge upon the evidence there submitted as to the character of the Communist Labor party, and as to whether or not it violates the federal statute authorizing the deportation of undesirable aliens. The question we are called upon to determine is whether the evidence is sufficient in this case to justify the finding of the jury that the Communist Labor party is such an organization as denounced by the law. As pointed out in the opinion of the District Court of Appeal, there was abundant evidence to sustain this conclusion by the jury. We approve and adopt the following conclusions of the District Court of Appeal:

[5] "Subdivision 4 of section 2 of the act provides that any one who organizes, or assists in organizing, or is, or knowingly becomes, a member of any organization, society, group, or assemblage of persons, organized or assembled to advocate, teach, or aid and abet criminal syndicalism, is guilty of a violation of the statute. The first count of the indictment upon which appellant was convicted is based upon this subdivision. He contends that the evidence does not support the finding of the jury and the verdict of imprisonment entered thereon. Under this phase of his appeal he attempts to narrow consideration to the question of whether or not the Communist Labor Party of California and the Communist Labor Party of America are organizations within the scope of the inhibitions of the Criminal Syndicalist Act. Stated in another way, as we understand appellant's position, his contention is that, in arriving at a decision in this matter, the jury based its decision largely upon its interpretation of the constitution, platform, and other documents setting forth the aims and objects of the communist parties, and that the construction of these documents was really a question of law for the court, and that, as a matter of law, the only evidence introduced in the case does not establish that the organizations named fall within the purview of the statute. This contention is plausible, but it is not sound, even if the issues were narrowed to the extent that the appellant would have us go. The authorities appear to be all to the contrary. Were it only necessary in the instant case to determine the beliefs, plans, and prospective actions of a large number of people organized in so-called political parties it would be a question of fact. Colyer v. Skeffington (D. C.) 265 Fed. 17, 56. Whether or not the Communist Labor Party of America, particularly the Communist Labor Party of California, in the organization of the latter of which appellant took part, were organized to advocate, teach, aid, and abet criminal syndicalism, was for the jury to determine, and not for the court to infer as a matter of law. Kumpula v. United States, 261 Fed. 49, 51, 171 C. C. A. 645; Pierce v. United States, 40 Sup. Ct. 205, 209, 252 U. S. 239, 64 L. Ed. 542; Shenck v. United States, 249 U. S. 47, 52, 39 Sup. Ct. 247, 63 L. Ed. 470; State v. Moilen, 140 Minn. 112, 167 N. W. 345, 348, 1 A. L. R. 331; People v. Malley, 194 Pac. 48.

"There was evidence in this case from which the jury might not be, and evidently were not, willing to draw as favorable conclusions of the aims and objects of the so-called political parties to which defendant belonged, as the appellant would have us reach. Again, the activities of the appellant do not appear to have been merely confined to his being 'in a minor capacity one of the organizers of the Communist Labor Party of America,' and taking 'a prominent part in the organization of the Communist Labor Party of California.' It appears from the record that he was at one time a member of the Industrial Workers of the World, an organization commonly known as the I. W. W. When his membership in that organization ceased, if it ever did, does not clearly appear from the record. He was also state secretary and organizer for the socialist party. He conceived and broached to Alverson, a state organizer for the party, and who was a witness for the people, a plan to gain control of the 'Local' of the socialist party, with which they were affiliated, by inducing and securing a large number of members of the Industrial Workers of the World to become members of the socialist organization, thereby affording the opportunity of transforming the socialist party from a political to a revolutionary party. With others, Taylor was a delegate to a gathering or convention of a faction, or 'left wing,' of the socialist party which met in Chicago. Dissension appears to have arisen in the meeting, and a portion of the delegates either withdrew or were excluded from its deliberations. They repaired to the hall of the I. W. W. in Chicago and proceeded to organize the Communist Labor Party of America. The constitution, platform, and manifesto of that organization were admitted in evidence, as were a number of reports of the proceedings of that so-called party.

"In the platform and program of the Communist Labor party the organization declares itself in 'complete accord with the principles of communism, as laid down in the Manifesto of the Third International formed at Moscow,' and calls upon the working class to organize and train itself for the capture of state power by the establishment 'of organs of administration created and controlled by the masses themselves, such, as, for example, the Soviets of Russia.' The platform also declares for the transfer of private property and the means of production and distribution to the working class government, to be administered by the workers themselves, and calls upon the revolutionary working class movements of all countries to closely unite. That manifesto advocates 'the disarming of the bourgeois at the proper time, the arming of laborers and the formation of a Communist army as the protector of the rule of the proletariat and the inviolability of the social structure.' Such, according to the manifesto, is the red army of Soviet Russia, which is declared to be inseparable from the soviet state. 'Conquest of political power,' according to the manifesto, 'means not merely a change in the personnel of ministries, but annihilation of the enemy's apparatus of government; disarmament of the bourgeois, of the counter-revolutionary officers, of the White Guard; arming of the proletariat, the revolutionary soldiers, the Red Guard of Workingmen; displacement of all bourgeois judges and organization of proletarian courts; elimination of control by reactionary government officials and substitution of new organs of management of the proletariat.' The revolutionary era, according to the manifesto, 'compels the proletariat to make use of the means of battle, which will concentrate its entire energies, namely, mass action, with its logical resultant, direct conflict with the governmental machinery in open combat. All other methods, such as revolutionary use of bourgeois parliamentarism, will be of only secondary significance.' For an interesting discussion of the effect of these declarations, see U. S. v. Wallis (D. C.) 268 Fed. 413.

"In its program, which appears to be part of its platform, the Communist Labor party favors international alliance only with the communist groups of other countries, those which have affiliated with the communist international. It also favors organized party activity and co-operation with 'class-conscious industrial unions, in order to unify industrial and political class-conscious propaganda and action, and advocates conduct of the communist propaganda and organization in the shops and to encourage the workers to organize in one big union.' Then follows the declaration that, 'in any mention of revolutionary unionism in this country, there must be recognition of the immense effect upon the American labor movement of the propaganda and example of the Industrial Workers of the World, whose long and valiant struggles and heroic sacrifices in the class war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and pledge them our whole-hearted support and co-operation in their struggles against the capitalist class.'

"Upon the return of Taylor and the other delegates to the Chicago convention to Oakland, steps were taken to form, and there was organized, the Communist Labor Party of California, which was closely allied with, and apparently became an integral part of, the parent organization. There seems to be no doubt that its aims, objects, and purposes were in full accord and in entire sympathy with the platform and principles of that body, including its allegiance to the soviet movement in Russia. At the outset of the organization meeting, those present gave three cheers for the Bolsheviki, and the appellant also led the meeting in singing songs, one of which called upon:

"'All who right and justice seek,
Burst your bonds no longer weak,
Unite and join the Bolshevik.
Rise! Rise! Rise!'

"Taylor took an active part in the organization of this body. The Oakland local of the socialist party, with which appellant seems to have been allied, seceded from that organization and went into the Communist Labor party. The appellant outlined an ambitious plan concerning the tactics to be used in accomplishing the ends of the Communist Labor party. His plan, according to his program, was to bring about a general strike of the workers in all industries and in all governmental offices. The army and navy and the police forces of the country would be paralyzed by the general strike and the failure of telephones and telegraphs, the railroads and food supply. The 'Red Guard,' of which he was to be the organizer, was to step in and immediately take control of all state, county, and city offices which were to be ruled and governed by those who were in the 'inner circle,' or those who were to be recognized as leaders of the revolution. This 'Red Guard,' according to the testimony, was to be in process of organization through those interested in the revolution, to be assembled the moment the general strike was called. This inner circle of leaders of the revolution was designated by the number '77.' Taylor referred to the uprising as the 'bloody revolution.' The Red Guard, it was planned, would seize the police stations and take the banks, moving all the currency and coin to one central place, there to be held by the guard. All newspapers in the locality were to be seized, except one, which, 'as a matter of revolutionary tactics,' should be spared as a medium of spreading the propaganda of the revolutionists. Advantage was to be taken by the party of the alleged unrest caused by German propaganda and discontent among soldiers returning from the war. The Red Guard, according to Taylor, had spies in the ranks of the American Legion and in and around the police department and in the various offices of the city hall in Oakland. Members of the inner circle had selected hiding places on the Mendocino coast and in the Sacramento valley to utilize in case of emergency.

"In outlining his further plans, according to the testimony, Taylor disclaimed any hope of success of political change through the ballot, and advocated getting results by force. He favored sabotage as a weapon of the working class against the employers and capitalists, such as pulling up rails and derailing trains in railroad strikes, destroying machinery in factory disturbances, and wrecking street cars in traction troubles. He also advocated burning hay stacks in order to bring the farmers to terms. During the time he was advocating all such measures, Taylor was active in the work of the Communist Labor party.

"Appellant attacks the veracity of the witness Alverson, from whose lips much of the foregoing testimony was elicited, and at the trial attempted to discredit a number of other witnesses. We are not concerned with that question here. The credibility of the various witnesses and the weight to be given to their testimony were matters resting entirely with the jury.

"In addition to the foregoing evidence it was shown that the headquarters of the Communist Labor party in the city of Oakland had been continually under the surveillance of the police authorities and agents of the federal Department of Justice. A newspaper, called 'The World' was established there for the purpose of disseminating the propaganda of the organization. In the hallways of the headquarters were news stands on which were displayed and from which were sold books, pamphlets, and newspapers. The meeting room of the party was in a hall adjoining. Eventually the place was raided, and the police authorities seized a mass of documents and files and carried away a large number of books and pamphlets and a miscellaneous assortment of literature and publications, including copies of The World and other papers, which appears to have been devoted to disseminating the propaganda of the Communist Labor party. Copies of the publications and documents were admitted in evidence. There was also admitted in evidence, over the objection of defendants, a number of books and publications having to do with the Industrial Workers of the World. There were books on 'Sabotage,' by Elizabeth Gurly Flynn, Walker C. Smith and Emil Pouget; 'I. W. W., Its History, Methods, etc.,' 'Revolutionary I. W. W.,' works on syndicalism, reports of the I. W. W. convention, and books and songs of the organization. Other documentary evidence of like nature was also admitted.

[6] "Appellant objected to the introduction of this evidence on the ground that it was in no way shown to be indorsed by or a part of the propaganda or platform of the Communist Labor Party, and also on the ground that it was not shown to be the property of, or in any way connected with, either himself or the organization. The court admitted the various publication of this evidence on the ground that it was material to show the purpose, and expressly limited it for the purpose of establishing the nature, aims, and objects of the Industrial Workers of the World in view of the approval of that organization and what it accomplished in the platform of the Communist Labor party. We think this was a correct ruling. It also had a tendency to connect the defendant, more or less intimately, with the organization of the so-called Red Guard, in which, according to the witness Alverson, he was industriously engaged.

[7] "With the foregoing testimony, and all of the other evidence in the case before it, the jury reached the conclusion, under apt instructions from the court that the appellant was guilty of the charge contained in the first count of the indictment. As we have already held, with citation of authorities, at the outset of the consideration of this phase of the appeal, the matter presented was a question of fact for the jury to determine. We must therefore hold, in view of the lengthy record which we have only epitomized, that the evidence was sufficient to support the finding of the jury on the first count.

"The appellant was also found guilty under the fourth count of the indictment, which charged that he did, by personal acts and conduct, commit acts advised, advocated, taught, and aided and abetted by the doctrine and precepts of criminal syndicalism, with intent to accomplish a change in industrial ownership and control, and effecting a political change. We are unable to see how conviction of the defendant on that charge can be sustained. The allegation was framed under the fifth subdivision of section 2 of the act, by reference to which it will be noted that it deals with the commission, by personal act or conduct, of any of the things prohibited by the statute, and which are held to amount to the practice of criminal syndicalism. It is not shown that the defendant committed any unlawful act of force or violence, or that he personally, or with others, directed or took part in any 'unlawful methods of terrorism.' It is undoubtedly true, as the record clearly indicates, that the defendant was guilty of advocating sabotage, violence, and unlawful methods of terrorism as a means of accomplishing changes in industrial ownership and control, and effecting political changes. For that reason we are unable to understand why the jury was unable to agree upon a verdict under the second count of the indictment. We are equally unable to comprehend how it arrived at a verdict of guilty under the evidence and instructions of the court upon the fourth count. There is no evidence to warrant conviction upon that charge.

[8] "Appellant complains of the refusal of the court to give certain instructions requested by him. Examination of these instructions clearly demonstrates that they go far afield from the issues involved in this case, and were, in the main, properly refused for that reason. The general right of the masses to strike, and the propriety or impropriety of extending sympathy to the soviet government of Russia, were not issues in this case. Certain portions of the requested instructions which were refused by the court, if segregated, might properly have been given, but the matters there involved were sufficiently covered by other instructions which the court gave. The charge appears to have been fair and comprehensive.

"As to the first count of the indictment, the judgment and the orders denying the motions in arrest of judgment and for a new trial are, and each is, affirmed. As to the fourth count, the judgment and said orders are reversed."

[9] As the case must be sent back for a new trial upon the fourth count other points will be considered which may arise on the new trial. With reference to the sufficiency of the fourth count, we hold that it does not state an offense because of its utter failure to state generally or specifically any crime or crimes alleged to have been committed by the defendant in furtherance of a change of industrial ownership or of political control. A demurrer thereto should have been sustained. As to the second and third counts of the indictment, we do not wish to be understood as holding that an indictment couched in the language of the statute is sufficient where the charge made relates to the advocacy of doctrines or the publication and circulation of books, etc. As each separate act and publication would constitute separate and distinct violations of the statute, the specific acts charged should be designated in the information with certainty. Without such information it would be impossible for the defendant to make his defense, and such information is always given and required in indictments for libel, fraud, and similar offenses.

The difficulty resulting from the form of indictment used in this case was very well illustrated by the following colloquy which occurred when the jury returned into court after seven hours' deliberation:

"The Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

"The Foreman: Your honor, we are not ready. We wish some further instructions or interpretation of a portion of the indictment. Some of us don't seem to be able to quite grasp the meaning of the wording, and we were rather wandering in the dark, because we don't know what it means.

"The Court: I don't know that the court could go very far, other than read the indictment to you. You might state the question that you desire to be instructed upon.

"The Foreman: Shall I read this portion of the indictment some of us do not understand?

"The Court: What?

"The Foreman: Should I read the portion—

"The Court: I don't know that there is any particular objection to your reading it. You may read it if you desire.

"The Foreman: This indictment charges that Mr. Taylor did then and there unlawfully—this is the portion that we do not understand: 'By spoken and written words, and by personal conduct, advocate, teach, aid, and abet criminal syndicalism, and the duty, necessity, and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change. * * *'

"The Foreman: And then going to the other portion of the third count: 'That the said John C. Taylor did then and there unlawfully, willfully, wrongfully'—this is the part—'by spoken and written words justify and attempt to justify criminal syndicalism, and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism, with intent then and there to approve, advocate, and further the doctrine of criminal syndicalism. * * *'

"The Foreman: This is the portion we do not understand. They don't both mean the same thing."

The court thereupon read sections 1 and 2 of the Criminal Syndicalism Act and the instructions given on the second and third counts of the indictment, and read the third count of the indictment as follows:

"And the said John C. Taylor is accused by the grand jury of said county of Alameda, by this indictment, of the crime of felony, to wit, a violation of an act entitled 'An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor,' approved April 30, 1919, committed as follows: That the said John C. Taylor, prior to the time of finding this indictment, and on or about the 28th day of November, A. D. 1919, at the said county of Alameda, state of California, did then and there unlawfully, willfully, wrongfully, deliberately, and feloniously, by spoken and written words, justify and attempt to justify criminal syndicalism, and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism, with intent then and there to approve, advocate and further the doctrine of criminal syndicalism.

"If you are satisfied, to and beyond all reasonable doubt, that the said John C. Taylor, on or about the time alleged in the indictment, and within three years prior to the finding thereof, in the county of Alameda, did then and there, by either spoken or written words, justify or attempt to justify criminal syndicalism, as that term has been defined in the statute referred to, or the commission or attempt to commit crime, or sabotage, or violence, or unlawful methods of terrorism, with intent then and there to approve or advocate or further the doctrine of criminal syndicalism, then, and in such case, you should find the defendant guilty under such third count.

"Let me repeat, ladies and gentlemen of the jury, do you feel any clearer now than you did before on the questions that were bothering you concerning these two counts? The second count in the language, that you have mentioned, Mr. Rowe, reads: 'And by personal conduct advocate, teach, aid, and abet criminal syndicalism, and the duty, necessity, and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change.'

"Foreman H. D. Rowe: Yes, your honor.

"The Court: That is the second count. You will see that it speaks, or charges the defendant, rather, that he did then and there, by spoken and written words, and by personal conduct, advocate, teach, aid, and abet criminal syndicalism, and the duty, necessity, and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change. And the language in the third count that you have pointed out reads as follows—or charges in the following language: 'Did then and there unlawfully, willfully, wrongfully, deliberately, and feloniously, by spoken and written words, justify and attempt to justify criminal syndicalism, and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism, with intent then and there to approve, advocate, and further the doctrine of criminal syndicalism.'

"The Court: Do you see the difference now, ladies and gentlemen of the jury?

"A Juror: I do your honor.

"The Court: And the other ladies and gentlemen of the jury, do they see the difference in these two counts?

"The Second Juror: They are so much alike.

"The Court: You understand the language itself, do you not?

"The Second Juror: Yes, your honor.

"The Court: One speaks of willfully, wrongfully, deliberately, and feloniously, by spoken and written words, justify and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism with intent then and there to approve, advocate, and further the doctrine of criminal syndicalism, and the other count in the language pointed out charges that the defendant did then and there unlawfully, willfully, deliberately, and feloniously, by spoken and written words and by personal conduct, advocate, teach, aid, and abet criminal syndicalism, and the duty, necessity, and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change. It would seem that that count charges the defendant with—that the defendant by spoken and written words and personal conduct advocated, taught, aided, and abetted criminal syndicalism, and the duty, necessity, and propriety of committing crime, sabotage, violence, and unlawful methods of terrorism as a means of effecting a change in industrial ownership and control, and as a means of effecting a political change, while the other count, in the language that no attention has been drawn to, charges that he did then and there unlawfully, willfully, wrongfully, deliberately, and feloniously, by spoken and written words, justify and attempt to justify criminal syndicalism, and the commission and attempt to commit crime, sabotage, violence and unlawful methods of terrorism, with intent then and there to approve, advocate, and further the doctrine of criminal syndicalism. Are you satisfied now, do you believe, ladies and gentlemen?

"The Foreman: I am.

"The Court: And you and each of you? (The jury answer in the affirmative.)

"The Court: Very well. I hope I have made it plain in discussing or rather, giving the instructions. *I kept close to the legal verbiage for the reason that it was the proper thing and the duty of the court, and the court had to do it. I do not desire to analyze the language of the count, since it is in the lawful words and terms that you find it in.*" (Italics ours.)

Thirty-five minutes after these instructions were given the jury returned with a verdict against the defendant on two counts. They could not agree on the other counts.

There were 25 exhibits offered by the people, thus summarized in the reporter's transcript:

1. Song.
2. Manifesto.
3. Press and Propaganda Report.
4. Statement of Delegates.
5. Platform and Program.
6. The Truth.
7. Ohio Socialist.
8. Committee on Credentials Report.
9. Report State Conv. World Nov. 14.
10. Letter of Katterfeld.
11. Syndicalism.
12. Charter.
13. Minutes.
14. I. W. W.; Its History, Methods, etc.
15. General Strike, by Haywood.
16. Revolutionary I. W. W.
17. Joe Hill Songs.
18. Preamble and Constitution.
19. Advancing Proletariat.
20. Sabotage, Elizabeth Curley Flynn.
21. Songs, to Fan the Flames, etc.
22. Tenth Convention, I. W. W.
23. Sabotage, Walker C. Smith.
24. Sabotage, Emil Pouget.
25. Resolutions.

In addition thereto there was evidence of speeches and debates participated in by the defendant. There is no reason why the rule pertaining to the trial of libel cases could not be equally applicable to a trial of criminal syndicalism, so far as the relative duty of court and jury with reference to interpretation of documentary evidence is concerned. In a libel case, where the language of the article published is clear, and definite, the court should say whether or not it is a libelous article. Van Vactor v. Walkup, 46 Cal. 124; Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103; Mellen v. Times-Mirror Co., 167 Cal. 587, 140 Pac. 277, Ann. Cas. 1915C, 766.

On the other hand, if the instrument is susceptible of two different interpretations, one of which would be libelous and the other not, it would be for the jury to say, on proper instruction from the court, whether or not the article is libelous under all the circumstances and proofs of the case. Van Vactor v. Walkup, supra; Tonini v. Cevasco, supra; Mellen v. Times-Mirror Co., supra. If a pamphlet, newspaper, or article circulated by the defendant is in plain and unequivocal terms, it is the duty of the court to construe the meaning and effect of the document for the benefit of the jury.

It appears from the colloquy above quoted as well as from the general tenor of the instructions given by the court, that the trial judge felt that it was a more conservative, if not a necessary, course, to confine the instructions and observations of the court to the general language of the statute and indictment. In view of the general and comprehensive character of these statements, the jury should have been more definitely informed, not only concerning the nature of the charge, but the character of the evidence sufficient to support the charge. It is evident that the trial court took the view that the statute was dealing with a course of conduct on the part of the defendant; that is to say, if the defendant in various ways, by pamphlets, by speech, by circulars, newspapers and posters advocated sabotage, this course of conduct in its sum total constituted a violation of the law. On the contrary, as already pointed out here and in the case of People v. Steelik, supra, each separate act constitutes a crime. The only way in which the sum total of these acts can properly be presented under one charge is where they resulted in the actual commission of crime or are a part of propaganda carried on by an organization, and are thus pertinent, not for the purpose of showing the separate acts of crime, but for the purpose of proving the character of the organization with which the defendant has wrongfully affiliated himself.

In view of the general nature of the charges, of the wide scope of the evidence, and the lack of definiteness in the instructions, we would unhesitatingly reverse the judgment if there had been a conviction on counts 2 or 3. We do not agree with the contention of the Attorney General that a charge under this statute in the language of the statute is sufficient. It is true that as to many crimes an indictment in the exact language of the statute is sufficient, but the fundamental rule which controls in the interpretation of the indictment is that announced in section 959, subdivision 6, of the Penal Code:

> "That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, *and in such a manner as to enable a person of common understanding to know what is intended.*" (Italics ours.)

The indictment in this case is no more illuminating in that regard as to counts 1, 2, 3, and 4 than if the defendant had been merely charged with "violating the statute defining criminal syndicalism found in the statutes of 1919, p. 281." This is clearly insufficient.

The suggestions herein contained as to the sufficiency of the indictment as to counts 2 and 3 are made because it is clear from the many informations and indictments called to our attention that district attorneys generally are using the general language of the statute in indictments under the Criminal Syndicalism Act. And, in such cases it is manifest that great injustice may be done a defendant by a mass of evidence which may establish the commission of many different offenses not called to the attention of the defendant with sufficient clearness to enable him to prepare an intelligent defense thereto. This is particularly true where a mass of documentary evidence is admitted to establish the character of the organization to which it is alleged the defendant belongs, and where there is also a general charge of criminal syndicalism under the subdivisions 1 and 2 of section 2.

As pointed out in People v. N. Steelik, supra, there is no essential difference between "advocating" and "justifying" crime. Either charge covers the other. Hence subdivisions 1 and 2 of section 2 do not state separate offenses.

While appellate courts may be compelled in many cases to affirm convictions under this law, because of article 6, § 4½, of the Constitution, because there is no miscarriage of justice in the particular case under review, this fact ought not to encourage a system of pleading or practice under which proper notice of the nature of the offense is given by accident rather than by design. It is well to remember in this type of case that, while the defendants may be charged with an attempt to destroy this government, they are as much entitled to its protection, until convicted of crime as any other citizen or individual, and one of these fundamental rights is that when they are charged with crime they should know the particular crime they are charged with.

The judgment is affirmed as to count 1 and reversed as to count 4.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; SHAW, J.

(187 Cal. 620)

WEEKS v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR ALAMEDA COUNTY. (S. F. 9906.)

(Supreme Court of California. Dec. 22, 1921. Rehearing Denied Jan. 19, 1922.)

1. Divorce ⚷170—Final decree not granted as of course.

It is within the contemplation of Civ. Code, § 132, as to final decree one year after interlocutory decree, that facts arising subsequently to the granting of the interlocutory judgment should have their influence in determining the right to a final decree.

2. Contempt ⚷80—Party in contempt cannot secure aid of court.

No party to an action can ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to its legal orders and processes.

3. Contempt ⚷80—Defendant disobeying order as to child's custody cannot secure final decree.

Where, by the terms of the interlocutory decree, the court determined that the husband was entitled to a divorce and awarded him the custody of the minor child of the parties, and defendant wife thereupon left the state with the child, *held*, she could not procure the entry of final decree at the expiration of a year after the interlocutory decree, under Civ. Code, § 132, while still remaining with the child outside the state so that the court's decree as to the child's custody could not be enforced.

In Bank.

Application by Irene Moeling Weeks for writ of mandate prayed to be directed to the Superior Court of State of California, in and for Alameda County, and to compel the granting of a final decree of divorce. Writ denied.

Max J. Kuhl, of San Francisco, for petitioner.

T. P. Wittschen and G. E. Jackson, both of Oakland, for respondent.

WASTE, J. The petitioner seeks a writ of mandate to compel the respondent to grant her a final decree of divorce. Her application here is based upon the refusal of the superior court to act, for the reason that the petitioner, as a party to the divorce action, has willfully disobeyed the lawful order of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the court relating to the custody of a child of the marriage, and is, therefore, in contempt of court.

The petitioner is the defendant in an action for divorce brought against her by her husband on the ground of extreme cruelty. When the action came on for trial she was represented in court by counsel, and she and the minor child of the marriage were in the state and within the jurisdiction of the Superior court. By the terms of the interlocutory decree the court determined that the husband was entitled to a divorce, and awarded him the custody and control of the minor. On the day of the trial, and after the decree was granted, the petitioner, without the consent or permission of the court or of the plaintiff in the action, removed the minor from the state, where she has kept the child ever since. When one year expired after the entry of the interlocutory judgment, the petitioner, without coming into the state, applied to the respondent, through an attorney, for the entry of a final judgment granting the divorce. Her application was opposed by the plaintiff in the action on the facts stated, and upon the ground that petitioner is in contempt of court in keeping the minor outside the jurisdiction of the superior court to prevent him from gaining possession of the child in accordance with the court's decree. Petitioner made no attempt to controvert these facts or the allegation as to her motive.

[1-3] We think the respondent was right in refusing to enter the final decree of divorce. Section 132 of the Civil Code provides that when one year has expired after the entry of the interlocutory decree the court, on motion of either party, or upon its own motion, may enter the final judgment granting the divorce. But that does not mean that a party to the action may have a final decree entered when to do so would be a flagrant abuse of the principles of equity and of the due administration of justice. It is within the contemplation of the section that facts arising subsequently to the granting of the interlocutory judgment should have their influence in determining the right to a final decree. Olson v. Superior Court, 175 Cal. 250, 252, 165 Pac. 706, 1 A. L. R. 1589. When one becomes a voluntary actor before a court and seeks the court's aid, it is manifestly just and proper that in invoking that aid he should submit himself to all legitimate orders and processes. No party to an action can, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to its legal orders and processes. O'Neill v. Thomas Day Co., 152 Cal. 357, 362, 92 Pac. 856, 14 Ann. Cas. 970. "No rule of law seems more widely prevalent or better established than that a court whose authority has been put to naught will extend no favors or privileges to the party in contempt until he has acknowledged its authority by purging the offense." 4 Ency. Pl. and Pr. 805; 13 Corpus Juris, 91; Winter v. Superior Court, 70 Cal. 295, 11 Pac. 633; Monterey Coal Co. v. Superior Court, 11 Cal. App. 207, 104 Pac. 585; Smith v. Smith, 18 Wash. 158, 51 Pac. 355; Campbell v. Justices of the Superior Court, 187 Mass. 509, 73 N. E. 659, 69 L. R. A. 311, 2 Ann. Cas. 462; White v. White, 148 App. Div. 883, 132 N. Y. Sup. 1043.

The identical situation presented by this application was but recently considered by the Supreme Court of Washington. Pending the determination of a divorce action the superior court of that state ordered the plaintiff, the wife, to keep the child of the parties to the action within the jurisdiction of the court. She failed to comply with the order and moved the court for a voluntary dismissal of her action. The court refused to entertain the motion for the reason that the plaintiff was at the time in contempt of court for failure to obey its order. The plaintiff thereupon sought a writ of mandate to compel the superior court to hear and grant her motion. The Supreme Court held that the statute of Washington conferred an absolute right upon the plaintiff in the action to dismiss her action, but that as she was in contempt, she would not be allowed to present her motion to dismiss until she cleared herself of that contempt. State ex rel. Hunter v. Ronald, 106 Wash. 413, 180 Pac. 125. So, in this case, the petitioner has treated the order of the court with contempt and removed herself and the minor from the jurisdiction so that it cannot be enforced. She should not be allowed to make application for final decree of divorce until she has submitted to the lawful order of the superior court in relation to the custody of the child of the parties to the action or otherwise purged herself of the contempt.

The application for the writ is denied.

We concur: SHAW, C. J.; WILBUR, J.; RICHARDS, Justice pro tem.; LENNON, J.; SHURTLEFF, J.; SLOANE, J.

187 Cal. 615

EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited, et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9839.)

(Supreme Court of California. Dec. 21, 1921. Rehearing Denied Jan. 19, 1922.)

1. Master and servant 🔑347 — Workmen's compensation confined to relation of employer and employee.

Const. art. 20, § 21, as to workmen's compensation, does not give the Legislature power to create and enforce a liability on the part of any one not an employer to compensate persons not his employees, nor to create courts or commissions having judicial power for the settlement of disputes concerning such liability between persons not sustaining the relation of employer and employee, and is not changed in this respect by its amendment in 1918.

2. Master and servant 🔑361—Compensation award to partner as employee unauthorized.

Where claimant's own testimony showed that he was a partner of the firm by which he claimed to be employed, in that he performed his part of the business of the firm without wages, receiving his only reward therefor out of an equal division of the firm profits, the fact that his name was among the employees of the firm on the firm's workmen's compensation policy, and that the insurance carrier received benefits in the way of additional premium because his name was added to the list of employees in the policy, did not give the Industrial Accident Commission power to award him compensation as an employee, for whether or not the insurance company would be estopped to deny liability to claimant as an employee covered by the policy in another form of proceeding, no such estoppel would confer jurisdiction to make such an award upon the Commission, a tribunal with powers limited to awarding compensation to claimants who are employees in fact.

3. Courts 🔑24—Jurisdiction of subject-matter not conferred either by agreement or estoppel.

Jurisdiction of the subject-matter of a controversy cannot be conferred on a tribunal of limited powers either by the direct agreement of the parties or by an estoppel growing out of such agreement.

In Bank.

Proceeding under the Workmen's Compensation Act by W. L. Williams, as employee, opposed by Employers' Liability Assurance Corporation, Limited, insurance carrier, and Green & Williams, a copartnership, employers. The Industrial Accident Commission awarded compensation to claimant, and the insurance carrier and employers apply for certiorari to review the Commission's order. Award annulled.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondent Commission.

Courtney L. Moore, of San Francisco, for respondent Williams.

RICHARDS, Justice pro tem. This proceeding was instituted by the petitioners herein to review an award of the Industrial Accident Commission granting compensation to W. L. Williams, one of the respondents herein. There is no dispute as to the facts upon which this proceeding is predicated. W. L. Williams was a partner in the firm of Green & Williams, copartners, engaged in the rock-crushing business and employing several men. The duties of Williams as a member of said firm were those of working with the men in the gravel pit, while the duties of Green, the other member of the copartnership, were those of attending to the selling and collecting business of the firm. Each was an equal partner, neither receiving wages, but deriving his benefits from the association solely out of the profits of the business. The petitioner herein was the insurance carrier of the firm under the terms of a policy issued by it, which policy, as to most of its provisions, was in the usual printed form, apparently intended for general use throughout the United States where workmen's compensation laws existed, with addenda attached thereto referring particularly to the provisions of the California law upon the subject. In this policy of insurance there was inserted the following clause:

> "Pay roll for Comp. to include drivers and drivers' helpers, also chauffeurs and chauffeurs' helpers.
>
> "Including William L. Williams at an amount not exceeding $1,666 per annum. All others excluded."

W. L. Williams was injured while at work in the gravel pit during the life of this policy, and made application to the Industrial Accident Commission for an award, naming the firm of which he was a member and its insurance carrier as the respondents in said application. An answer was filed by the said respondents, denying the jurisdiction of the Commission over said proceeding, and also denying that the applicant was in the employ of said firm, and alleging that upon the date of his injury said applicant was not earning more than the minimum amount upon which compensation is based under the Workmen's Compensation Act. Upon the hearing before the Commission it made an award to the applicant of $20.83 a week for 240 weeks, and $12.82 a week for the remainder of his life, together with the sum of $708.22 accrued from the date of his injury to the date of said award. The award states:

> "That the foregoing weekly benefit is based upon wages exceeding the maximum at which compensation shall be computed."

The insurance carrier applied for a rehearing before the Commission, which was denied, whereupon it instituted this proceeding, seeking the annulment of the foregoing award.

The petitioner's first contention is that W. L. Williams was not an employee of the firm of Green & Williams, and hence the Industrial Accident Commission could have no jurisdiction over his case. It must be concluded that as to the facts of the case, the undisputed evidence showed that W. L. Williams was not an employee of the copartnership of Green & Williams of which he was an equal member, performing without wages his part of the work and business of said firm, and receiving and to receive his only reward therefor out of an equal division of the profits thereof. There had been no profits earned by said copartnership up to the date of the applicant's injury. While he had withdrawn some small amounts from the firm, these were, according to his own testimony, in the nature of loans, some portion of which he had repaid from other resources. Section 21 of article 20 of the state Constitution, as it read prior to 1918, provided:

> "The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section by arbitration, or by an industrial accident board, by the courts or by either any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

[1, 2] It has been held by this court in several recent cases that the Legislature had no power under this clause of the Constitution to create and enforce a liability on the part of any person not an employer to compensate persons who do not sustain to him the relation of employee, and that the Legislature under said section had no power to create courts or commissions having judicial power for the settlement of disputes concerning such liability between persons who did not sustain the relation of employer and employee to each other. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Pacific G. & El. Co. v. Industrial Accident Comn., 180 Cal. 497, 181 Pac. 788. Each of these cases had reference to liabilities arising out of and during a partnership relation, and in each of which it was decided that the provisions of the Workmen's Compensation Act wherein it was attempted to invest the Industrial Accident Commission with jurisdiction to hear and determine such cases were unconstitutional and void. In the year 1918 the foregoing section of the Constitution was amended so as to broaden the powers of the Legislature "to create and enforce a complete system of workmen's compensation, by appropriate legislation." Whatever the effect of this amendment to the Constitution may be in other respects, its primary object remains that of dealing, and of authorizing the Legislature to deal, with the subject of workmen's compensation. In that respect it purports to be no broader in its scope than the section of the Constitution above quoted and which it replaced. This being so, the above-cited decisions of this court defining the powers of the Legislature under said former clause in the Constitution still remain as to the particular point at issue here in full force and effect. The respondent herein concedes the force of these decisions, but undertakes to avoid their effect by showing that in the policy of insurance issued to the firm of Green & Williams, said W. L. Williams was expressly mentioned and listed among the employees of said firm, and it is the respondent's contention that the name of W. L. Williams having been thus inserted in said policy among the employees of the firm, even though he was not in fact such employee, and that said insurance carrier having received benefits in the way of added premium by virtue of the insertion of the name of said Williams in said policy as such an employee, were sufficient to give the Industrial Accident Commission jurisdiction to determine the fact as to whether said Williams was or was not an employee of his own firm. This contention is based upon the showing that the Workmen's Compensation Act embraces certain sections which provide that working members of partnerships receiving wages, irrespective of profit from said partnership, shall be deemed employees thereof, and which also undertake to give the Commission jurisdiction to determine controversies arising out of insurance policies issued to self-employing persons. Workmen's Compensation Act, 1917, §§ 8b, 57b (St. 1917, pp. 835, 869). Even if it were to be conceded that such a stipulation between the insured and the insurance carrier could suffice to confer jurisdiction upon the Industrial Accident Commission to hear and determine the question as to whether the person named as an employee therein is or is not such an employee as would be entitled to the benefits of the act, it would avail the applicant in this proceeding nothing since the undisputed evidence shows that he was not in fact an employee of the partnership of which he was was a member. His own testimony before the Commission is conclusive upon this subject, and brings the case squarely within the above authorities so as to compel an annulment of this award.

[3] The respondent herein, however, urges that the insurance carrier by the fact of having issued this policy and received the consideration therefor in the way of premium is estopped thereby to claim that W. L. Williams is not an employee of the insured. In support of this contention the respondent cites a number of cases from other jurisdictions, all of which, with one exception, are cases of agreement between individuals and

estoppels arising therefrom in no way affecting the question of the jurisdiction of tribunals to hear and determine such controversies. On the other hand, it has been held in this state that a surety company is not estopped to deny liability upon a void obligation by reason of the fact that it has executed the same and received the benefits thereof. Loop L. Co. v. Van Loben Sels et al., 173 Cal. 228, 159 Pac. 600; Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; Coburn v. Townsend, 103 Cal. 233, 37 Pac. 202. The case of Kennedy v. Kennedy Mfg. Co., 177 App. Div. 56, 163 N. Y. Supp. 944, is the only case cited by petitioner bearing upon the question at issue here. That was a case arising under the Workmen's Compensation Act of New York, and the court held that the insurer in that case was estopped to deny that the applicant was an employee of the insured corporation when he had been listed as such employee in the insurance policy. This ruling, however, was not necessary to the decision of that case, since it clearly appeared that, irrespective of the terms of the policy, the applicant was, upon the facts, an employee of the corporation. That case is therefore not authority for the respondent's contention in the instant case. Upon principle it must be held that jurisdiction of the subject-matter of a controversy cannot be conferred upon a tribunal of limited powers either by the direct agreement of the parties or by an estoppel growing out of such agreement. 15 Corpus Juris, p. 844, § 164; Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 334, 187 Pac. 1056. Upon the facts of this case the applicant for this award was not an employee of the copartnership of which he was a member at the time of his injury. The Industrial Accident Commission had therefore no jurisdiction to entertain his application or to make the award. Whether or not W. L. Williams would have a right of recovery in the ordinary courts of law upon any obligation on the part of the insurer arising out of the terms of this policy and of his injuries is a matter which we are not called upon to determine in this proceeding.

The award is annulled.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; LENNON, J.; SHURTLEFF, J.

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187 Cal. 623

MORE v. HUTCHINSON. (S. F. 9836.)

(Supreme Court of California. Dec. 22, 1921. Rehearing Denied Jan. 19, 1922.)

1. Corporations 🔑264—No liability to creditor where one corporation assumes indebtedness of another until creditor accepts the offer thereby made.

Where one corporation assumes an indebtedness of another corporation, the contract between the corporations, as far as the creditor is concerned, amounts to a mere offer, and as affecting the time of accrual of liability of stockholders there is no liability to the creditor on the corporation assuming the indebtedness until the creditor accepts, by suit or otherwise.

2. Corporations 🔑264—Action on note held to accrue only on acceptance by creditor of agreement to assume.

Where a corporation was formed to take over the assets and assume the indebtedness of another corporation, including an obligation evidenced by a note, there was no liability on the part of a stockholder of the new corporation until the holder of the note assented to or accepted the agreement, and an action against a stockholder was not barred until three years after such acceptance and assent, expressed by acceptance of a new note from the new corporation, under Code Civ. Proc. § 359, Civ. Code, § 1559, and in this connection the new note cannot be considered a renewal of the old one, but constituted a new and independent contract.

3. Corporations 🔑264—Liability of stockholder not revived by renewal or extension.

Where a note is given by a corporation in renewal of an existing indebtedness of its own, the liability of stockholders of such company cannot be revived or extended beyond three years by such renewal or extension, under Code Civ. Proc. § 359.

Sloane, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. L. More against Kate K. Hutchinson, as executrix of the last will and testament of Joseph Hutchinson, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

J. S. Hutchinson and Walter Slack, both of San Francisco, for appellant.

Robert B. Gaylord, of San Francisco, for respondent.

WILBUR, J. This is an action to recover on a stockholder's statutory liability. The defense is that the cause of action is barred by the provisions of section 359, Code of Civil Procedure. Defendant is a stockholder in a corporation which assumed and agreed to pay an outstanding obligation of the Morris Real Estate Company. The question involved is as to whether or not the liability of the stockholders of the Palo Alto Investment Company, in which the defendant was a stockholder, accrued at the time of the assumption of this outstanding indebtedness or at the time of the execution of the note given by the latter company to the creditor.

[1] The District Court of Appeal, First District, Division 1, held that the liability accrued at the time of the execution of the

note sued on, and not at the time of the assumption of the liability. In the petition for transfer to this court it was claimed that the decision was directly contrary to the established law in this state. The transfer was made in order that this point might receive further consideration. After such consideration we are satisfied with the opinion of the District Court, written by Mr. Justice Kerrigan, and adopt it as our own. It is true that our authorities uniformly hold that suit may be brought by the third person upon a contract entered into for its benefit immediately upon the execution of the contract, but this rule arises from the fact that the suit itself is deemed an acceptance of the contract. The true rule is that until such acceptance by the third person, there is no liability on the part of the person who assumes the indebtedness, but, as stated in the opinion of Mr. Justice Kerrigan, such contract, as far as the third person is concerned, amounts to a mere offer.

In addition to the authorities cited by the District Court of Appeal the following authorities support this view: Blake v. Atlantic National Bank, 33 R. I. 464, 82 Atl. 225, 39 L. R. A. (N. S.) 874, see note; Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003; Zwietusch v. Becker, 153 Wis. 213, 140 N. W. 1056; see cases cited in Decennial Digest, Contracts, § 187, subd. 5.

Appellant insists that the case of Morgan v. Overman S. M. Co., 37 Cal. 534, 537, sustains his position. In that case suit was brought by a third party, and the bringing of the suit constituted an acceptance. Appellant quotes from Washer v. Independent Mining, etc., Co., 142 Cal. 702, 708, 76 Pac. 654, as holding that the obligation accrued at once in favor of the third person without an acceptance. The quotation in appellant's petition is taken from that opinion but is in turn a quotation from Brewer v. Dyer (Mass.) 7 Cush. 337. Turning to that decision we find it stated:

> "It seems to us that the case at bar falls clearly within them, and that the agreement in question, having been made for the benefit of Brewer on a sufficient consideration, *and having been accepted and adopted by him*, he can well maintain his action of assumpsit against the defendant." (Italics ours.)

Neither this Massachusetts case nor our own case are authority for the proposition that an acceptance is unnecessary.

The decision of the District Court of Appeal, hereby adopted, is as follows:

"This is an action to enforce a stockholder's liability. The proceeding was instituted by respondent as the holder of a promissory note of the Palo Alto Investment Company, a corporation, to enforce the liability of the appellant's testator as a stockholder of that company. Judgment was rendered in favor of plaintiff for the sum of $1,371.83, and defendant as executor has appealed.

[2] "The defense urged at the trial was that the action was barred by the statute of limitations, and this is the sole question presented on this appeal.

"The facts are undisputed, and were established by stipulation at the trial. They may be briefly summarized as follows: The history of the transaction dates back to the year 1906. At that time one J. J. Morris and Marshall Black borrowed $7,500 from the Crocker National Bank, giving their note therefor. In 1908 this note was taken up by the individual note of Morris. In 1912 the Morris Real Estate Company assumed payment thereof. There was then due and unpaid thereon the sum of $5,545. In March of the same year the Palo Alto Investment Company was organized for the purpose of taking over the assets and liabilities of the Morris Company, and this arrangement was consummated at that time, and later, on April 29, 1912, the Palo Alto Investment Company executed an instrument, acknowledging receipt of a conveyance from the Morris Company of its assets, and in consideration of this transfer it thereupon agreed to assume the liabilities of that company, among which was the note in question. About seven months thereafter, and on December 4, 1912, the board of directors of the Palo Alto Company adopted a resolution to renew this promissory note by executing a new note for $5,545, payable to the Crocker Bank. The note was accordingly executed by the Palo Alto Company, drawn to its own order, indorsed by it in blank, and delivered to and accepted by the Crocker National Bank, which in turn subsequently transferred the note to plaintiff, who thereafter, on November 29, 1915, commenced this action. This was the last day of the three-year period established by section 359, Code Civ. Proc., when computing the time from the date of the note.

"It is appellant's contention that decedent's liability as a stockholder of the Palo Alto Investment Company to the Crocker Bank was created by the consummation of the agreement between the Morris Company, by which the former conveyed its assets to the latter, which in turn assumed the liabilities of the former, and that the stockholders' liability began to run from the date of this agreement. Respondent, on the other hand, insists that the indebtedness was incurred at the time the note was executed, and not before. There is no showing in the record that the bank ever knew of the existence of the obligation of the Palo Alto Company to assume the liabilities of the Morris Company, or that it ever assented to it in any way, or accepted its benefits or its burdens prior to the time that it might be charged with such knowledge by its acceptance of the note in suit.

"The contention of the appellant is based upon the doctrine laid down in Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87, and subsequent cases, to the effect that actions based upon a stockholder's liability must be brought within three years after the liability is created. If the doctrine invoked can be made to apply to this case so as to successfully avail appellant, then a situation is presented of a person being made a party to a contract and foreclosed of certain rights thereunder, based upon facts of the existence of which he has absolutely no information or knowledge whatsoever, and to which he has never assented. We are cited to no authority supporting such a principle.

"There is no question that it is the settled law of this state that the statute of limitations begins to run in favor of the stockholder of a corporation at the time the debt against the corporation is created; and that under this principle the obligation of the Palo Alto Investment Company's stockholders to the Morris Company, being incurred when the agreement of April 12, 1912, was executed, was barred as against the Morris Company in three years from that date. Quite different, however, is the situation of the bank in its transaction with the Palo Alto Company. It never knew of, and consequently never assented to, the agreement transferring its claim until the new note was executed in its favor, and it accepted the same on November 29, 1912, the day the note bore date. So far as the record shows, this is the only knowledge or information that it had concerning the entire transaction.

"Appellant claims that the assent of the bank was in no manner essential to the creation of the liability of the Palo Alto Company or the accruing of the action in favor of the bank against such company, for the reason that where, as here, one corporation takes over the assets of another with an agreement to assume the liabilities of the latter, the creditors of the old corporation may enforce the agreement against the new corporation, citing Morgan v. Overman, etc., Co., 37 Cal. 534; Stanford Hotel Co. v. Schwind, 180 Cal. 348, 181 Pac. 780. Authority in support of this principle is unnecessary. Our Civil Code (section 1559) expressly provides that 'a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.'

"A contract for the benefit of a third person, however, like any other contract, requires an acceptance; and until such acceptance is manifested in some manner no rights creating a corresponding liability in favor of such party can arise. Until then the transaction amounts to a mere offer. 13 Corp. Jur. 711; Johnson v. Central Trust Co., 159 Ind. 605, 65 N. E. 1028. The exemption from liability here claimed by appellant finds no support in the doctrine announced in Hunt v. Ward, supra. If the operation of the statute could be set in motion against the bank seven months before it had any knowledge of the liability created in its favor, and to which arrangement it had never assented, it might be concealed for a period beyond which any liability against stockholders might be invoked. In other words, the statute could toll against a right of the existence of which one was ignorant by reason of the fact that he had never assented to the agreement out of which it arose. We cannot subscribe to such a doctrine.

[3] "Equally untenable is the appellant's contention that the note of the Palo Alto Company was a mere renewal, one which did not extend the time prescribed in the statute. It is undoubtedly true that where a note is given by a company in renewal of an existing indebtedness of its own the liability of stockholders of such company cannot be revived or extended by such renewal or extension. Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Goodall v. Jack, 127 Cal. 258, 59 Pac. 575. Here, however, no such condition is presented. The transaction under consideration was a new and independent contract, made with a different company. Under such circumstances it cannot be said that the new note was a renewal of the old one. The bank had the right to, and undoubtedly did, rely upon the right of recourse to the stockholders of the new company in accepting its note."

Judgment affirmed.

We concur: SHAW, C. J.; LENNON, J.; SHURTLEFF, J.

SLOANE J. I dissent. From whatever standpoint we view the transaction, it seems to me the liability impressed upon the defendant as a stockholder of the Palo Alto Investment Company was created when that corporation in its contract with the Morris Real Estate Company agreed to pay the latter's indebtedness to plaintiff's assignor, the Crocker National Bank. That obligation was the foundation of defendant's liability. It was the only consideration for the note subsequently given by the corporation and sued on in this action. Whether the note was an extension or a renewal of the original liability, it, in neither case under the established rule in this state, could stay the statute of limitations as to the defendant.

I do not think it is at all clear that an acceptance was necessary by the plaintiff here before a complete accrual of a cause of action in its favor upon the obligation assumed by the Palo Alto Company.

Section 1559 of the Civil Code declares that such a contract may be enforced by the third party "at any time." Notice of acceptance is not required. He may sue precisely as upon a direct contract in his favor. Our decisions, so far as they go, seem to recognize such a contract as in itself establishing the cause of action. As said in Washer v. Independent M. & D. Co., 142 Cal. 702, 709, 76 Pac. 654, 657, the action "does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law operating upon the acts of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded."

The case of Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003, one of the decisions cited in Mr. Justice WILBUR'S opinion, we think is misapprehended therein. While it recognizes authority in the books for the doctrine that the third party does not become possessed of the benefit of the promise until he accepts it, the court, after an elaborate review of the authorities, reaches the following conclusion:

"Without further discussion of the matter, we adhere to the doctrine that when one person,

> for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person, without his consent."

The suggestion that to apply the bar of the statute of limitations in this case, during a period when the plaintiff probably had on knowledge of his right of action against the defendant, would be unfair and unreasonable, is beside the point. Obviously the statute did run against the original liability from the date of the assumption of the debt. If there had been no new obligation entered into by the Palo Alto Company by making of the note to plaintiff, defendant's liability would clearly have expired, even if plaintiff had never heard of the transaction. If the action is not barred, it is because the note created a new and independent indebtedness of the corporation.

Even if notice to and acceptance by the beneficiary of the contract was necessary, it had such notice and made such acceptance when it received this new note of the Palo Alto Company for the old note of the Morris Company. The old note was surrendered on the making of the new, and the only consideration was the renewal or satisfaction of the old debt, the one by which defendant's statutory liability was originally created. The complaint in this action recognizes the assumption by the Palo Alto Company of the liabilities of the Morris Company as the basis of its claim. There is set forth in the complaint the facts that plaintiff's assignor in the first instance held the obligation of the Morris Company for its indebtedness, that the Palo Alto Company took over the assets of the former, and executed this new note "in renewal" of the Morris Company note. The logical deduction from this state of facts is that the parties met in the execution of the new note upon a mutual recognition of the liability which had been assumed by the Palo Alto Company to pay to the Crocker Bank the old indebtedness of the Morris Company. The new note of the Palo Alto Company to the Crocker Bank was received in recognition and settlement of that liability.

Clearly, the only claim the Crocker Bank had upon the Palo Alto Company was by reason of the latter's assumption of the indebtedness of the Morris Company. Had the Bank rested its claim on that liability, it would have had to begin his action within three years of the assumption of the debt. Instead, it consented to take a "renewal" note. This could not be done to the prejudice of the stockholders' rights, to rest on the original liability.

187 Cal. 566

In re BARNES' ESTATE. (L. A. 6874.)

(Supreme Court of California. Dec. 15, 1921.)

1. Executors and administrators 🔑20(7) — Evidence held sufficient to support finding that applicant for letters was not a bona fide resident.

Evidence *held* sufficient to support finding of trial court that the applicant for letters of administration on the estate of a decedent was not a bona fide resident.

2. Constitutional law 🔑211, 253—Executors and administrators 🔑18 — Statute denying nonresident heirs right to administer on property of decedent does not conflict with the federal Constitution.

Statute denying nonresident heirs right to administer on the estates of decedents does not conflict with the Fourteenth Amendment of the federal Constitution as to due process and equal protection of law.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

In the matter of the estate of Elmer Barnes, deceased. From an order appointing an administrator and denying Hervey Barnes' petition to be appointed administrator, Hervey Barnes appeals. Order affirmed.

John A. Harvey, of Santa Ana, for appellant.

H. C. Head and A. W. Rutan, both of Santa Ana, for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order of the superior court of Orange county appointing Charles D. Brown, public administrator of the estate of Elmer Barnes, deceased, and denying the application of Hervey Barnes to be appointed such administrator. Elmer Barnes died intestate on or about January 5, 1920, at Wheaton, Ill., being at the time of his death a resident of the county of Orange, state of California, and leaving estate consisting of an undivided half interest in certain real property therein. He left as his surviving heirs his father and mother, Hervey Barnes and Mary Barnes, who, up to the time of his death and for a long time prior thereto, resided in Wheaton, Ill. On December 14, 1920, Raymond C. Barnes, a brother of said deceased, filed a petition to be appointed administrator of the decedent's estate, whereupon the said public administrator filed a like petition, in which he alleged that said Raymond C. Barnes was not qualified to be appointed as such administrator for the reason that he was not entitled to share in the distribution of said estate. Thereupon Hervey Barnes, the father of said deceased, having received at his home in Illinois a telegram from his son, Raymond C. Barnes, stating that the latter was having some difficulty in being appointed administrator, and requesting him to come out as an heir of his deceased son and apply for letters of administration, came at once to California, arriving in Orange county on December 20, 1920, and filed his petition for letters of administration in said estate on December 30, 1920. The petition of Raymond C. Barnes was thereupon dismissed. Both of the other petitions came on for hearing at the same time, and the court, after taking evidence for and against each petition, made its order denying Hervey Barnes' petition upon the ground that he was not a bona fide resident of the state of California at the time, and granting the petition of the public administrator for letters of administration. This appeal is from said order.

It is the contention of the appellant that he was a bona fide resident of the state of California at the time of filing his petition to be appointed administrator of his son's estate, and as such was entitled to be appointed such administrator under section 1365 of the Code of Civil Procedure. This contention rests almost entirely for its support upon the testimony of the appellant himself that it was his intent in coming to California upon this occasion to become a bona fide resident thereof. The appellant argues that this expression of his intent, coupled with the fact of his presence in California at and after the time of the filing of his petition for letters of administration, are controlling upon the question of his qualification as a bone fide resident within the state to receive such letters of administration. In support of such contention the appellant cites Estate of Newman, 124 Cal. 688, 57 Pac. 686, 45 L. R. A. 780, wherein, upon a much similar state of facts, the probate court found in favor of the applicant and appointed her administratrix, and this court upheld such finding and the order making such appointment. The respondent, on the other hand, contends that, looking to the record as a whole, there was sufficient evidence to justify the holding of the trial court that the appellant herein was not a bona fide resident of California at the time his petition for letters was filed; and the respondent upon his part relies upon Estate of Donovan, 104 Cal. 625, 38 Pac. 456, wherein, upon a state of facts almost identical with those of the instant case, the probate court denied letters to the petitioner, and upon his appeal this court upheld the finding and order of the probate court. In Estate of Newman, supra, the attention of this court was called to its decision in Estate of Donovan, supra, and to the similarity of the facts in each case, whereupon it made the following significant comment:

> "The difference between this case and the case of In re Donovan, 104 Cal. 623, is that there the court found against the petitioner as to the fact. In each case this court must abide the conclusion."

There is no escape from the application of a like conclusion to the instant case.

[1] The appellant, it is true, testified to his present intention to become and be a bona fide resident of the state of California and that such intent had been forming in his mind for about two years and ever since the occasion of a former visit to this state. But the evidence also showed his long residence in Illinois, where he had maintained the family home and where his aged mother, his wife, and certain of his children were still residing. The evidence also showed that his mother's age and infirmities were such that she could not be moved at the time, and that it was necessary that his wife should remain in Illinois to care for her for an indefinite period of time. It also appeared that while his son, Elmer Barnes, had died in January, 1920, leaving estate in California, the appellant had taken no steps toward coming to this state or acquiring a residence therein until, in the following December, his other son had telegraphed for him to come on and apply for the letters of administration, which he himself was unable to obtain. He then came hastily, bringing no property, and, upon his own statement, being obliged presently to return to Illinois for the purpose of so adjusting his affairs there as to make his removal to California feasible, depending upon the future condition of his mother's health. There can be no doubt that upon this state of the proof there was sufficient evidence to justify the finding of the probate court that the appellant was not, at the time of his application for letters of administration, a bona fide resident of the state of California. Such finding and the order based upon it will not be disturbed upon appeal.

[2] The appellant makes the further contention that the statute denying to nonresident heirs the right to administer upon the property of decedents in this state is void as in violation of the Fourteenth Amendment to the federal Constitution, which provides that no state shall "deprive any person of

life, liberty, or property, nor deny to any person within its jurisdiction the equal protection of the laws." This contention is supported by no authority and has no merit. The administration of estates is a matter of statutory regulation, and the right to provide thereby for the temporary possession of the property of decedents for the purpose of paying their debts and distributing the residue of their estate among those entitled to succeed thereto has been universally recognized and upheld.

The order is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; LENNON, J.; WASTE, J.; SHURTLEFF, J.

187 Cal. 610

CALIFORNIA PACKING CORPORATION v. LARSEN. (S. F. 9705.)

(Supreme Court of California. Dec. 20, 1921.)

1. Reformation of instruments 🔑37—Defendant need not ask for reformation for mutual mistake.

A defendant may plead and prove a mutual mistake in the making of a contract which is sought to be enforced against him, and be entitled to relief therefrom, without asking for a reformation of the contract or having the same reformed.

2. Appeal and error 🔑1008(1) — Whether clear evidence of mistake is convincing for trial court.

If it is the rule that mutual mistake must be shown by clear and convincing evidence, the question whether clear evidence introduced is convincing rests entirely with the trial court.

3. Reformation of instruments 🔑25—Failure to read does not bar.

Mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation for mutual mistake at the instance of the party who executes it thus carelessly.

4. Reformation of instruments 🔑45(15) — Evidence held sufficient to sustain finding of mutual mistake.

In an action by a packing company for damages resulting from failure to deliver an entire crop of apricots as provided by contract, evidence *held* to sustain a finding that there was a mutual mistake in the minds of defendant and plaintiff's agent as to terms and scope of the written contract; the agent knowing that defendant owned only half of the crop.

In Bank.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by the California Packing Corporation against H. Larsen. Judgment for defendant, and plaintiff appeals. Affirmed.

Short, Lindsay & Woolley, of Fresno (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for appellant.

Harris & Hayhurst and Julius Hansen, all of Fresno, for respondent.

PER CURIAM. This action was brought by the plaintiff for the recovery of the sum of $387.50, damages alleged to have resulted from the failure and refusal of the defendant to deliver to plaintiff one-half of a crop of apricots, amounting in all approximately to four tons, grown upon the premises owned by the defendant. The plaintiff alleged that the said defendant entered into a written contract with it for the sale and delivery of the whole of said fruit, but only delivered one-half thereof under said contract, and failed and refused to deliver the other half thereof, to its damage in the sum stated. The written contract between the parties relating to the sale and delivery of said fruit is attached to and made a part of the complaint.

The defendant in his answer denied the execution of said contract in the form and effect averred by the plaintiff, and further affirmatively set forth substantially the following facts: That as the owner of the premises upon which the apricot crop in question was grown he had, some time before the contract for the sale of said fruit was made between the plaintiff and himself, entered into a lease of said premises with one Poulson, who went into possession thereof; that by the the terms of said lease each of the parties thereto was to receive one-half of the crops grown on said premises, and each was to have the right to sell his one-half thereof; that, on the date on which the contract between himself and the plaintiff was signed, one Pilegard, a purchasing agent of the plaintiff, came to said premises and requested the defendant to sell to plaintiff the crop of apricots growing thereon; that thereupon the defendant fully explained to the said agent of the plaintiff that the said premises were leased to the said Poulson, and that he, the defendant, had only the right to sell one-half of the said apricot crop, and would not agree to sell any more than one-half thereof, that thereupon, and with that understanding, the defendant signed the memorandum of agreement which the said agent of the plaintiff then prepared, it being fully understood and agreed between himself and the said agent of the plaintiff that the "crops" mentioned in said agreement referred only to the portion of the crop which the defendant could sell, viz. the one-half thereof; that by mistake on the part of the said Pilegard he failed to write into said agreement that the defendant was selling only one-half of the crop; and that at said time said Pilegard fully knew and understood that the defendant intended to sell only one-half thereof. The defendant further averred that he had fully delivered to plaintiff the one-half of said crop so sold and agreed to be delivered by him and has fully performed the terms of his said contract to be by him performed. The defendant prayed that plaintiff have nothing by its action and that he have judgment for his costs.

Upon the trial of the cause the defendant testified fully in support of the foregoing affirmative averments of his answer, and was supported therein by other testimony and evidence. Upon the submission of the case the trial court found that all the foregoing averments of the defendant's answer were true, and, as a conclusion of law therefrom, found that the plaintiff should take nothing by its action and that the defendant should have judgment in his favor and for his costs. From the judgment entered in conformity with these findings, the plaintiff prosecutes this appeal.

[1] It is conceded by the appellant upon the threshold of its argument herein that there is but one issue upon this appeal, and that is as to "whether or not the evidence sustains the findings of the court that the parties made a mutual mistake in executing the agreement sued on." This concession takes out of review all questions as to the sufficiency of the averments of the defendant's answer as to a mutual mistake of fact attending the execution of the contract in question, and it must therefore be taken as conceded that, had the defendant asked for affirmative relief in the way of the reformation of said contract, he would, if the proof had supported his averments, have been entitled to such relief. It was not necessary for the defendant to ask for such relief, since this court has held that a defendant may plead and prove a mutual mistake in the making of a contract which is sought to be enforced against him, and be entitled to relief therefrom without asking for a reformation of the contract or having the same reformed. Newman v. Lassing, 141 Cal. 174, 74 Pac. 761; Field v. Austin, 131 Cal. 379, 63 Pac. 692; Toby v. Oregon Pacific Ry., 98 Cal. 490, 33 Pac. 550; Pomeroy Equity Jurisprudence (4th Ed.) § 868. The case of Bradbury v. Higginson, 167 Cal. 553, 140 Pac. 254, cited by the appellant, is not in conflict with the foregoing cases, since in that case a rescission was affirmatively pleaded and sought, and the court was dealing with the sufficiency of the averments and proofs to justify a rescission of the contract, and was not dealing with the question of defensive relief where a right of reformation was sufficiently pleaded and shown.

[2] We are thus brought to the second question presented by the appellant herein, which is as to the sufficiency of the evidence educed by the defendant to establish a mutual mistake in the execution of the contract for the sale of the fruit in question. The appellant insists that the evidence which will be sufficient to justify the reformation of a contract upon the ground of mistake must be clear and convincing. Assuming that the rule for which the appellant contends would have application to the attitude of the trial court toward cases of this character, we are satisfied that in this case there was clear evidence of a mistake, and whether or not it was convincing was entirely a question for the trial court. Wadleigh v. Phelps, 149 Cal. 627, 637, 87 Pac. 93; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; DeKahn v. Chase, 177 Cal. 281, 170 Pac. 608.

[3] The evidence which the defendant presented to the trial court sufficiently showed the following facts in this case. The defendant, as the owner of the premises upon which the apricot crop in question was grown, had leased the same to one Poulson under a cropping lease which gave the latter possession of the premises with the right to one-half of the fruit grown thereon, each of the parties to said lease having the right to sell his one-half of said fruit. On the day upon which the contract between plaintiff and the defendant was entered into, the plaintiff's agent approached the defendant with an offer to buy said fruit. The defendant informed him that he had only the right to sell one-half of the apricot crop. The agent understood at the time that Poulson was the defendant's lessee under a cropping contract entitling him to one-half of the fruit crop grown on the premises. He went away for the stated purpose of securing the consent of his principal to purchase the defendant's fruit, and a few hours thereafter returned, bringing with him the usual printed form of contract for the buying of fruit crops, which he proceeded to fill out with the few written words requisite to give it application to the defendant's fruit, and passed it to the defendant to sign. The defendant did not read the contract closely, for the reason that he understood it was to have application to his portion of the fruit crop only, and also because the plaintiff's agent had hurriedly prepared and proffered said contract to him for his signature, and then hastened away to secure contracts from other fruit growers, taking the contract with him and not leaving with the defendant any copy thereof.

It is urged by the appellant that the fact that the defendant did not read his contract, as it was his legal duty to do, should militate strongly against the right of the defendant to a reformation thereof. But whether or not it does so must depend upon the circumstances of the particular case. This subject was fully discussed by this court in Los Angeles, etc., Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029, which, after a full review of the cases, this court said:

> "It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly."

The defendant never saw the contract again until after he had delivered to plaintiff his one-half of the apricot crop, which the latter received and paid for, and thereafter for the first time demanded that he deliver the whole of the crop. The defendant is supported in his testimony as to the foregoing facts by other witnesses called on his behalf, while the evidence of the plaintiff's agent, Pilegard, called on its behalf, tends to support the defendant's story in so far as it shows that he knew at the time the contract was drawn that the defendant was not entitled to sell but one-half of the crop. In so far as the testimony of the defendant and his witnesses is in conflict with the testimony of the plaintiff's agent, Pilegard, it was for the trial court to determine which was to be believed, and its conclusion thereon is not the subject of review here.

[4] We think the finding of the trial court to the effect that there was a mutual mistake in the minds of the parties as to the terms and scope of the written contract for the sale of this fruit was sufficiently supported by the evidence, and, since this is the only question in the case, the judgment is affirmed.

SHAW, C. J., RICHARDS, Judge pro tem., and WASTE, LENNON, WILBUR, SHURTLEFF, and SLOANE, JJ., concur.

187 Cal. 597

In re CARRILLO'S ESTATE. (L. A. 6832.)

(Supreme Court of California. Dec. 20, 1921.)

1. **Wills 🔑449—Partial intestacy not favored.**

Construction of a will resulting in partial intestacy is not favored.

2. **Wills 🔑570—"Cash" held to include note and mortgage.**

Where testatrix bequeathed to her daughter and brother, by her olographic will, each "one-third of cash that is left after my demise," and most of her estate consisted, at the time she drew the will, of a sum of $7,000 that she was entitled to from the estate of her deceased husband, and this expected increment was still in the form of money due and payable at her demise, and was, by her administrator, after her death, placed in the form of a note and mortgage for that sum executed by the executors of her husband's estate, *held*, that the term "cash" was properly construed to include such note and mortgage, thereby effectuating her intent and avoiding partial intestacy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cash.]

3. **Wills 🔑487(2)—Surrounding circumstances considered in ascertaining intent.**

In ascertaining a testator's intent, resort may be had to the circumstances under which the will was executed.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

In the matter of the estate of Eva Van Buskirk Carrillo. From a decree of distribution, Maude M. Whitaker, the daughter and sole surviving heir of decedent, appeals. Affirmed.

Thomas K. Case, of Los Angeles, for appellant.

Peyton H. Moore, of Los Angeles, for respondent administrator.

Charles L. Evans, of Los Angeles, and W. W. Butler, for other respondents.

RICHARDS, Justice pro tem. This appeal is from a decree of final distribution of the residue of the property belonging to this estate. The only question presented upon this appeal is as to the meaning to be given to the word "cash" as used by the testatrix in her olographic will. Eva Van Buskirk Carrillo was the widow of one J. J. Carrillo, who had died, leaving a will by the terms of which she was given a one-eighth interest for life in the residue of his estate, consisting at the time his will was made of certain lands subject to mortgage. She was also given a legacy of $5,000. During the course of probate of his estate she had applied for and received a family allowance, a considerable portion of which was not promptly paid, nor was her legacy delivered to her up to the time of the making of her olographic will. In the year 1918 Eva Van Buskirk Carrillo executed her olographic will, wherein, with much detail, she proceeded to bequeath numerous articles of personal property, such as rings, brooches, bracelets, earrings, china, clothing, and other personal effects of which she was then possessed to her various relatives, giving to each specific articles by name. She also devised the only piece of real estate of which she was then the owner, her home, to her brother and her daughter, share and share alike. As to her said daughter, Maude M. Whitaker, the clause in her said will by which the latter was to receive certain specific articles of personalty, and was also to receive her above-named interest in said real estate, contained the added words "1 third cash." The succeeding clause in said will, by which her brother, James L. Orr, was also given considerable personal effects, together with a one-half interest in said real estate, contained the words, "1 third of cash that is left after my demise." One other clause in said will may be noted as bearing on the question involved in this appeal. It reads as follows:

> "If I have the $7,000 coming to me I give to Mr. Peyton H. Moore for the legal work $500.-00 he is deserving of it, as I promised if he got my estate settled I would make him a present and please give this amount to him providing I have $7,000.00 left."

At the time of the execution of this will the only actual money which Mrs. Carrillo had on hand was the sum of $95 in bank. There was then due her, however, the sum of $1,450 upon account of her widow's allowance from her husband's estate, together with her one-eighth interest in the residue thereof, as well as her said unpaid legacy. Between the date of her said will and the date of her death in October, 1919, she effected a compromise of her claims against her said husband's estate by which it was agreed that she should be paid the sum of $10,500 in full settlement. Of this sum she received the sum of $1,000 during her lifetime, of which sum $907.17 was on hand at the time of her death. After her death, and while her estate was in course of probate, her administrator with the will annexed received the additional sum of $2,500 in money and a promissory note and mortgage for the sum of $7,000 executed by the duly authorized executors of her husband's estate. Of the money thus received there were expended certain sums in the course of administration, so that there remained on hand in money the sum of $1,612.98 when the estate was ready for distribution. There was also on hand the aforesaid note and mortgage for the sum of $7,000. The petition for final distribution, which was filed by Maude M. Whitaker, the daughter of said decedent, set forth the foregoing two items as assets of the estate and prayed that they be distributed to her as the sole surviving heir of her mother. The court, however, disregarded this prayer, and, treating these assets as "cash," distributed the same by its decree of distribution one-third each to the persons named in said will as entitled to "1 third of cash that is left after my demise." From said decree of distribution the said daughter and sole surviving heir of said decedent prosecutes this appeal.

[1, 2] It is the contention of the appellant that the word "cash" and the phrase "cash that is left after my demise" are to be construed as meaning the actual money on hand at the time of the death of the testatrix, to wit, the sum of $907.17, and that it is this sum only that should have been divided among the three persons mentioned in the said will as entitled to "cash that is left after my demise." The balance of the money on hand at the date of distribution and the said note and mortgage the appellant claims herself to be entitled to as the unassigned residue of said estate. It is to be noted at the outset that this claim on the part of the appellant, if acceded to, would compel the conclusion that the testatrix did not intend to dispose of her whole estate by her said will, but did intend to leave that portion thereof which the appellant now claims in a state of intestacy. Such an interpretation is not favored by the law. Estate of O'Gorman, 161 Cal. 654, 120 Pac. 33; Estate of Heberle, 153 Cal. 275, 95 Pac. 41; Estate of Blake, 157 Cal. 448, 108 Pac. 287; Civ. Code, § 1326. It is also to be noted, as an aid to our reasoning as to the proper interpretation to be given to these words in this will, that the testatrix began to write her said olographic will with the following words:

> "I, Eva Van Buskirk Carillo being in sound mind and body do hereby give to the following persons named herein for love and affection money and articles."

It is also to be noted that no money is disposed of by the terms of this will unless the word "cash" as used therein is to be interpreted as the synonym of "money." It is significant at this point to take note of the fact that the maker of this will had expressly in mind the sum of $7,000 which she was entitled to receive, and which, according to her expression, was "coming to me" in cash from the estate of her deceased husband, and which she had an expectancy of receiving during her lifetime. Had this expectancy been realized then, according to the appellant's own interpretation of the meaning of this will, it would under its terms have been properly divided into the three equal shares among those entitled to "cash" bequests in said will. It must therefore have been so intended by the testatrix, if the appellant's own contention be taken to be sound. In this immediate connection also it is to be noted that this expected increment was still in the form of money due and payable at the time of her demise, and was only placed in the form of a note and mortgage by the act of her administrator after her death. It must therefore, for the purpose of interpreting this will, be treated as money in expectancy when the testatrix drew her will. Pursuing the foregoing chain of reasoning, and treating the testatrix's use of the word "cash" as employed in her said will as intended to mean "money," we are led to the conclusion that the testatrix used the word "cash" in the broader meaning of "money," which has sometimes been given to it. The following cases show the sense in which the word "money" has been sometimes used in wills. In Estate of Miller, 48 Cal. 165, 22 Am. Rep. 422, the following words were used:

> "It is conceded by the appellant that the word 'money' in wills has been frequently construed by the courts, both in England and America, to include the personal estate of the testator. The following authorities would seem to place this point beyond all doubt: Dawson v. Gaskoin, 2 Keen. 14; Boys v. Morgan, 3 Mylne & Craig, 661; Kendall v. Kendall, 4 Russ. 360; Chapman v. Reynolds, 20 Beav. 221; Levinson v. Lady Lennard, 34 Beav. 490; Morton v. Perry, 1 Metc. 446; Cowling v. Cowling, 26 Beav. 452; Langdale v. Whitfield, 4 Kay & J. 436; 2 Redfield on Wills (2d Ed.) 111; 2 Williams on Executors, 1025; 2 Redfield on Wills, 437, note; Jarman on Wills, c. 24, and cases there cited."

In Estate of Jacobs, 140 Pa. 268, 21 Atl. 318, 11 L. R. A. 767, 23 Am. St. Rep. 230, the property of the testatrix at the time her will was executed consisted only of personal estate. She disposed of the residue of her estate as follows:

> "The remainder and residue of my money I give and bequeath to the hospital of the Protestant Church of Philadelphia."

The Supreme Court of Pennsylvania, in construing this clause in her will, said:

> "It appears very plain to us that this testatrix used the word 'money' in the popular sense as the equivalent of 'property,' and that she intended all of her estate to pass by the residuary clause. She knew of what her estate consisted when she made her will. She knew it would satisfy all the pecuniary legacies, and leave a small residue."

In 27 Cyc. at page 120, the commentator, in defining the word "money" as used in wills, says:

> "In its widest and popular sense it is frequently employed as synonymous with property, estate, including, when the contest so indicated, any kind of property, even land. Sometimes it includes the whole personal estate and often the proceeds of realty. The meaning of the word, when used in a will, depends upon the context, and may be affected by the conditions of the testator's property and the surrounding circumstances."

[3] We are pointed by these authorities to the final test to be applied to the determination and meaning of doubtful words and phrases in the will of a decedent. Such words and phrases should be so construed as to give effect, if reasonably possible, to the intent of the testatrix. Estate of Heywood, 148 Cal. 184, 82 Pac. 755; Estate of Reith, 144 Cal. 314, 77 Pac. 942; Estate of Koch, 8 Cal. App. 90, 96 Pac. 100. In ascertaining this intent resort may be had to the circumstances under which the instrument was executed. Estate of Spreckels, 162 Cal. 559, 123 Pac. 371. One of the most significant circumstances attending the execution of a will is to be found in the knowledge which the testatrix has of what her estate consists. In the case at bar this knowledge on the part of the testatrix was most exact and detailed. She knew she had certain items of jewelry and of household and personal effects, which she distinctly identifies and distributes to the recipients of her bequests by name. She knew she had certain real estate, and to whom she wished to devise it. She knew she had the sum of $7,000 in the form of a money obligation presently payable, and which she expected to receive before she died. She knew she had no other estate. By use of the words in her will, "what is left after my demise," she clearly intended to refer to the residue of her estate, and she therefore as clearly did not intend to leave any portion of her estate undisposed of. These considerations lead to but one unavoidable conclusion, which is that by the use of the word "cash" in her will, with its context, the testatrix intended to refer to and distribute the money to be received by her from her deceased husband's estate. This construction the trial court adopted in its decree of distribution in this estate, and we are satisfied that it committed no error in so doing.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; LENNON, J.; SHURTLEFF, J.; SLOANE, J.

187 Cal. 603

In re NICKSON'S ESTATE.

CLAYTON v. PERRY et al.

(L. A. 6925.)

(Supreme Court of California. Dec. 20, 1921.)

Husband and wife 🔑264 — Evidence held to show property acquired after marriage was separate property of husband.

In contest as to distribution of estate of a deceased husband, evidence, as to property acquired during his marriage, *held* to overcome the presumption under Civ. Code, § 164, that it was community property, and to sustain finding that it was his separate property.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of the Estate of John Nickson, deceased. Contest as to distribution of the estate by Minnie L. Clayton, opposed by H. L. Perry, executor, and others. From the decree of distribution Minnie L. Clayton appeals. Affirmed.

W. C. Shelton, of Los Angeles, for appellant.

R. S. Parker and Parker & Parker, all of Pasadena, and Owens & Wingert, of Whittier, for respondents.

RICHARDS, Judge pro tem. This appeal is from a decree of final distribution wherein the trial court, over the objection of the appellant, distributed the whole of the estate of the decedent as having been his separate property during his lifetime. Decedent died in Los Angeles county, Cal., where he had lived since his removal to California from the the state of Iowa in or about the year 1894. Prior to his residence in Iowa he had lived in Wisconsin for a number of years where, in the year 1878, he had married Naomi Nickson, who thereafter lived with him as his wife in Wisconsin, in Iowa, and in California up to the time of his death. Both parties to this marriage had been married before and each had children of such prior marriage, Naomi having two daughters, Lillie Watson and Mrs. Minnie L. Clayton, the latter being the contestant and appellant herein. John Nickson had by his prior marriage five sons, J. W. Nickson, T. J. Nickson, C. D. Nickson, Samuel S. Nickson, and Harry S. Nickson. There were no children of this second marriage. Some time prior to his death John Nickson made his last will, in which he declared that the whole of his estate was his separate property, which he therein proceeded to dispose of by making certain specific legacies to certain of his said children and stepchildren. He then devised all of the remainder of his property to his wife, Naomi Nickson, for and during her natural life, with the right to the total net income thereof, and also with right that, in the event of such net income not being sufficient for her reasonable care and support, she might use so much of the principal estate as might be necessary for such purpose. Upon her death the remainder of said estate was to be divided among four of his said sons, share and share alike. John Nickson died on December 15, 1917. His said will was offered for probate shortly thereafter, and, having been duly admitted to probate the administration of his estate proceeded until the same was ready for distribution in September, 1919, when the executor filed his final account the petition for distribution of said estate, wherein he averred that "the whole of the said estate is separate property of said deceased," and prayed for its distribution according to the terms of the last will of the decedent. In the meantime his widow, Naomi Nickson, had been declared incompetent, and her daughter, Mrs. Minnie L. Clayton, had been appointed her guardian; and the latter, on October 8, 1919, appeared on behalf of her said mother and objected to the distribution of said estate as prayed for by said executor, alleging that the whole of the decedent's property and estate was community property of himself and his said wife, Naomi Nickson, and praying that the same should be distributed one-half to said Naomi Nickson, as her share of the community property, and the balance thereof according to the terms of said last will of the decedent. The contest thus created came on for hearing before the court, and a large amount of testimony was offered thereon. At the conclusion of such hearing the court made its findings in words and effect "that all of said property and every part thereof was at his decease the separate property of said John Nickson, deceased, and that no part thereof was or is community property of said John Nickson and Naomi Nickson." The court accordingly by its decree distributed the whole of said property and estate according to the terms of the last will of said deceased. From this decree the appellant, Minnie L. Clayton, prosecutes this appeal.

It is an undisputed fact upon this appeal that all of the property which John Nickson undertook to dispose of by his last will and testament and of which he died seized he had acquired by purchase and increment since his arrival in California, and hence during his marriage with his said wife, Naomi. This being so, the appellant invokes the presumption created by section 164 of the Civil Code that all of said property was community property, and, having done so, insists that this presumption is one which can only be overcome by "clear and satisfactory proof," or, as it is sometimes stated in the cases, by "clear and convincing evidence" that such property was acquired by separate funds, and that the burden of producing such proof lies upon the party claiming the property as separate, citing in that behalf Smith v. Smith, 12 Cal. 216, 76 Am. Dec. 533; Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547. There can be no quarrel with a rule as well and old established as the rule above stated and supported by said authorities; but we are still required to determine the scope and meaning of the terms "clear and satisfactory proof" and "clear and convincing evidence" as employed in these cases. In arriving at this determination we are directly aided by the decision of this court in the case of Freese v. Hibernia Savings, etc., Society, 139 Cal. 392, 73 Pac. 172, in which the precise question was discussed and decided as to the force and effect to be given to both of the foregoing phrases:

> "Speaking of expressions of this nature," says the court, "some of which were stronger in terms than any used by this court, * * * Ballinger, in his work on Community Property, says (section 167): 'It is not believed, however, that these terms should be considered as going to the length that their general meaning might import. Certainly it is not required that the proof to destroy this presumption should be any more than sufficient to satisfy the mind of

court or jury that its weight is enough to cause a reasonable person, under all the circumstances, to believe in its sufficiency, in order to counterbalance the naked presumption that the property was acquired with the funds of the community. The property is merely considered as the property of the community until the contrary is shown by legal proof, and legal proof would seem to be a preponderance of the testimony under all the facts and circumstances of the particular case.' * * * We are of the opinion that it is incumbent on the party seeking to overcome the presumption of community property to do no more than to produce such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction in an unprejudiced mind, and that in the face of such evidence, the naked presumption, unsupported by any testimony, must fall."

In the later case of Couts v. Winston, 153 Cal. 686, 96 Pac. 357, this court says:

> "Whether or not the evidence offered * * * is clear and convincing is a question for the trial court. * * * In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court."

In the case of Estate of Pepper, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092, the language of both of above cases was quoted and approved. In the light of these cases we approach the evidence in the instant case, which may be fairly summarized as follows: John Nickson, prior to the time of his marriage with his second wife, Naomi, in the year 1878, had been the owner of a farm in Wisconsin and also of some mining interests therein, which, together with his personal property, consisting of money, cattle, and farming equipment, was variously estimated by several witnesses to be of the value of from $10,000 to $14,000. About 3 years before his marriage with Naomi, and while his first wife was still living, he began to remove his property interests and effects to the state of Iowa, where he acquired a farm of about 160 acres, which he stocked with his cattle and farming machinery brought from Wisconsin. These possessions were his when he returned to Wisconsin to marry Naomi, and he was then sufficiently well-to-do to be loaning money in the neighborhood of his Iowa home. From time to time during the 20 years he lived in Iowa after his marriage he added to his farm holdings until they amounted to about 540 acres in 1894, when he determined to remove to California, which he did in the month of December of that year. During the 16 years of his married life in Iowa he and his wife Naomi were both hard-working people on the farm, his wife performing the usual work of a farmer's wife thereon, and both deriving their living from its proceeds. Whatever increment there was in the acreage or equipment of his farm during these years came chiefly from its annual product and the profits arising therefrom. When the resolution was reached to remove to California John Nickson offered his realty holdings in Iowa for sale, and held a public auction of his personal property, and derived from the sale of both the sum of about $16,000, which he transferred to this state and began investing here. Some question has been raised as to the rights of the wife in this property prior to its removal to California and under the laws of the state of Iowa, but we think this question is fairly set at rest by the decisions of that state holding that the dower interest of the wife under the statutes of Iowa then in force was a mere expectancy, dependent on survivorship to become a vested right. Mock v. Watson, 41 Iowa, 241; Daugherty v. Daugherty, 69 Iowa, 677, 29 N. W. 778; Purcell v. Lang, 97 Iowa, 610, 66 N. W. 887; Beach v. Beach, 160 Iowa, 346, 141 N. W. 921, 46 L. R. A. (N. S.) 98, Ann. Cas. 1915D, 216. Within a short time after his arrival in California John Nickson began investing in real estate. He first purchased 5 acres of land planted to citrus fruit at Chula Vista, Cal., upon which he and his wife lived, and where for a brief time they ran a boarding house, but whether at a profit or not does not appear. He also invested in a prune orchard near Tulare, Cal., where he and his wife worked for two summers. Some 6 years later he bought another tract of land in Whittier for $1,400 on the installment plan, for which he finally paid. He also from time to time purchased other property, so that at the time of his death he was the owner of real estate in the counties of Orange, Riverside, and Los Angeles of the appraised value of $28,472.46. During these years of residence in California and of the acquisition of these properties therein John Nickson was an elderly and aging man, with no trade, profession, or business, but worked hard upon the properties he from time to time owned, and showing some considerable degree of shrewdness in making his investments. During these years also his wife, Naomi, lived and worked with him upon whichever of their properties they resided, but it nowhere appears that any income which could reasonably be credited to these joint labors would have more than sufficed for their mutual support. In the year 1915 John Nickson executed his will, which was the subject of probate in this proceeding, and in his said will stated that all of his property devised thereby was his separate property and estate. About 2 years thereafter, and in December, 1917, he undertook to establish the title to his various pieces of real estate in the county of Los Angeles under the Torrens Land Act. In the petition filed by him in that proceeding he alleged himself to be "the owner of an estate in fee simple as his separate property" of the real estate described therein. It was also stated that "Naomi Nickson joins herein as applicant," and the affidavit appended to said petition was signed by both John and Naomi Nickson. The decree followed the language of the petition in finding that all of the allegations thereof were true, and in decreeing that John Nickson "is the owner of an estate in fee simple as his separate property in the premises described in said petition." We do not undertake to consider or decide herein the validity of the foregoing proceeding or the effect of the decree therein as being res adjudicata between the parties hereto, since we think that our conclusions herein may be put upon other grounds.

In addition to the other facts above set forth, there was some further evidence produced tending to show that Naomi Nickson had at one time stated that she herself was the owner of certain separate property at the time of her marriage to John Nickson, which had gone or was to go to her daughters, whereas the property belonging to John was to go to his sons exclusively; and that upon various other occasions after the making of his said will she had stated to various parties that she was satisfied with its terms and with her husband's treatment of her therein, and that all of the property was his. On the other hand, there was some evidence that at the time the proceeding under the Torrens Land Act was taken and the foregoing statements were made by her, Naomi Nickson was over 80 years of age, and was in a feeble condition of both mind and body. In regard to these matters the evidence is somewhat conflicting, but with respect to the main body of the evidence touching the property, ownership, investments, and accretions of John Nickson before and after his marriage to Naomi Nickson there is practically no conflict in this evidence, and we are of the opinion that it is ample to produce that degree of proof which would suffice to overcome the presumption that the properties acquired by John Nickson after his said marriage were community property, and also to sustain the finding and decree of the probate court that the said property and the whole thereof was his separate property.

The appellant chiefly relies for a reversal upon the case of Estate of Hill, 167 Cal. 59, 138 Pac. 690, but an examination of that case shows that the appellant can derive no comfort therefrom, since upon a state of facts in many respects similar to those in the instant case the trial court decided that certain of the property involved therein was the separate property of the husband, which conclusion this court approved upon appeal.

Judgment affirmed.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; SHURTLEFF, J.; SLOANE, J.

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187 Cal. 632

TURNER v. TURNER. (L. A. 6217.)

(Supreme Court of California. Dec. 23, 1921. Rehearing Denied Jan. 19, 1922.)

1. Appeal and error 🔑1011(1) — Findings on conflicting evidence not disturbed.

Where the evidence is in substantial conflict, the findings of the trial court, if in themselves responsive to the issues, will not be disturbed.

2. Trial 🔑395(3)—Findings which are mere conclusions of law insufficient.

General findings which, standing alone, amount to nothing more than a conclusion of law are insufficient.

3. Trial 🔑395(3)—General finding as to truth or falsity of material averments insufficient.

A general omnibus finding that all the material allegations in the complaint are untrue, and that all the material allegations in the answer are true, is insufficient, since no one can know what averments were deemed material.

4. Trial 🔑395(9) — Where specific findings support judgment, insufficient general findings may be disregarded.

Notwithstanding the court makes general findings which are insufficient to support the judgment, such findings may be disregarded, where other specific findings as to the truth or falsity of each particular averment in the complaint are sufficient.

5. Divorce 🔑37(7) — Separation by mutual consent not desertion.

A separation between husband and wife by mutual consent will not support a charge of desertion.

6. Trial 🔑395(1)—Finding negativing allegation in identical language sufficient.

A finding which is in identical language a negation of an allegation in the complaint is sufficient.

7. Trial 🔑404(1)—Findings construed to support judgment.

Findings are to be construed so as to support the judgment.

8. Divorce 🔑150(2)—Finding of absence of cruelty held not overcome by another finding.

Since findings must be read together, a judgment refusing a divorce on findings that defendant had not been guilty of cruelty toward plaintiff is not erroneous, notwithstanding a single finding capable of a construction in favor of plaintiff on the charge of cruelty.

9. Evidence 🔑317(8)—Statements by plaintiff to third persons as to cause of physical condition inadmissible as hearsay.

In a divorce suit, it was not error to exclude evidence by the plaintiff wife's physician and another witness as to statements made by her to them relative to the cause of her condition; such evidence being hearsay.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Jennie Walz Turner against Lewis Maney Turner for divorce. Judgment for defendant, and plaintiff appeals. Affirmed.

Williams & Williams and Goudge, Robinson & Hughes, all of Los Angeles, for appellant.
W. I. Gilbert, of Los Angeles, and Maury Kemp, of El Paso, Tex., for respondent.

RICHARDS, Justice pro tem. This appeal is from a judgment in favor of the defendant in an action for divorce upon the grounds of extreme cruelty and desertion. The parties intermarried on September 16, 1899, in El Paso, Tex. Several children were born of said marriage, of whom there were living, at the time this action was instituted, three daughters, whose names and ages were: Virginia, aged 17 years; Marion, aged 12 years, and Jane, aged 2 years.

Plaintiff sets forth in the first count of her complaint certain acts and conduct of the defendant which are alleged to have caused said plaintiff great mental suffering and a nervous breakdown, seriously impairing her health. It is not necessary to consider these allegations in detail for the reasons hereinafter stated, with the exception of the following averment. The complaint alleges:

> "That, within one year last past, the said defendant has, at divers times, falsely and willfully insinuated and stated to the two older children of the plaintiff and defendant that the plaintiff was not a proper person to have the care, custody, and upbringing of the said children, and has questioned the said two older children as to the acts and conduct of the plaintiff during the absence of the defendant, in such a manner as to tend to cause them to believe that the plaintiff's acts and conduct have not been proper, but that defendant well knew, at the time, that the plaintiff had been guilty of no improper conduct, and that it was the purpose and intention of said defendant to prejudice the said children against the plaintiff."

The defendant in his answer specifically denies the above allegation. Upon the trial and submission of the cause the court made the following finding in respect thereto:

> "The court finds that the defendant did not, within one year last past, or at any time or at all, falsely, or willfully, or at all, insinuate or state to the two older children of the plaintiff and defendant, or to either of said children, that the plaintiff was not a proper person to have the care, or custody, or upbringing of said children, and finds that the defendant has not questioned the said two older children as to the acts and conduct of the plaintiff during the absence of the defendant, in such a manner as to tend to cause them to believe that the plaintiff's acts or conduct had not been proper, when the defendant knew at said time that the plaintiff had been guilty of no improper conduct, and the court finds that it was not the purpose or intention of said defendant to prejudice the said children against the plaintiff."

[1] The appellant urges several contentions upon this appeal, the first of which is that the evidence is insufficient to justify the findings of the trial court upon the various acts of alleged cruelty, other than the specific act embraced in the foregoing averment and finding. It is sufficient to say in response to this contention that as to each and all of these acts of alleged cruelty, with the exception above noted, the evidence is in substantial conflict, and, this being so, the findings of the trial court, if in themselves sufficient to respond to these issues, will not be disturbed. The appellant, however, contends that the findings of the trial court upon these several alleged acts of cruelty, other than that above specifically referred to, are insufficient to respond to the issues therein presented, and hence insufficient to support the judgment. An examination of the findings of the court discloses that at the outset the court made the following general finding having relation to the first count of the plaintiff's complaint:

> "The court finds that the defendant has not, at divers times within 18 years last past, or at any time, or at all, been guilty of extreme or any cruelty toward the plaintiff, and has not wrongfully, or at all, inflicted upon the plaintiff grievous or any bodily injury, or grievous or any mental suffering."

It will further be noted that toward the close of its findings the court made the following two general findings:

> "And the court further finds that, except as herein found to the contrary, each and every material allegation contained in plaintiff's complaint herein is untrue.
> "The court finds that, except as herein found to the contrary, each and every material allegation contained in the defendant's answer is true, as therein stated."

[2] It may be conceded that the foregoing general findings would, neither separately nor in conjunction, be sufficient to respond to the issues above referred to, nor to support the judgment; the first, because, standing alone, it would amount to nothing more than a conclusion of law. Franklin v. Franklin, 140 Cal. 607, 74 Pac. 155; Smith v. Smith, 62 Cal. 466.

[3] It may also be conceded that the further and concluding findings of the court above quoted would also be insufficient to support the judgment for the reason that they are each subject to the vice pointed out in the case of Holt Manufacturing Co. v. Collins, 154 Cal. 276, 97 Pac. 520, wherein the court said:

> "The general omnibus finding 'that all the material denials, and averments in answer to the complaint herein are true, and all of the material averments of the amended complaint in intervention are true,' is insufficient for any purpose."

The reason is that it is uncertain; no one can know what averments were deemed material.

See, also, Johnson v. Squires, 53 Cal. 37; Ladd v. Durkin, 54 Cal. 395; Krug v. F. A. Lux, etc., Co., 129 Cal. 322, 61 Pac. 1125; Stampfli v. Stampfli, 199 Pac. 829.

[4] The difficulty with the appellant's foregoing contention as to the insufficiency of these findings is that the trial court did not content itself with the general findings above criticized, but proceeded to make specific findings as to the truth or falsity of each and all of the particular averments of cruelty set forth in the plaintiff's complaint, with the exception above noted, and as to these found them to be either untrue or unsustained by sufficient evidence. The generalities in the court's findings may therefore be disregarded, and the contention of the appellant with regard to the insufficiency of such findings to support the judgment be held to be without merit.

[5] It may be said that as to the second count of the plaintiff's complaint alleging desertion, there was sufficient evidence before the court to justify the conclusion that whatever separation there was between the parties was by mutual consent, which would suffice to justify the finding which the court made against the plaintiff upon that alleged cause of action.

[6] This brings us to the main contention of the appellant as to the insufficiency of the evidence to support the finding and of the findings to sustain the judgment of the trial court in relation to the averment and finding first above specifically set forth. As to that finding, it is the contention of the appellant in substance that it is ambiguous and misleading, and that, drawn as it is in a partly disjunctive and partly conjunctive form, it cannot be determined therefrom whether it is to be understood as a finding in favor of or against the allegations of the plaintiff's complaint as to the specific charge referred to in said finding. The appellant further contends that if said finding is to be construed as a finding against the plaintiff as to this specific charge it is unsupported by the evidence in the case. In answer to the first of these contentions it may be stated generally that a finding which is in identical language a negation of the allegation in the complaint is sufficient. Dam v. Zink, 112 Cal. 91, 44 Pac. 331; McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14; Hayne, New Trial and Appeal (Rev. Ed.) § 242.

[7, 8] It should also be stated as a general rule that findings are to be construed so as to support the judgment. It was evidently the intention of the trial court in this case to make a finding against the plaintiff in the identical language of the complaint, except as such finding was attempted to be cast in the negative form. Its efforts so to do may have resulted in giving to such finding the doubtful and ambiguous meaning of which the appellant complains, but, even if this be conceded to be true, it does not therefore follow that the judgment should be reversed for that reason, since even if said finding should be given the construction which the appellant claims for it, and even if it were true that said finding was a clear and unambiguous finding of fact in favor of the plaintiff upon this single charge of cruelty, it must still be read in conjunction with the conclusion of the trial court above quoted, to the effect that the defendant has not at any time or at all been guilty of extreme cruelty toward the plaintiff. Such findings, read together and taken in connection with the other specific findings of the court against the plaintiff as to every other specific charge of cruelty averred in her complaint, would amount to the finding that the single act of alleged cruelty intended to be covered by the objectionable finding was insufficient in itself to amount to extreme cruelty so as to entitle the plaintiff to a divorce. If our reasoning and conclusion in this regard be correct, it follows that the appellant's second contention that said finding, if taken to be a finding against her, is unsupported by the evidence, becomes immaterial, since even if said finding were clearly in accord with the evidence it would still be insufficient, according to the trial court's conclusion, to constitute extreme cruelty so as to justify a judgment of divorce.

[9] The appellant further urges that the trial court committed error in the rejection of certain evidence offered on her behalf. The plaintiff's physician was called by her, and testified as to certain troubles existing in her sexual organs and a general nervous condition due to such trouble. He was then asked the question as to whether she made any statement to him as to the cause or reason of her condition, which question he answered affirmatively. He was then asked: "What did she say about it?" which question was objected to, and the objection sustained. He was then asked as to whether he had formed an opinion as to the reason for or cause of her condition. Upon an objection being urged to this question, the court inquired of the physician whether he could tell from his objective examination what the cause of the condition of the plaintiff was, and upon his answer that he could do so relatively he was permitted by the court to answer, limiting his reason to what he ascertained from objective examination. The trial court also refused to allow another witness called on behalf of the plaintiff to testify as to statements and complaints made to her by the plaintiff of unhappiness in her married life. We see no error in the rulings of the trial

court in regard to these two witnesses. Whatever statement the plaintiff may have made to her physician regarding her husband's treatment of her as affecting the happiness or unhappiness of her married life would not be the less hearsay and self-serving declarations when made to him than when made to any other person not a physician. They were not part of the res gestæ, as was the case in Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499, cited by appellant, nor does it appear that they were necessary to enable the physician to determine the nature of her malady, to which he fully testified as the result of his objective examination. The only purpose for which the evidence of these two witnesses apparently was offered was to show that the plaintiff had made statements to each of them as to the unhappiness of her married life. Such evidence was clearly hearsay and inadmissible.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.

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187 Cal. 591

DEARBORN v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(L. A. 6809.)

(Supreme Court of California. Dec. 20, 1921.)

Master and servant ⚷405(2)—Evidence held to show employment was not casual within Compensation Act.

Evidence *held* to show that the labor cost of the building upon which the injured employé was engaged was in excess of $100, and the time occupied by the contemplated work more than 10 days, so as to support a finding of the State Industrial Commission that employee's employment was not casual within Workmen's Compensation Act, §§ 8a, 8c (Stats. 1917, p. 835).

In Bank.

Proceeding under the Workmen's Compensation Act by Mrs. Elizabeth Hayden and others, to recover compensation for the death of S. E. Hayden, employee, opposed by Florence Ritchie Dearborn, employer. An award was made by the Industrial Accident Commission, and the employer applies for certiorari to review the commission's order. Award affirmed.

Jerome H. Kann, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

WASTE, J. This is a proceeding brought to review, and have annulled, an award of the respondent the Industrial Accident Commission. S. E. Hayden was killed on March 24, 1920, while working as a carpenter for Florence Ritchie Dearborn, the petitioner herein. The accident was caused by his being thrown from an automobile while on his way to a telephone to order lumber needed in the erection of the building on which he was working. He left surviving him the other respondents, a widow and three minor children, who were dependent upon him for support. The employer denied any liability for compensation for the death of Hayden, and the dependents made due application for an adjustment of the claim. There were two hearings before the Commission. On the first the applicants were awarded the sum of $4,999.98. That decision was confirmed on the rehearing. Thereupon the petitioner brought this proceeding in review.

The defendant before the Commission, the petitioner here, denied liability for compensation in the matter of Hayden's death, upon the ground that his employment was both casual, and not in the course of petitioner's trade, business, profession, or occupation. There was ample proof that Hayden, at the time of receiving the injuries from which he died, was actually performing services for Mrs. Dearborn. The burden was therefore cast upon petitioner to prove that the deceased was an independent contractor in the matter, or otherwise excluded from the provisions of the Compensation Act. Workmen's Compensation Act, § 19d (Stats. 1917, p. 849). She was unsuccessful before the Commission, which found that the employment of Hayden was not casual, and made the award. The correctness of that finding presents the only point of controversy on the hearing.

The material facts appear without conflict. Mrs. Dearborn, the petitioner, is associated with her husband in ranching near Blythe, in this state. Being desirous of having a small dwelling house erected for the occupancy of her brother and his family, she employed the deceased, Hayden, to attend to the matter for her. She ordered the lumber and paid the labor bills. Her testimony relating to the employment is that—

> "He (Hayden) was to build that little house at Fertilla. He was to receive his pay by the day; that was what he asked; he did not ask for pay any other way. I employed him. I authorized him to employ the other carpenters. There was no understanding with him that I would give him a lump sum of money for building the house so that he could pay them; the arrangement was hurried; there was nothing said about help. Ultimately the price (for the help) would come out of my pocket. The only sum that was mentioned was the amount he asked me for his services by the day—that was $8.50. That is what I agreed to pay him. There was no provision whatever in the arrangement with Mr. Hayden by which a sum of money was to be paid to him for building

this house, out of which he could pay these other men."

It appears also that Mrs. Dearborn bought and paid for all the lumber and materials used in the erection of the building. It seems conclusively established, therefore, that the deceased was not an independent contractor in building the house. Was he otherwise excluded from the protection of the act? To have worked this result his employment must have been both casual, and not in the course of the business or occupation of his employer. As before stated, Mrs. Dearborn was engaged, with her husband, in farming. Respondents do not contend that the employment of Hayden was in the course of that business. Hence the inquiry narrows to a consideration of the alleged nature of his work.

The relevant portion of the Workmen's Compensation Act, section 8a (Stats. 1917, p. 835), provides that the term "employee," as used in sections 6 to 31, inclusive, of the act, shall be construed to mean, "every person in the service of an employer, * * * but excluding," among others, any person whose employment is casual. Section 8c of the act provides that the term "casual" "shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days, without regard to the number of men employed, and where the total labor cost of such work is less than one hundred dollars." The application of this test to the facts of the case presents the question to be determined.

At the outset of this inquiry we may repeat what was said by the present Chief Justice in Southern Pacific Co. v. Industrial Accident Comm., 177 Cal. 378, 380, 170 Pac. 822, 823:

> "This court, in reviewing awards of the commission, is not acting as a court of appeal. It has no power to weigh the effect of positive evidence. It must assume that the Commission believed all the evidence given which tends to sustain the award made. * * * Section 84 [section 67 of the present act] of the Workmen's Compensation Act, which gives us the power we are now exercising over this award of the Commission, authorizes us to annul an award only when the Commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof. The review of the findings, even in such cases, is not based on the theory that they are not supported by the evidence and that we are weighing evidence to determine that proposition, but upon the theory that the Commission has no jurisdiction to make a finding where there is no evidence to support it."

This restatement of the power of the court on review in these proceedings is pertinent for the reason that the petitioner takes the position that there was no evidence in this proceeding below to support the finding of the noncasual character of Hayden's employment, and that, as a consequence of such absence of fact, the Commission exceeded its jurisdiction in making the award. If the petitioner's contention is correct the award must be annulled; otherwise it must stand.

According to the testimony before the Commission, Mrs. Dearborn contemplated the construction of a small dwelling on property to be purchased, to be occupied by her brother and his family. She wanted the work to be done quickly. Consequently she talked the matter over with the decedent, and employed him in the manner already shown. She was assured by Hayden that the work would take three or four days. Mrs. Dearborn and Hayden, together, ordered the first list of materials for the building. Hayden secured two carpenters to work with him on the job for two or three days, agreeing to pay them $8.50 per day, the same wages he was to be paid by the petitioner. The work was commenced on Wednesday, and had not proceeded far before the carpenters found they were short the amount of milling needed for the building. Hayden started to go to a nearby store to telephone to the lumber company about the shortage of material. He had not gone far when Mr. Ritchie, brother of Mrs. Dearborn, for whose use the latter was building the house, volunteered to take him to the store in his automobile. On the way Ritchie turned suddenly to avoid running down a chicken. As the auto swerved back into the roadway, which was in the sand, Hayden was thrown out, coming into violent contact with the ground, and sustained the injuries which resulted in his death. The work on the building was interrupted for a short time on the day of the accident, and for a like period on the day Hayden was buried. Lumber and materials for the job, costing in all $454.39, were ordered, from March 24th to and including April 9th. It was used in the building. Mrs. Dearborn testified that workmen were on the job all the time between those dates. Switzer, the last of the carpenters to be paid off, received a check dated April 10th. He testified that he worked but 8, 9 or 10 days, but the fact remains that the materials were being furnished to and were used in the erection of the structure by some one over a period far in excess of 10 days. The total cost of the labor for the building was $189.15. On the foregoing evidence the Commission based its findings and made the award.

The petitioner seeks to avoid the effect and compelling force of the evidence already summarized by asserting that, while the cost of the labor on the finished house, and the length of time consumed in its erection, unite to remove the work of decedent from the category of a "casual employment," the work actually "contemplated" by her when she employed Hayden was completed within 10 days, and at a cost for labor of less than $100. In support of this contention she testified that the structure she was building for the occupancy of her brother, and family, was to be completed only as far as the exterior was concerned. No inside comforts or furnishings were to be provided, and no toilet was to be built on the premises; that as the work progressed she changed her mind, and, in order to make the place more habitable as a dwelling, she went ahead and completed the structure. She relies upon evidence of an alleged understanding with the decedent, Hayden, that the house would be built in 3 or 4 days, and her own testimony as to what work she contemplated at the time. However that may be, at one point in her testimony Mrs. Dearborn testified that she employed Hayden "with the expectation that he would remain to finish—to go through with the building." It is quite clear that the death of Hayden in no way operated to cause any change in the plans for the building. It seems only reasonable to infer that the work actually contemplated by the petitioner, when she employed Hayden, was the erection of some kind of a dwelling house, which would be habitable, and at least fairly comfortable when occupied by her relatives. She may not have had very definite ideas on the subject as to the cost and duration of the work. Whatever her plans may have been, her testimony last quoted shows that it was undoubtedly within her contemplation that the decedent would remain to finish the work of erecting the building. That work, as has been shown, took more than 10 days, and the cost of the labor was in excess of $100. In the judgment of the Commission the petitioner did not successfully overcome the burden of proof imposed by the statute. It specifically found that the evidence before it was insufficient to show that the work contemplated was confined to exterior work and flooring, and did not include interior work and the toilet.

The respondents point out that, if it were true that the work contemplated by the petitioner, when she employed the decedent, was to be completed in 4 days, there would still be evidence to support the finding of the Commission that the cost of the labor was in excess of $100, and the employment was therefore not casual. The carpenters, and there were three of them, each received $8.50 per day. At that rate, the cost of their labor alone for the four days would amount to $102.

From this review of the proceedings it clearly appears that facts were not wanting before the Commission to justify the finding that the total labor cost of the building upon which the decedent employee was engaged was in excess of $100, and the time occupied by the contemplated work more than 10 days. Its conclusion, based thereon that the employment was not casual is amply supported. The Commission was therefore not without jurisdiction in the matter, and the award is affirmed.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; RICHARDS, Judge pro tem.

187 Cal. 569

SHIELDS v. RANCHO BUENA VENTURA.
(S. F. 9405.)

(Supreme Court of California. Dec. 15, 1921.)

1. **Appeal and error 🔑1195(1)—Decisions on appeal law of case upon retrial.**

Decision of District Court of Appeals reversing a judgment is to be taken as the law of the case upon retrial as to all points of law passed upon.

2. **Appeal and error 🔑1194(3)—Decision of appellate court construed.**

A statement of District Court of Appeal, on reversing a judgment for plaintiff, that "there can be no doubt that the plaintiff was required by his contract to render an account annually, and it is apparent that without this annual account there was no basis upon which a settlement could be arrived at between the parties," was not a decision that on retrial plaintiff could not recover without proving an annual submission of accounts to the defendant.

3. **Master and servant 🔑70(3) — Keeping of accounts and yearly settlement held not essential to recovery of salary payable out of profits.**

In an action to recover for services rendered in managing a ranch during three years, requirement in contract that there be a keeping of annual accounts *held* not of the essence of the contract, and plaintiff was entitled to compensation if he proved the items of account at the end of three years, and showed that the profits were sufficient for each year to pay his salary, which was dependent upon the profits exceeding a certain amount in each year; it appearing that, owing to the fact that the profits were not in the form of cash, there was not sufficient money with which to pay plaintiff at the end of the first two years, and he did not ask payment, and both parties continued under the contract, thereby waiving the right to a yearly settlement of accounts.

4. **Evidence 🔑376(1)—Books of account held admissible.**

Where manager of ranch kept a complete record of transactions by entries in memorandum books, books of secretary of corporation owning ranch were admissible in evidence, where such secretary testified that the entries therein were taken entirely from the manager's memoranda, and that these memoranda were correctly copied by him, and the manager testified as to the completeness and accuracy of his own memoranda.

5. Evidence 🔑177—Summaries of entries in book properly admitted.

Books of account being properly admitted in evidence, it was not error to permit a party to read in evidence summaries of the accounts therein for the purpose of avoiding delay, under Code Civ. Proc. § 1855, subd. 5.

6. Evidence 🔑354(19)—Witness may corroborate accounts by testifying to facts.

A party was properly entitled to corroborate accounts shown by books admitted in evidence by testifying to facts from his own personal knowledge.

7. Evidence 🔑314(1) — Testimony of corporate secretary held not hearsay.

Testimony of secretary of corporation that an entry in cash account represented cash belonging to plaintiff manager of ranch personally, and not cash obtained from defendant corporation, was not open to the objection that it was hearsay testimony, in view of the fact that the secretary was the bookkeeper for the corporation, and kept the books of the ranch before and during plaintiff's management, and was therefore presumably thoroughly familiar with the financial affairs of the corporation.

8. Master and servant 🔑80(10)—Evidence to show advances by employé.

In action by manager of ranch to recover compensation, evidence *held* to support an inference that $1,000, appearing in the cash account of defendant corporation owning the ranch, was the property of the plaintiff, and not the corporation, and that it was not chargeable against the plaintiff.

9. Appeal and error 🔑930(1)—Evidence viewed in light favorable to judgment.

On appeal from a judgment in favor of plaintiff, the evidence must be viewed in the light most favorable to plaintiff.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by A. J. Shields against the Rancho Buena Ventura, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 38 Cal. App. 696, 177 Pac. 499.

Short & Sutherland, Carl E. Lindsay, and Short, Lindsay & Woolley, all of Fresno, for appellant.

George Cosgrave and Frank Kauke, both of Fresno, for respondent.

LENNON, J. This is the second appeal prosecuted by the defendant corporation, Rancho Buena Ventura, from a judgment in favor of the plaintiff, A. J. Shields, in an action upon claims alleged to have arisen in connection with the management of a ranch in Shasta county, Cal.

The ranch was the property of the defendant corporation. Practically the entire capital stock of this corporation was owned by three persons—Frank Short, George Hoxie, and the plaintiff, Shields. E. A. Mower was the secretary of the corporation, and handled all its accounts. For several years prior to 1910 plaintiff had been in charge of the ranch, developing it and working under a salary. In 1910 plaintiff and defendant corporation entered into a contract under which plaintiff operated and managed the ranch from January 1, 1910, until the month of October, 1912, when the land was sold. The provisions of the contract which are of importance for present purposes may be summarized as follows: Plaintiff was to have complete charge of the ranch and was to manage and conduct the same. It was agreed that:

> "The party of the second part [plaintiff herein] is to keep full and correct books of account showing all receipts and expenditures by him received, incurred or made in connection with said ranch, all business and the products thereof, and all of the same, and on the first day of January of each year the party of the second part will render a complete, full and correct statement of his accounts and transactions, receipts and expenditures."

The proceeds of the ranch were to be applied in the following manner: After the payment of all expenses incurred in the management of the ranch, including the household and living expenses of himself and family, plaintiff was entitled to $1,500 each year in full payment for his services; all of the residue was the property of the defendant corporation. There was a provision that the contract should cease to operate upon certain contingencies, one of which was a sale of the premises, and therefore the agreement was terminated by the sale of the ranch in October, 1912.

In this action plaintiff seeks to recover compensation for his services, at the rate of $1,500 per year, or $125 per month, for the period during which he managed the ranch under the above-mentioned contract, namely, from January, 1910, until October, 1912. He also asks repayment of a certain sum claimed to have been advanced by him in connection with the management of the ranch and not repaid by defendant. The first trial resulted in a verdict and judgment in plaintiff's favor for the sum of $7,060.94, but the judgment was reversed by the District Court of Appeal. Shields v. Rancho Buena Ventura, 38 Cal. App. 696, 177 Pac. 499. Upon the second trial plaintiff voluntarily reduced his claim to $5,742.52, and recovered a verdict and judgment for that amount. This latter sum is arrived at by computing plaintiff's salary at $125 a month for 34 months, making a total of $4,250, and allowing $1,492.52 for money advanced for the use of defendant.

[1-3] The decision of the District Court of Appeal in Shields v. Rancho Buena Ventura, 38 Cal. App. 696, 177 Pac. 499, reversing the first judgment in plaintiff's favor, must as to all points of law therein passed upon be taken as the law of the case upon retrial. Relying upon this fact, defendant contends that the holding in that case was that plaintiff could not recover without a showing that he had rendered annual accounts to the defendant as required by his contract, and, inasmuch as it is conceded that plaintiff did not report to defendant concerning the state of his accounts at the end of each year during the time that he was managing the ranch, defendant deduces the conclusion that plaintiff has failed to make out a case under the law as established upon the previous appeal. This contention cannot be sustained for the reason that it is based upon an incorrect interpretation of the decision of the District Court of Appeal. In that decision it was held that "the operation of the ranch by the plaintiff was as to each year a separate and distinct transaction, and not a continuous transaction for the entire period," and that consequently before plaintiff could recover for any year the compensation of $1,500 provided for by the contract, it must be made to appear that the net proceeds of the ranch for that year equaled that sum. At the first trial plaintiff made no attempt whatever to show the amount of the proceeds of the same for any one year, but merely introduced in evidence a single account covering the entire period from January, 1910, to November, 1912, and, accordingly, the judgment was reversed for the reason that—

> "The jury in the condition of the evidence upon which the cause was submitted, had no means of knowing whether for the years 1910 and 1911 there was anything due from the defendant to the plaintiff under the terms of the contract."

Since the total lack of evidence concerning the annual profits of the ranch was the ground of the reversal of the first judgment in plaintiff's favor, it is apparent that the question of the effect of plaintiff's failure to render an annual report to the defendant was not within the issues decided upon the former appeal. Upon that appeal it was said:

> "There can be no doubt that the plaintiff was required by his contract to render an account annually; and it is apparent that without this annual account there was no basis upon which a settlement could be arrived at between the parties."

Defendant interprets this to mean that plaintiff could not recover without proving an annual submission of accounts to the defendant, but that is not the purport of the quoted sentence. The keeping accounts in annual periods and the submission of these accounts to the defendant at the end of each year are distinct obligations, and the sentence in question may be paraphrased thus: The keeping of accounts in annual periods was indispensable to the performance of the contract by its very terms; the contract also called for the presentation of these accounts annually. But the annual presentation of the accounts was not of the essence of the contract. Plaintiff was not entitled to compensation until he proved that the amount of compensation claimed by him had been earned by the ranch during the year in which the services were rendered, and, therefore, if plaintiff demanded that his compensation be paid precisely at the end of each year, it was incumbent upon him to report upon his accounts at that time. It appears, however, that, owing to the fact that the profits of the ranch were not in the form of cash, there was insufficient money with which to pay plaintiff at the end of the years 1910 and 1911. As a result, plaintiff did not ask payment at the end of these years, but plaintiff and defendant continued under the contract, payment of the salary being deferred, until the sale in 1912. Under these circumstances it must be held that both parties waived the right to a yearly settlement of accounts. Therefore, if plaintiff can prove that there was each year a profit equal to or in excess of the sum of $1,500, he is entitled to full compensation, irrespective of the fact that his accounts were not presented and settled annually.

[4-6] Proceeding in accordance with the ruling of the District Court of Appeal, plaintiff introduced evidence at the second trial showing, or tending to show, that he had kept a complete record of all transactions at the ranch by entries in memorandum books, and that from these memoranda the secretary of the corporation subsequently posted up the corporation's books. The plaintiff's memorandum books were not offered in evidence for the reason that they were left upon the ranch when it was sold in 1912 and were subsequently burned, but the books kept by the secretary of the corporation were produced in court. The secretary testified, regarding the manner in which he kept the books, that the entries therein were taken entirely from plaintiff's memoranda, and that these memoranda were correctly copied by him. Plaintiff himself testified concerning the completeness and accuracy of his own memoranda of the transactions on the ranch. The books having thus been authenticated and their correctness attested by the party who made the entries and by the person furnishing the original data from which the entries were made, they were admissible as containing the first permanent entries of the

transactions in question. Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 Pac. 657; San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 319, 104 Pac. 999; Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 256, 146 Pac. 692; Chicago Lumbering Co. v. Hewitt, 64 Fed. 314, 12 C. C. A. 129. The books of account being properly admitted, it was not error to permit the plaintiff to read in evidence summaries of the accounts therein, for the purpose of avoiding delay. Code Civ. Proc. § 1855, subd. 5. Nor was error committed in admitting, in addition to these accounts, the testimony of the plaintiff concerning the transactions on the ranch during each of the years mentioned. If plaintiff was able to corroborate the accounts by testifying to facts from his own personal knowledge, certainly the admission of this testimony furnishes the defendant no ground of complaint.

It appears from the accounts, and testimony, that there was not enough cash on hand to pay plaintiff's salary at the end of the years 1910 and 1911, but plaintiff contends that the gain is to be found in the value of the increase in stock and products, together with an increase in the permanent improvements on the ranch. Upon this phase of the case it was stated in the opinion of the District Court of Appeal upon the former appeal:

> "A proper construction of this contract, having in mind the conditions under which it was entered into and its objects and purposes, would treat as proceeds, not only money received from actual sales of produce, but the increased value of stock or produce on hand at the end of a given year over the value of stock or produce on hand at the end of the preceding year; for it was the duty of the plaintiff, under his contract, to manage the business prudently and for the best interests of his employer, and it would not be to that interest that he should, in anticipation of the closing of the annual period, make hasty and ill-advised sales of produce merely for the purpose of having money on hand applicable to the payment of expenses and his own compensation."

This interpretation of the contract is not attacked by defendant, and, placing this construction upon the contract, the accounts and the inventories put in evidence at the second trial, supplemented by Mr. Mower's and the plaintiff's testimony, reveal a net gain each year considerably in excess of $1,500. The evidence is too voluminous to warrant setting it forth in this opinion. Suffice it to say that the evidence was sufficiently substantial to support the finding of the jury, which must be implied from the verdict, that the amount of the net proceeds resulting from the operation of the ranch each of the years in question entitled plaintiff to full compensation for his services under his contract.

The next question for consideration is plaintiff's right to reimbursement in the sum of $1,492.52 for money alleged to have been invested by him in the ranch. The only question raised by defendant in connection with this phase of the case is whether or not there is sufficient evidence that that sum was actually advanced by plaintiff in the management of the ranch. This must be ascertained from the summaries of cash receipts and disbursements. It may be stated, by way of preliminary explanation, that these accounts contained entries of the receipt and disbursement of some $6,200, which was borrowed for use in the management of the ranch and repaid by plaintiff from the income from the ranch. An additional $3,000, borrowed by plaintiff, was entered among the receipts of the ranch. At the termination of the agreement plaintiff had on hand a sum sufficient to repay this obligation. The transactions concerning this $9,200, and the payment of interest thereon, may, it is conceded, be eliminated from the accounts in determining the amount of cash received and disbursed in managing the ranch. Moreover, plaintiff's salary, although not actually paid, was entered among the disbursements as a matter of bookkeeping, because sufficient profits had in fact been earned to entitle plaintiff to the amount thereof. Eliminating the money borrowed from receipts and eliminating the money repaid, together with interest thereon, and the salary items from the disbursements, the accounts show that the excess of cash disbursements over receipts was approximately $3,800 in the year 1910, and $790 in 1911, while receipts were about $3,082 greater than disbursements for the 10 months of 1912, making a total of some $1,500 excess of disbursements over receipts during the period of plaintiff's management. This fact, when considered in connection with the testimony of plaintiff that he received no money from the corporation for the management of the ranch, is sufficient evidence in support of plaintiff's claim to reimbursement to the extent that the expenditures exceeded receipts.

[7, 8] Defendant attacks this conclusion upon two grounds. It is first claimed that in this computation plaintiff has failed to credit defendant with $1,000 in cash which the cash account shows he had on hand at the time he started operations under the contract, and which, it is claimed, was the property of the defendant corporation. Mr. Mower, the secretary of the corporation, testified that this entry in the cash account of $1,000 "cash on hand" as of January 1, 1910, represented cash belonging to the plaintiff personally, and not cash obtained from the defendant. The suggestion that this was hearsay testimony is of little weight, in view of the fact that Mr. Mower was bookkeeper for the company, kept the books of the ranch both before and during plaintiff's management, and therefore was presumably thoroughly familiar with the financial affairs of

the company. Moreover, plaintiff himself testified that the defendant never advanced any money for use on the ranch and the money in question is not listed in the inventory of the property of the corporation intrusted to plaintiff under the contract on January 1, 1910. Clearly, therefore, there is evidence to support the inference that this $1,000 appearing in the cash account was the property of the plaintiff, and no more belonged to the defendant than the money borrowed by the plaintiff and repaid by him, which likewise found its way into the cash account.

[9] The next contention of defendant is that, even conceding that this $1,000 expended in the management of the ranch was the money of the plaintiff, the latter's own testimony proves that there is no possible source from which he could have obtained the remaining $492.52 claimed to have been advanced by plaintiff to the corporation and allowed him by the jury. Plaintiff testified, in effect, that on January 1, 1910, he had $2,000 in his own personal funds, and that later he received a dividend of $2.000. Aside from the $1,000 expended by him in the management of the ranch, this $4,000 represents the total amount of plaintiff's personal funds while he was in control of the ranch. It is defendant's theory that the disposition of this money is entirely accounted for by plaintiff's testimony to the effect that he had spent some $4,000 in the support of his wife and children during the period between January 1, 1910, and October, 1912, and that it is therefore apparent that plaintiff did not have $492.52 of his own money to expend for the corporation. The fallacy of this argument lies in defendant's interpretation of plaintiff's testimony concerning the amount of money spent by him in the support of his family. It is true that there is some confusion in plaintiff's testimony, and that it is possible to interpret his testimony as estimating his expenses to have been as high as $4,000. Nevertheless, the testimony will also support a lower estimate, and upon this appeal it must be viewed in the light most favorable to plaintiff. In approximating plaintiff's personal expenses it must be remembered that the household and living expenses of plaintiff were, under the terms of the contract, paid from the income from the ranch and rated as part of the expense of managing the ranch, and that there was testimony that plaintiff's wife had money of her own, and "always attended to her own buying."

Turning, then, to the testimony relied upon by defendant, it may be summarized, in the aspect most favorable to plaintiff, as follows: Plaintiff expended "around $100 a month" upon his three children during the time they were in school. Allowing for a three months' vacation, this would amount to $900 a year. From January, 1910, until October, 1912, this would mean an expenditure of approximately $2,500. Plaintiff estimated his own personal expenses, and those of his wife paid by him, at less than $500, making a total of $3,000. Even allowing a margin of $500, this calculation shows that plaintiff would still have had sufficient cash to advance to the corporation the $492.52 for which the jury allowed him reimbursement.

The judgment is affirmed.

We concur: SHAW, C. J.; SLOANE, J.; WILBUR, J.; SHURTLEFF, J.

187 Cal. 340

MARTIN v. DE SHIELDS, Auditor of Tehama County. (Sac. 3234.)

(Supreme Court of California. Nov. 10, 1921.)

1. Counties 🔑74(6)—Provision in freeholders' county charter setting compensation of deputy county officer is illegal.

An allowance in a county freeholders' charter to a chief deputy or other deputy as a salary for the services of such deputy is in violation of Const. art. 11, § 7½, subd. 5, requiring that the power to fix the number and compensation of deputies must be vested by the charter in the board of supervisors.

2. Sheriffs and constables 🔑29—County charter fixing salary of sheriff and deputy held legal under authority to fix salary of sheriff.

Under Const. art. 11, § 7½, subd. 2, authorizing a county freeholders' charter to fix the compensation of the sheriff, a clause of a freeholders' county charter setting the salary of the sheriff and allowing him deputies not to exceed a certain sum, being a method of fixing the sheriff's compensation, is legal notwithstanding subdivision 5, providing that such a charter must provide for the appointment and compensation of deputy county officers by ordinance of the board of supervisors.

3. Sheriffs and constables 🔑17—County freeholders' charter held not to limit right of Legislature to provide for deputy sheriffs.

Where a county freeholders' charter contained no limitation on the power of the Legislature to give the sheriff additional deputies, and did not authorize the supervisors to make provision for the deputies, the right of providing for deputy sheriffs remains with the Legislature.

In Bank.

Suit by Henry Arthur Martin for writ of mandate against George M. De Shields, as Auditor of the County of Tehama. On issuing of the writ of mandate in The District Court of Appeal for the Third Appellate District, a petition for hearing in this court was granted. Writ to issue.

F. L. Butterway, of Red Bluff, for petitioner.

M. J. Cheatham, of Red Bluff, for respondent.

LAWLOR, J. This is a companion case to Jones v. De Shields, 202 Pac. 137, filed this day. Petitioner, Henry Arthur Martin, was appointed by the sheriff of Tehama county to the position of deputy sheriff, but respondent, George M. De Shields, as auditor of said county, refused to draw his warrant on the county treasurer in the sum of $108.33 for petitioner's salary for the month of November, 1920. The contentions of the parties are the same as those made in Jones v. De Shields, supra.

[1] In section 1 of article IV of the charter of Tehama county (Stats. 1917, p. 1883) it is provided as follows:

> "The salary of the sheriff as sheriff and coroner shall be two thousand four hundred dollars per annum, and he may be allowed deputies at not to exceed one thousand three hundred dollars per annum."

As was held in Jones v. De Shields, supra, an allowance to the chief deputy or other deputy as salary for the services of such deputy is violative of the constitutional provision which requires that the power to fix the number and compensation of deputies must be vested by the charter in the board of supervisors. The situation, however, presented by the provision of the charter relating to the salary of the sheriff is different.

[2] The provision with reference to the salary of deputies is a part of the provision fixing the compensation of the sheriff as authorized by subdivision 2 of section 7½ of article 11 of the Constitution. See Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161. It is as though the provision had read:

> "The compensation of the sheriff shall be $2,400 per annum and the pay of his necessary deputies to the extent of $1,300 per annum."

If part of the provision must fall, it is clear that all must fall, with the result that the charter would be without any valid provision at all as to the compensation of the sheriff. This would relegate the sheriff to his salary under the general law. Jones v. De Shields, supra. It is not necessary, however, to hold the entire provision invalid. It embodies a well-recognized method of fixing the compensation of an officer, as shown by Dougherty v. Austin, supra, and a long line of subsequent decisions, at either a lump sum, he to pay his own deputies and assistants, or at a specified sum, with an allowance for a part of the expenses of deputies and assistants. Here we have the second one of these alternative methods—a specified sum, together with further allowance for deputies to the extent of $1,300 per annum. If we assume that the sum of $1,300 allowed for deputies is an essential part of the compensation of the sheriff, and therefore the provision concerning the same authorized by the provisions of section 7½, art. 11, providing that the compensation of the sheriff may be fixed by the charter, then the sheriff undoubtedly had a right to appoint the petitioner as deputy sheriff under the general law at a salary to be fixed by the sheriff himself and to be paid from the compensation allowed by the charter to the sheriff, unless other provision is made in that behalf by the general law. The general law relating to Tehama county fixes the salary of the sheriff at $4,800, a lump sum, from which salary the sheriff is required to pay his deputies. The salary of $2,400 allowed by the charter, plus an allowance of $1,300 for deputies, takes the place and supersedes the salary allowed by the general law to the sheriff. It may be assumed, we think, in the absence of any contention or showing to the contrary, that the sheriff in employing the petitioner fixed his salary at the sum of $108.33 per month, and this sum so fixed by the sheriff is payable from the county treasury from that portion of the salary of the sheriff fixed by the charter to be paid to his deputies.

[3] It is to be observed that we are not here considering a situation where the general law fixes the salaries of the sheriff's deputies in Tehama county. We are merely determining that the effect of the charter is to fix the compensation of the sheriff at $3,700 per annum, $1,300 thereof to be used by the sheriff for compensation for such necessary deputies as he may appoint to assist him in the performance of his duties. The charter cannot be considered as a limitation upon the power of the Legislature to give to the sheriff additional deputies, as such limitation has no place in the charter. Jones v. De Shields, supra. The charter having failed to authorize the supervisors to make provision for necessary deputies for the sheriff, that right remains in the state Legislature. In the meantime, however, the sheriff is entitled to appoint deputies and pay their salaries to the extent of $1,300 from the fund set apart for that purpose to him by the charter.

The application for a writ of mandate is granted.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; SHURTLEFF, J.

55 Cal. App. 239

UNITED TAXPAYERS' CO. v. CITY AND COUNTY OF SAN FRANCISCO.

(Civ. 3931.)

(District Court of Appeal, First District, Division 1, California. Nov. 17, 1921.)

1. **Interest 🔑39(2)—Judgment 🔑22—Interest improperly allowed on an order for judgment.**

An order for judgment is not a judgment under Civ. Code, § 1920, which allows interest upon judgments from the date of their entry, and such is true as to cases brought under Pol. Code, § 3819, to recover taxes paid under protest, and it was error for court to allow interest in a judgment, even though plaintiff was entitled to have such court enter a judgment nunc pro tunc as of the date of the early order; no such form of judgment being asked for or obtained.

2. **Judgment 🔑251(1), 255—Must not cover issues and amounts not embraced in pleading or stipulations.**

A judgment to recover taxes illegally collected under Pol. Code, § 3819, could not be so expanded as to cover issues and amounts and items not embraced in the plaintiff's pleading, and not covered by stipulations of the parties as to the facts of the case.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the United Taxpayers' Company against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Judgment modified.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for appellant.

J. E. Bien, of San Francisco, and E. H. Williams, of San Leandro, for respondent.

RICHARDS, J. This action was commenced by the plaintiff, United Taxpayers' Company, as the assignee of seven different taxpayers to recover back from the city and county of San Francisco certain taxes for the fiscal year 1907–08 alleged to have been paid under protest pursuant to the provisions of section 3819 of the Political Code. The aggregate sum which the plaintiff thus sought to recover as stated in the prayer of its complaint was $4,777.26, with interest thereon from the 17th day of January, 1908, together with costs.

The answer of the defendant was so framed as to put in issue most of the allegations of the complaint but subsequently to the date of filing the same and on June 2, 1910, there was filed the stipulation of the parties to the action embracing an agreed statement of facts to be used at the trial of the case. In said stipulation the right was expressly reserved to the parties to introduce evidence at the trial as to any other facts not inconsistent with those admitted to be true by the terms of said stipulation. Shortly after the filing of said stipulation the parties hereto entered into another stipulation permitting an amendment to the plaintiff's complaint so as to show that Jacob Kamm, one of the plaintiff's assignors, had paid an additional sum of $1,690.65 as a second installment of taxes for said fiscal year; it being stipulated, however, that at the time of the payment of said second installment of taxes no other or additional protest was made to that filed by said Kamm at the time of payment of the first installment of his taxes. Certain other amendments to said complaint were agreed to and made, but no additional sum was prayed for to the aggregate demanded in the original complaint.

It would seem that at or about the time when the foregoing stipulations were entered into there had been put to trial and tried and determined in the trial court an action entitled Josselyn v. City and County of San Francisco, which was a case involving the same issues of law as are involved in the present action. An appeal was taken in that case to the Supreme Court, which was heard and determined therein, and a decision rendered on October 2, 1914, which decision is to be found in Josselyn v. City and County of San Francisco, 168 Cal. 436, 143 Pac. 705. While this last-named case was taking its course through the process of trial, appeal, and final determination in the Supreme Court, nothing further was done in the instant case, with the exception of the matters and things which are referred to and agreed to in a stipulation between the parties hereto entered into on the 18th day of June, 1919, and filed on the 28th day of July, 1919. It may be noted that said stipulation refers to the present action and also to another and similar action having the same title and wherein a like agreed statement of facts had been filed. This last stipulation reads as follows:

"Whereas, prior to November 10, 1910, a certain stipulation and agreed statement of fact was entered into by and between the plaintiff above named by Joseph E. Bien, Esq., its attorney, and the defendant above named by the then city attorney, by the terms of which certain facts being then and there matters of record then and there known to the said city attorney of his own knowledge, were stipulated and agreed to as being true with the same effect as if said facts had been proved in open court by competent evidence; and

"Whereas, prior to said November 10, 1910, it was further stipulated and agreed between the said plaintiff and the said defendant by its then city attorney that the said statement of facts should apply to and govern both of the cases numbered and entitled as above in the records and files of the superior court of the state of California in and for the city and county of San Francisco; and

"Whereas, it was prior to November 10, 1910, stipulated between plaintiff and defendant by its then city attorney that the issues of law presented by the facts so stipulated and agreed to should be determined according to the rulings of the courts in other cases arising on identical facts and then and there pending for determination in the courts of California; and

"Whereas, the Supreme Court of the state of California, in the case of Josselyn v. City and County of San Francisco, 168 Cal. p. 436 [143 Pac. 705], in its decision duly given and made October 2, 1914, resolved all points of law presented by an identical agreed statement of facts against defendant; and

"Whereas, the superior court of the State of California in and for the city and county of San Francisco, dept. 1 thereof, J. M. Seawell, judge presiding, did on November 10, 1910, duly give and make its order for judgment in favor of the plaintiff as prayed in both of the said actions numbered and entitled as above:

"Now, therefore, it is hereby stipulated and agreed that said agreed statement of facts may be taken as and for findings in the above-entitled actions, and that all further findings and facts other than the facts stated in the agreed statement may be waived."

Upon the making and filing of the foregoing stipulation, this case came on to trial and was submitted to the trial court for its decision upon the aforesaid agreed statement of facts and upon said last-named stipulation; whereupon, and on August 22, 1919, the trial court rendered and entered its judgment herein in favor of the plaintiff for the sum of $5,750. It is from this judgment that the present appeal has been taken.

The single point urged by the appellant upon this appeal is that the judgment appealed from is $972.74 in excess of the sum which the plaintiff, in its original complaint, sought to recover, and is the same amount in excess of any judgment which the trial court was empowered to render under the agreed statement of facts and the stipulations of the parties to the action.

No reason was assigned by the trial court for this increase of $972.74 in its judgment over the amount demanded by the plaintiff in its complaint, and we are left in a large measure to the surmise of the respective parties as embodied in their briefs for whatever reason, good or bad, there may be for this increase. The appellant suggests two conceivable reasons for the court's action, both of which it argues are indefensible. One of these is that the trial court undertook to award to plaintiff interest upon the amount prayed for in its complaint from and after the 10th day of November, 1910, when, according to the last stipulation of the parties above set forth in full, the trial court did "duly give and make its order for judgment in favor of plaintiff as prayed for." This supposititious reason for the increased amount of said judgment is indefensible, according to the contention of the appellant, because no actual judgment was then or ever entered pursuant to said order, and hence there was no actual judgment prior to August 22, 1919, upon which interest could be computed or allowed under section 3819 of the Political Code, as well as under section 1920 of the Civil Code.

The second reason which the appellant surmises for the increase of said judgment is that the trial court undertook to allow plaintiff judgment for some other item of taxes held to have been illegally imposed in the Josselyn Case, but for which item of taxes this plaintiff had not in this action sought recovery.

The respondent herein takes up the gauge of battle which the appellant thus throws down. It asserts, as to the first proposition, that the order for judgment stipulated to have been given and made by the trial court on November 10, 1910, was and is a sufficient foundation for the allowance of interest by it from that date forward in its judgment finally rendered and entered on August 22, 1919.

[1] This contention cannot be sustained. An order for judgment is not a judgment. Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301. Interest, by the express language of section 1920 of the Civil Code, is allowable upon judgments from the date of their entry only; and concededly no judgment was entered in this action until August 22, 1919. Whether or not, under the terms of the foregoing stipulation the plaintiff would be entitled to have the trial court enter said judgment nunc pro tunc as of the date of its earlier order for judgment is quite immaterial here, since no such form of judgment was asked for or obtained. Under the authority not only of the Code, but of repeated decisions of our Supreme Court, interest prior to the entry of judgment cannot be allowed in the class of cases permissible to be brought under section 3819 of the Political Code. Sav. & Loan Soc. v. San Francisco, 131 Cal. 356, 63 Pac. 665; Columbia Sav. Bank v. Los Angeles County, 37 Cal. 467, 70 Pac. 308; Miller v. Kern County, 150 Cal. 797, 90 Pac. 119; Kern Valley W. Co. v. Kern County, 150 Cal. 801, 90 Pac. 121.

[2] The next contention of the respondent is that, under the terms of the stipulation of the parties entered into on June 18, 1919, and above set forth in full the plaintiff would be entitled in this action to recover everything in the way of taxes illegally collected from him which the plaintiff in the Josselyn Case was held to be entitled to recover. It needs no argument that this contention cannot be sustained, since to do so would be to import into the plaintiff's pleading and prayer for recovery items of taxes

regarding which no issues were ever framed nor any agreed statement of facts ever filed. The agreed statement of facts made and filed in open court on June 2, 1910, covers only one item of taxes found to have been illegally imposed in the Josselyn Case. This agreed statement of facts then filed took the place of findings in the instant case by virtue of the stipulation of the parties entered into upon June 18, 1919, and upon which the judgment entered on August 22, 1919, was predicated. This judgment could by no process of sound reasoning be so expanded as to cover issues and amounts not embraced in the plaintiff's pleading and not covered by the stipulation of the parties as to the facts of the case. It follows necessarily that the judgment of the trial court exceeded the amount which under the pleadings in the case and the stipulations of the parties it was entitled to render by the sum of $972.74, and that it must be modified so as to eliminate this excess.

It is therefore ordered that the judgment herein be so modified as to strike therefrom the sum of $972.74 as of the date of the entry thereof; and the trial court is hereby directed to make such modification and enter its judgment accordingly in the plaintiff's favor for the sum of $4,777.26 as of the date of its original judgment herein.

We concur: WASTE, P. J.; KERRIGAN, J.

(55 Cal. App. 798)

UNITED TAXPAYERS' CO. v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 3932.)

(District Court of Appeal, First District, Division 1, California. Nov. 17, 1921.)

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the United Taxpayers' Company against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Judgment modified.

Geo. Lull, City Atty., and Maurice T. Dooling, Asst. City Atty., both of San Francisco, for appellant.

Jos. E. Bien, of San Francisco, and E. H. Williams, of San Leandro, for respondent.

PER CURIAM. Upon the authority of United Taxpayers' Co. v. City and County of San Francisco (No. 3931), 203 Pac. 120, this day decided, and for the reasons stated therein, the judgment for $5,000 rendered and entered herein is modified so as to strike therefrom $780.63 as of the date of the entry thereof. The trial court is hereby directed to make such modification and enter its judgment accordingly in the plaintiff's favor for the sum of $4,219.37 as of the date of its original judgment herein.

(55 Cal. App. 96)

McKINNON v. UNITED RAILROADS OF SAN FRANCISCO et al. (Civ. 3925.)

(District Court of Appeal, First District, Division 1, California. Nov. 7, 1921. Hearing Denied by Supreme Court Jan. 5, 1922.)

1. Carriers 🔑321(12)—Instructions in suit for injury in collision against two street railroads held not erroneous as misleading.

In a suit for injury to a passenger in a collision against two street railroads, two instructions given after instructing the jury that each of defendants was a common carrier, one, that proof of injury to a passenger on the car of a common carrier, caused by operation of the car casts on the carrier the burden of proving the injury was occasioned by inevitable casualty, etc., and, the other, that a carrier of passengers is required to exercise the highest degree of care in their safe transportation and is responsible for injuries received by a passenger without fault, which injuries might have been avoided by exercise of such care, and hence when it is shown that injury to a passenger was caused by the carrier operating the instrumentalities employed in its business, there is a presumption of negligence, etc., obviously applied to the carrier on whose car he was riding, and were not erroneous as misleading the jury to apply them to the other carrier's liability.

2. Carriers 🔑321(23)—Evidence held to justify an instruction predicated on violation of a speed ordinance.

Where, in a suit for injury in a collision at a crossing between street cars, one of which was descending a hill, it was shown that it and other similarly constructed and operated cars were accustomed to safely negotiate this particular decline under conditions identical with those attending the collision in question, and no reason appeared why this car could not have done so if in proper mechanical condition and properly run, it justified an instruction predicated on the violation of an ordinance limiting speed to 10 miles an hour, as against a contention that the evidence did not show a violation thereof, and did show the car was a runaway in the sense that owing to a slippery condition it got beyond control.

3. Carriers 🔑297—Motor Vehicle Act held not to apply to street railways and not to repeal speed ordinance and so render erroneous instruction based on violation thereof.

Motor Vehicle Act, limiting speed to 20 miles per hour, has no application to vehicles operated on stationary rails or tracks, and hence does not repeal an ordinance limiting the speed of street cars to 10 miles, and so render erroneous an instruction predicating liability for injury to a passenger on a violation of such ordinance.

4. Appeal and error 🔑1066—Instructions as to liability of a street railroad for the acts of its gripman held not prejudicial to its codefendants.

In suit for injuries received in a collision at a crossing of street car tracks, an instruction that the gripman of one defendant railway company had a right to rely on the right of way given to his street car at that place, but that, if a situation should arise so that the safety of the passengers should require it, it would be his duty to yield the right of way, was correct as to the company whose car was carrying the injured person and specifically applied to that company and was not prejudicial to its codefendant.

5. Appeal and error ⚷1066—In action against two codefendants, instruction specifically applying to one held not prejudicial to the other.

In an action for injuries received in a collision of street cars at crossing of street car tracks, an instruction that if the gripman of the car on which the injured person was riding was suddenly confronted by imminent danger demanding alternative courses of conduct, and made such choice as a person of ordinary prudence placed in such a position might make, the fact that if he had chosen the other hazard he would have escaped the injury was not important, was correct, and, being specifically applicable to one defendant, was not prejudicial to its codefendant.

6. Trial ⚷191(8), 240—Instruction held not defective as argumentative and assuming negligence of defendant.

In an action for injuries received in a collision between street cars at a track crossing, an instruction that a slippery track is no excuse if the railroad company was guilty of negligence in failing to provide against its consequences was correct in principle, and was not defective as being argumentative and assuming the negligence of defendant.

7. Trial ⚷260(1)—Refusal to give instruction in form asked when substance is given in another form is not prejudicial.

Refusal to give instructions in form of which they were asked, which were fully and sufficiently covered by other instructions given by the court, does not constitute prejudicial injury.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John L. McKinnon against the United Railroads of San Francisco and another. From judgment for plaintiff against the named defendant, it appeals. Affirmed.

Wm. M. Cannon, Wm. M. Abbott, and Kingsley Cannon, all of San Francisco, for defendant and appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for plaintiff and respondent.

Wright, Wright & Stetson and J. J. Dunne, all of San Francisco, for defendant and respondent.

RICHARDS, J. This is an appeal by the defendant United Railroads of San Francisco from a judgment for the sum of $1,500 rendered against it in an action for damages for personal injuries sustained by the plaintiff in a collision between the street car of the said defendant and a street car of its codefendant, California Street Cable Railroad Company, upon the car of which latter codefendant the plaintiff was a passenger.

The collision occurred on the evening of May 27, 1917, at the intersection of Hyde and Sacramento streets in the city and county of San Francisco. The Hyde street car of the California Street Cable Railroad Company had come up Hyde street, traveling in a northerly direction, and was crossing Sacramento street when it was struck by the car of the Sacramento street line of the United Railroads, which descended the hill on that street going west, and collided with the rear end of the Hyde street car. The undisputed evidence shows that a short while before the time of the collision a drizzling rain or mist had been falling in that vicinity, rendering the rails of the respective street car systems quite slippery. The evidence also shows without conflict that both by custom and by agreement the cars of the California Street Cable Company had the right of way at this particular intersection. The plaintiff was himself without fault in relation to the collision and his injuries sustained thereby.

Upon the trial of the cause the jury returned a verdict absolving the defendant California Street Cable Railroad Company from responsibility for the collision, but fixing the responsibility therefor upon the defendant United Railroads, against which it awarded the plaintiff damages in the sum of $1,500. The latter defendant appeals from the judgment which followed this award.

While the appellant herein urges that upon the facts of the case the jury if rightfully instructed, might with reason have returned a verdict in its favor, it does not seriously argue that the evidence in the case is insufficient to support the verdict which the jury in fact rendered. Its argument upon this appeal is devoted solely to alleged errors in the instructions of the trial court by which the jury was prejudicially misled as to the law of the case.

[1] The first two instructions which the appellant assails may be considered together, since the same argument is urged against each. After instructing the jury that each of the defendants was a common carrier of passengers in said city, the court gave these two instructions:

> "The proof of an injury to a passenger on the car of a common carrier, caused by the operation of the car, casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent.
>
> "A carrier of passengers is required to exercise the highest degree of care and diligence in their safe transportation, and is responsible for injuries received by a passenger without fault of his own which injuries might have been

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

avoided by the exercise of such care. Hence, when it is shown that an injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in its business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without negligence on its part."

It is claimed that the jury were misled into giving each of these instructions application to the legal liability of this appellant as one of the defendants in the case, which were prejudically erroneous as applied to it.

If this premise were correct, the conclusion would be irresistible; but reading these two instructions, it is, we think, perfectly obvious that they were applicable only to the codefendant of this appellant, and as applied to it were sound law; and this becomes even more apparent if possible when the instructions of the trial court are considered as a whole, since it therein appears that the court was particularly if not unusually explicit in pointing out to the jury the difference in point of the law of liability between the California Street Cable Railroad Company as the carrier of this particular passenger, and that of the United Railroads as a carrier generally, but not as the carrier of the plaintiff at the time of said collision. This being so, the plaintiff was clearly entitled to have these two instructions given to the jury in support of his claim for damages against the codefendant of the appellant, and, as we have indicated, the jury could not have been misled thereby.

[2] The next contention of the appellant is that the trial court erred in instructing the jury that a violation of the speed ordinance of the city and county of San Francisco, if found to exist on the part of the United Railroads at the time of said collision, constituted negligence per se. The argument offered in support of this contention is threefold: First, that the evidence does not show that there was any violation of the terms of said ordinance, which limits the speed of street cars to 10 miles an hour; second, that the evidence shows that the car of the appellant responsible for this collision was a runaway car in the sense that owing to the slippery condition of the road it had gotten beyond its operator's control while descending the Sacramento street hill immediately prior to the collision; third, that the provisions of the ordinance in question had been repealed by the provisions of the Motor Vehicle Act permitting a speed for vehicles of 20 miles an hour in cities.

As to the first two of these contentions it may be said that the evidence in the case does in our opinion sufficiently justify the instruction in question, both that the car on its way down the hill was traveling at an accelerating speed in excess of that permitted by said ordinances, and that in so doing it was not a runaway car in the sense that the appellant was not to be held liable for its excess of speed. It and other similarly constructed and operated cars of the said defendant were shown to have been accustomed to safely negotiate this particular decline under conditions identical with those attending this particular collision, and no reason appears why this car should not have done so if in proper mechanical condition and if properly run and operated. That it did not do so on this occasion would seem to reasonably give rise to the inference that it was not in such condition or was not carefully controlled.

[3] As to the third of the appellant's contentions in respect to this instruction, it will appear from a cursory reading of the Motor Vehicle Act that it has no application to vehicles operated upon stationary rails or tracks. Stats. 1917, p. 382.

[4] The appellant's next contention is that the trial court erred in its instruction to the jury to the effect that the gripman of the Hyde street car was entitled to rely upon the presumption that the right of way of his car would be respected by the car of the United Railroads Company. While it may be conceded that a general instruction to the above effect would be obnoxious to the law and language of the Supreme Court in the case of Kimic v. San Jose-Los Gatos, etc., Co. et al., 156 Cal. 379, 104 Pac. 986, it will be noted in the instant case that the instruction thus objected to by the appellant herein was not the only instruction which the trial court gave on this subject, since it also gave the following instruction:

"Even if you find that the defendant California Street Cable Railroad Company had the right of way over the crossing of Sacramento and Hyde streets at the time of the accident in question, that fact would not release it from the legal burden of exercising the highest degree of care for the safety of its passengers. If a situation should present itself in which the safety of its passengers would require it to yield the right of way to its codefendant in order to avoid a collision and injury to its passengers, it would be its duty, if by the exercise of the highest degree of care it could do so, to yield such right of way so as to save its passengers from injury."

When these two instructions are read together, they come fairly, we think, within the rule enunciated in the Kimic Case; but however that may be, we are unable to perceive that this appellant was prejudicially injured by the act of the court in giving it, since their special application in this case was not to the defendant which is the appellant here, but to its codefendant, the California Street Cable Railroad Company, and to its liability to the plaintiff. Whether its motorman in negotiating the intersection was or was not entitled to rely upon the presumption that his employer's rights of way would be respected would not excuse the employees of the appellant herein for being themselves negligent in either disregarding such right of way, or exceeding the speed limit, or failing to properly control their car; in other words, would not justify or excuse whatever negligence this appellant might have been guilty of in the premises. We do not see, therefore, sufficient merit in this contention to justify a reversal of the case.

[5] The appellant's next contention is that the trial court committed error in giving an instruction to the jury to the effect that if the gripman of the Hyde street car was in the moment preceding the collision suddenly confronted by imminent danger demanding alternative courses of conduct, and made such a choice as a person of ordinary prudence placed in such a position might make, the fact, if it be, that if he had chosen the other hazard he would have escaped injury is of no importance. We do not think that the authorities cited by the appellant sustain its assumption that this instruction was error; but, on the other hand, we are satisfied that the instruction correctly states the law as sustained by the following cases: Waniorek v. United Railroads, 17 Cal. App. 125, 118 Pac. 947; Green v. Pac. Lumber Co., 130 Cal. 435, 62 Pac. 747; Robinson v. Western Pac. Ry. Co., 48 Cal. 421; Kramm v. Stockton Ry. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

We are, however, also of the opinion that any error which the trial court may have made in giving this instruction would not be a prejudicial error in so far as this appellant is concerned, since, like the other instructions above adverted to, it was given a special application to the appellant's codefendant and had no special application to the liability of the appellant herein.

[6] The appellant's next contention is that the court erred in instructing the jury that—

> "A slippery track is no excuse if the railroad company was guilty of negligence in failing to take proper steps to provide against its consequences."

No authorities are cited in support of this contention, and the only point urged against it is that it is argumentative and assumes that the appellant was negligent. We do not find it subject to either of these defects. It seems to express a truism applicable to the facts of the case at bar.

With respect to the instruction of the trial court as to the application of the doctrine of res ipsa loquitur we have examined the entire instructions of the court upon this subject, and we have no hesitation in reaching the conclusion that the trial court carefully differentiated between the differing situations of the appellant and of its codefendant, the carrier of the plaintiff as a passenger, making application of the rule to the latter defendant only. Whatever might have been its criticism of the correctness of this portion of the court's instruction had judgment gone against it, the appellant herein is in no position to urge that the court was in error in its statement of the law in this respect.

[7] The appellant finally urges that the trial court was in error in several respects in its refusal to give certain instructions requested by it. We have examined these refused instructions in the light of the instructions which the trial court gave to the jury, and we are satisfied that the subject-matter of these refused instructions is fully and sufficiently covered by those which were given, and hence that the appellant suffered no prejudicial injury by the court's refusal to give its instructions in the form in which they were asked.

Finding no prejudicial error in this record which would justify a reversal of the case, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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55 Cal. App. 173

HUFFMAN v. COULTER et al. (Civ. 4042.)

(District Court of Appeal, First District, Division 2, California. Nov. 14, 1921. Hearing Denied by Supreme Court Jan. 11, 1922.)

1. Animals ⚿49—Common-law rule as to preventing trespass in force in San Bernardino county.

Under St. 1915, p. 636, St. 1850, p. 131, and St. 1851, p. 299, the common-law rule requiring the owner of cattle to keep his animals from his neighbors' lands, fenced or unfenced, is in operation in San Bernardino county.

2. Injunction ⚿118(1) — Complaint held to state proper case for injunctive relief against adjoining owner permitting cattle to run at large.

A complaint alleging that defendant adjoining owner had permitted his cattle to trespass on plaintiff's land and threatened to continue to allow and cause said cattle to enter upon plaintiff's premises and to destroy his crops *held* to state a proper case for injunctive relief.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Earl Huffman against Fred F. Coulter and others. From an order granting a temporary injunction, defendants appeal. Affirmed.

Swing & Wilson, of San Bernardino, for appellants.

Glenn M. Ely, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendants from an order granting a temporary injunction preventing defendants from allowing cattle owned or controlled by them to trespass upon the adjoining land of the plaintiff.

Plaintiff and defendant Coulter are the owners of adjoining unfenced lands. The other defendants are employees of the defendant Coulter and in charge of his cattle.

[1] Two questions are presented: The first is whether or not the common-law rule requiring the owner of cattle to keep his animals from his neighbors' lands, fenced or unfenced, is in operation in San Bernardino county, Cal. The other relates to the sufficiency of the complaint to state a proper case for injunctive relief.

The first question is carefully and fully answered by the last case of Montezuma Improvement Co. v. Simmerly, 181 Cal. 722, 189 Pac. 100, wherein it is held that the Estray Act of 1915 (Stats. 1915, p. 636), by the very force of its terms, repeals all "fence laws" in the counties of this state except in the six counties specified therein, of which San Bernardino is not one; that it is settled law in California that the common-law rule applies in those counties of the state which have been excepted from the operation of the so-called "Fence Law" of 1850 (Stats. of 1850, p. 131), the "Estray Act" of 1851 (Stats. 1851, p. 299), and the successors of those statutes.

A detailed discussion of this question by us therefore would be an idle proceeding; the matter being authoritatively settled in this state by a very recent decision of our Supreme Court.

[2] We are also of the opinion that the complaint states a proper case for an injunction. The complaint alleges that the defendants are the owners or custodians of cattle; that at divers and various times said cattle have trespassed upon the land of plaintiff and have eaten up, injured, and destroyed the grain, hay, and verdure growing thereon; that plaintiff has repeatedly driven the cattle of defendants from his said property, and has repeatedly requested defendants to properly care for said cattle and keep the same from trespassing upon plaintiff's land, but all to no avail; that defendants, despite the fact that plaintiff has repeatedly driven said cattle from his land, continue to allow and cause and threaten to continue to allow and cause said cattle to enter upon said premises of plaintiff and tramp, tear up, and injure the soil, and destroy the grain and feed grown and growing thereon, and injure the same for the growing of grasses, grain, and other crops in the future; that the repeated trespasses of the cattle of said defendants, if permitted to continue, will compel plaintiff to bring numerous suits against the defendants and each of them for damages, and will compel the plaintiff to take up said cattle, repeatedly, under the Estray Act, which remedies are wholly inadequate, and will not cause said defendants to desist from said acts; that said acts of defendants, if permitted to continue, will cause plaintiff irreparable loss in that said land will thereby be made unfit for farming purposes, and said acts of defendants will prevent plaintiff from putting in a crop for this year unless defendants are immediately restrained and enjoined from committing and permitting said trespasses, on account of the short planting season in the vicinity of said land which is rapidly coming to a close, and that plaintiff, being so prevented from planting his said land, will be forced to move to another locality wherein he can procure food for his stock and be able to make his living, for all of which wrongs plaintiff has no plain, speedy, and adequate remedy at law.

It appears from the foregoing that the complaint in the instant case contained substantially the allegations of the complaint in the case of Montezuma Improvement Co. v. Simmerly, supra, which complaint was held sufficient to warrant the granting of injunctive relief.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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55 Cal. App. 192

PEOPLE v. CHAPMAN. (Cr. 805.)

(District Court of Appeal, Second District, Division 2, California. Nov. 15, 1921.)

1. Criminal law 🔑1023(9) — No appealable judgment without sentence.

Where defendant has never been sentenced on charges contained in certain counts on which he was found guilty, there is, as to such counts, no judgment from which an appeal can be taken.

2. Criminal law 🔑1134(4) — Denial of new trial not reviewed when time for sentence has passed.

Whether an order denying a motion for a new trial under Pen. Code, § 1181, is erroneous as to certain counts need not be decided where the time for pronouncing judgment has long since passed, so that defendant is entitled to a new trial as of right under section 1202.

3. Criminal law 🔑108(1) — False pretenses consummated where money or property obtained.

The crime of obtaining money or property by false pretenses is consummated at the place where the money or property is obtained from the defrauded person, which determines the venue, regardless of where the false pretenses may have been made.

4. Criminal law 🔑97(1) — False pretenses punishable under statute though money obtained in another state.

Under Pen. Code, § 532, defining the crime of obtaining money or property by false pretenses, and section 27, declaring that all persons who commit in whole or in part any crime within the state are liable to punishment, one making within the state false or fraudulent representations whereby money or property is obtained without the state, by means of drafts drawn on the defrauded party's agent, is punishable as for obtaining money by false pretenses, and it is immaterial whether the obtaining of money by false pretenses is a crime in the state where the money is obtained.

5. Criminal law 🔑97(1)—Statute as to commission of "any crime" partly within the state construed.

Under Pen. Code, § 27, providing that all persons who commit in whole or in part "any crime," within the state are liable to punishment, the words "any crime" mean any offense which, if committed wholly within the state of California, would constitute a crime against the laws of such state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any.]

6. Witnesses 🔑300 — Defendant cannot be compelled to produce incriminating evidence.

The court cannot compel a defendant in a criminal case to produce any incriminating evidence.

7. Criminal law 🔑400(1) — Secondary evidence of contents of incriminating document in defendant's possession admissible.

Ordinarily the prosecution may give secondary evidence of the contents of an incriminating document whenever it appears prima facie that it is in possession of accused.

8. Criminal law 🔑1186(4) — Asking defendant's counsel if he had document held not reversible error.

Even though the prosecution might not have made a prima facie showing that writings were in defendant's possession, and though for that reason it was error to seek to prove defendant's possession thereof by asking his counsel to produce them, the district attorney's question to defendant's counsel as to whether he had such writings was not reversible error under Const. art. 6, § 4½, and Pen. Code, § 1258, relating to technical error, where the nature of the writings are not shown, and there is nothing to show that, if produced, they would have worked any damage to defendant.

9. Criminal law 🔑1163(1)—Incumbent on defendant to show prejudice from error.

Under Const. art. 6, § 4½, and Pen. Code, § 1258, injury is no longer presumed from error, and it is incumbent upon appellant to show affirmatively that the error upon which he relies was prejudicial, even though the error consisted of an invasion of defendant's constitutional rights.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

R. E. Chapman was convicted of obtaining money by false pretenses, and from the judgment and an order denying a new trial, he appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. By an indictment containing twelve counts defendant in each of six counts was charged with the crime of obtaining money by false pretenses, as defined in section 532 of the Penal Code, and in each of the six remaining counts he was charged with the crime of embezzlement. He was acquitted of the embezzlement charges and convicted on each of the counts charging him with the crime of obtaining money by false pretenses; the jury returning a separate verdict on each count. On four of the verdicts finding defendant guilty of obtaining money by false pretenses, namely, on the verdicts finding him guilty as charged in the first, second, fifth, and sixth counts of the indictment, the court passed sentence; a separate judgment being pronounced on each of said four verdicts. Before any judgment was pronounced, an application for a new trial was made by defendant on certain of the grounds mentioned in section 1181 of the Penal Code. The motion for a new trial was denied, and thereafter the court pronounced judgment upon each of the four verdicts whereby defendant had been found guilty as charged in said first, second, fifth, and sixth counts.

In two of the counts whereby he was charged with obtaining money by false pretenses—two counts upon which no judgment has ever been pronounced, namely, counts 9 and 10—defendant was charged with having defrauded one F. J. McCann of certain sums of money by certain false and fraudulent representations. As to these two counts there was a variance between the allegations and the proof, in that the evidence showed that the person defrauded was not F. J. McCann, but the F. J. McCann Brokerage Company, a corporation. Though a verdict of guilty was returned on each of these two last-mentioned counts, the court, for reasons which developed after the motion for a new trial had been denied, but which we do not find it necessary to recapitulate, declined to pass sentence upon the verdicts of guilty that were rendered thereon. The time for pronouncing judgment on the verdicts finding defendant guilty of the charges contained in counts 9 and 10 has long since passed, and the trial court should therefore, and doubtless will, grant a new trial of the issues presented thereby whenever defendant shall see fit to make application therefor under section 1202 of the Penal Code, whereby it is provided that, if judgment is not pronounced within the time fixed therefor by the court, or the time to which it is continued under the provisions of section 1191, "then the defendant shall be entitled to new trial."

[1, 2] Defendant has appealed from each of the four judgments pronounced on the verdicts finding him guilty as charged in the first, second, fifth, and sixth counts, and has likewise appealed from the order denying the motion for a new trial which was made by him under section 1181 of the Penal Code before sentence was passed. Since defendant has never been sentenced under the charges contained in the ninth and tenth counts, there is as to those two counts, no judgment from which an appeal can be taken. Nor is it necessary to consider whether the order denying defendant's motion for a new trial on the issues presented by counts 9 and 10 should be reversed by reason of the variance between the allegations and the proof, because, as we have stated, as to these two counts, the defendant, whenever he shall conclude to make application under section 1202, clearly is entitled to a new trial upon the ground that no judgment was passed within the time allowed by law. Indeed, we do not understand that, as to these counts 9 and 10, defendant's counsel is seeking a reversal of the order denying his motion for a new trial on the ground of any variance between the allegata and probata.

Defendant's real contentions on this appeal are: (1) That the crime charged in each of the four counts upon which he was found guilty and sentenced—that is, the crime charged in counts 1, 2, 5 and 6, respectively—was committed outside the state of California, and that therefore the courts of this state have no jurisdiction thereof; and (2) that a question which was propounded by the district attorney to defendant's counsel in the presence of the jury, asking counsel if he had in his possession certain writings, constituted prejudicial misconduct, necessitating a reversal of the judgments pronounced on the four counts upon which defendant was sentenced. We think that each of these contentions lacks merit.

In each of the four counts upon which he was found guilty and sentenced, defendant is charged with having obtained the moneys in the county of Los Angeles. But the evidence discloses that the moneys were obtained in a manner substantially as follows: Defendant drew certain drafts upon the Chaddock Carney Sales Company, of Boston, Mass., as the drawee. That company, it seems, was acting for and as the agent of the persons alleged to have been defrauded. The drafts were delivered by defendant, at Los Angeles, to the Hellman Commercial Trust & Savings Bank for collection. That bank, a corporation engaged in the banking business at Los Angeles, forwarded the drafts to its banking correspondent at Boston. In the regular course of business the drafts were presented to the drawee, the Chaddock Carney Sales Company, at Boston, and were there paid by the drawee by means of checks drawn by it upon its local bank at Boston. The drawee's local bank then remitted the money to the Boston correspondent of the Los Angeles bank, the Hellman Commercial Trust & Savings Bank, and in due time the latter institution was credited with the amounts by its Boston correspondent. In this way defendant was enabled to and did receive the moneys at Los Angeles from the Hellman Trust & Savings Bank, or was credited therewith by that bank. Upon these facts it is contended that the moneys were paid by the defrauded persons at Boston, and hence that the moneys were obtained, not in California, but in Massachusetts, and that therefore, if any crime was committed by defendant, it had its consummation outside of the territorial jurisdiction of this state.

[3, 4] Without doubt, the crime of obtaining money or property by false pretenses is consummated at the place where the money or property is obtained from the defrauded person, regardless of where the false pretenses may have been made, and therefore the place where the money or property is obtained is the place where, ordinarily, the venue should be laid. People v. Cummings, 123 Cal. 269, 55 Pac. 898. In State v. Shaeffer, 89 Mo. 271, 1 S. W. 293, the defendant, who was prosecuted in the Missouri court for obtaining money by false pretenses, had drawn a draft in that state on the bank account of the drawee in New York; the money being collected through the agency of two other banks in New York and Missouri, respectively. It was held that the money was obtained in New York; that therefore the crime was consummated in that state, and not in Missouri, and that, as a consequence, the Missouri court had no jurisdiction. The appellant here, claiming that the facts of this case are, in all substantial respects, analogous to those presented to and passed upon by the Missouri court in the Shaeffer Case, confidently asks for a reversal at our hands. It is not necessary to enter upon any analysis of the evidence contained in the record before us for the purpose of determining whether the moneys were obtained by this defendant in Boston or in Los Angeles; for in this state we have a Code provision (subdivision 1, § 27, Pen. Code) under which, generally speaking, a defendant may be convicted even though the final act necessary to consummate and complete his crime may have taken place outside of this state.

Section 27 of the Penal Code, so far as applicable, reads:

> "The following persons are liable to punishment under the laws of this state: 1. All persons who commit, in whole or in part, any crime within this state."

It is not contended that the Legislature may not declare it to be an offense against the sovereignty of California to make false and fraudulent representations in this state whereby money is obtained elsewhere; and the validity of subdivision 1 of section 27 is not challenged. The sole question, therefore, which is one of interpretation of that Code provision, is this: Is defendant, under the facts charged and proved, guilty of the crime denounced by section 532 of the Penal Code, and is he punishable under subdivision 1 of section 27, notwithstanding the money may have been obtained in Boston?

Without doubt, our Legislature has no extraterritorial jurisdiction; and when it forbids, in unqualified terms, the doing of an act, it must always be understood that the thing forbidden is something done in this state. But if, as we hold, the Legislature, in subdivision 1 of section 27, has declared, in effect, that all persons who make in this state any false or fraudulent representations whereby money or property is obtained without the state are punishable just as though all the acts had taken place in this state, then defendant was properly convicted, notwithstanding the fact that a very substantial part of the crime denounced by section 532 may have taken place in Massachusetts.

[5] The words "any crime," as used in subdivision 1 of section 27, mean any offense which, if committed wholly within the state of California, would constitute a crime against the laws of this state. The provision was designed to apply to the commission within the jurisdiction of this state of any essential part of a crime as defined by the laws of this state, even though, by the commission elsewhere of other parts of the crime, the final consummation of the offense may have taken place without the state. New York has a similar statutory provision. After some wavering, the highest court of that state has finally adopted an interpretation of the New York statute that accords with what we think is the proper construction to be placed upon the corresponding statutory provision in this state—subdivision 1 of section 27 of our Penal Code. The New York Court of Appeals now holds, as do we, that under a statute such as this, one who makes false or fraudulent representations in a state where such statutory provision obtains is guilty of the crime of obtaining money by false pretenses even though the money or property be obtained in another state whose laws do not make it an offense thus to defraud a person of money or property by false or fraudulent pretenses. It was so decided by the Appellate Division of the New York Supreme Court in the case of People v. Arnstein, 157 App. Div. 766, 142 N. Y. Supp. 842. In reversing the decision of the Appellate Division in that case, one of the justices of the New York Court of Appeals held that, in adopting the Code section of that state which corresponds with our section 27, it was not the intention of the Legislature to enact any substantive law so as to make it an offense to commit in the state of New York a part only of a transaction denounced by the New York law as a crime, even though the remaining part of the whole transaction were committed in another state. The remaining six justices held that the statute was intended to give the state of New York jurisdiction of an offense commenced within that state, but consummated beyond its borders. Of these six, three held that it was necessary that the transaction should also constitute a crime under the laws of the foreign state; the remaining three holding that it was not necessary that the transaction be made a crime by the laws of the state where the offense was consummated. People v. Arnstein, 211 N. Y. 585, 105 N. E. 814. The question again came before the Court of Appeals in People v. Zayas, 217 N. Y. 78, 111 N. E. 465, Ann. Cas. 1917E, 309, where it was held that, under the Code section of that state, which corresponds with section 27 of our Penal Code, a person who commits within the state of New York any crime, in whole or in part, is liable to punishment within that state; and it is not necessary that the transaction shall constitute a crime under the law of the foreign state where part of the acts are committed; it being sufficient that the transaction would be a crime under the laws of New York if it were committed entirely within that state. In that case the defendants were charged with larceny by obtaining property under false pretenses. The indictment alleged that the false pretenses were made in the state of New York, and that by reason thereof the complaining witness delivered money or property to the defendants in the state of Pennsylvania. The Court of Appeals held that the defendants were punishable just as they would be if each and all of the acts necessary to complete the crime had occurred in New York, and that therefore the indictment was good, irrespective of the law of Pennsylvania, where the money or property was obtained. We are in entire accord with the reasoning of the New York Court of Appeals in the Zayas Case, as well as that which was pursued by Chief Justice Willard Bartlett in his dissenting opinion in the Arnstein Case. Not only does the interpretation there given to the New York Code provision accord with the construction which our Supreme Court placed upon the corresponding Code section of this state in People v. Botkin, 132 Cal. 231, 64 Pac. 286, 84 Am. St. Rep. 39, but, as was said by the Appellate Division of the New York Supreme Court in the Arnstein Case, 157 App. Div. 766, 142 N. Y. Supp. 846, to hold that the test of jurisdiction is that the entire transaction is likewise made a crime by the laws of the state where the offense is finally consummated "would be to impute to the Legislature an attempt to punish a violation of the statutory law of the foreign jurisdiction, which it could not constitutionally do."

For the foregoing reasons we are of the

opinion that the defendant is guilty of the crime charged against him in the four counts upon which he was sentenced, notwithstanding the evidence may show that the money was obtained in the state of Massachusetts. His acts constituted the crime of obtaining money by false pretenses, as defined by section 532 of the Penal Code of this state. The false pretenses alone constituted an essential ingredient of that crime. They were made in this state. Therefore, under subdivision 1 of section 27, defendant is punishable under the laws of this state for the crime with which he was charged—that of obtaining money by false pretenses.

One of the witnesses for the prosecution, during her examination by the district attorney, testified that she had received two written contracts at Butte, Mont.; that, after reading and signing them, she had given them to a broker to be mailed to defendant in California for his signature; and that they had not been returned to her. Nowhere in the briefs is our attention called to any evidence tending to disclose the nature of the terms contained in either of these two contracts. So far as we are aware, neither writing may have contained anything that, by any possibility, could prove harmful to defendant or to his cause. After the witness had thus testified that she had given the contracts to a broker to be mailed to defendant, and that they had not been returned to her, and after defendant's counsel had successfully objected to the introduction of any secondary evidence of the contents of the writings upon the ground that no proper foundation had been laid, the district attorney, addressing himself to defendant's counsel, said: "Mr. Gilbert, have you those contracts of Mr. Chapman?" Whereupon defendant's counsel said: "I assign that question as error." The district attorney immediately withdrew the question, but defendant's counsel insisted that he would not permit it to be withdrawn, saying:

> "I do not propose for it to be withdrawn. I assign the question of counsel propounded to me as attorney for the defendant in the presence of the jury, 'Mr. Gilbert, have you those contracts of Mr. Chapman in your possession?' as error and uncalled for."

Whereupon the court rebuked the district attorney and admonished the jury as follows:

> "Now, just a moment. The district attorney has no right and should know that it is an invasion of the constitutional right of the defendant to be called upon to produce evidence. You should not have asked that question; you should not have made that demand; and I do not want anything of that kind to occur again in the case. The jury are instructed to disregard that statement of the district attorney and to absolutely remove it from their minds in the consideration of this case. The defendant is not called upon to produce any evidence, and he cannot be required to produce any evidence, and the people have no right to demand that he produce evidence; and any inference that might have crept into your minds by reason of the statement of the district attorney, which was highly improper, is to be absolutely removed from your minds in the consideration of this case. Proceed."

[6-9] Appellant now assigns as reversible error the conduct of the district attorney in requesting defendant's counsel to produce the writings. It is axiomatic that the court cannot compel the defendant in a criminal case to produce any incriminating writing. It is for this reason that, ordinarily, the prosecution may give secondary evidence of the contents of an incriminating document whenever it appears prima facie that it is in the possession of the accused. 16 C. J. pp. 616, 617. It was doubtless in view of this rule of law that the district attorney made the demand of defendant's counsel to produce the contracts. It is probable that the district attorney regarded the evidence of the witness then on the stand as being sufficient to make out a prima facie showing that the contracts were in defendant's possession; and, defendant's counsel still objecting to the introduction of secondary evidence, the district attorney was doubtless prompted by the objection to make the request. If, in fact, the prosecution had shown, prima facie, that the contracts were in defendant's possession, then unquestionably appellant would not now be in a position to claim prejudice after having objected to the introduction of secondary evidence. People v. Rial, 23 Cal. App. 714, 720, 139 Pac. 661. But even though the prosecution may not have made a prima facie showing that the writings were in defendant's possession, and even conceding that, for that reason, it was error to seek to prove defendant's possession of the writings by asking his counsel to produce them, still there is no showing of prejudice. For, aside from the court's stern rebuke of the district attorney and its vigorous admonition to the jury to disregard the improper demand, there is nothing to show that the writings, if produced, would have worked any damage to defendant. Appellant therefore has failed to make any affirmative showing of reversible error. The rule obtaining in some jurisdictions that prejudice is presumed from any error of law has been abrogated in this state. Section 4½, art. 6, Const.; Pen. Code, § 1258; People v. O'Bryan, 165 Cal. 65, 130 Pac. 1042; People v. Stephens, 29 Cal. App. 621, 157 Pac. 570, 572. It is incumbent upon the appellant to show affirmatively that the error upon which he relies was prejudicial. People v. Lapara, 181 Cal. 72, 183 Pac. 545. This follows from the consideration that injury no longer is presumed from error. And the rule that, to justify the reversal of a judgment of conviction, it must affirmatively appear to the satisfaction of the reviewing court that the defendant may well have been substantially injured by the error complained of, applies to an erroneous invasion of even a constitutional right. People v. O'Bryan, supra, 165 Cal. 66, 130 Pac. 1042.

The judgments and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

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55 Cal. App. 55

CORDES v. HAMMOND et al. (Civ. 3949.)

(District Court of Appeal, First District, Division 1, California. Nov. 3, 1921.)

1. Corporations ⟹268(1)—In suit on unpaid subscriptions for stock, averments as to execution not sufficient, but made so by amendment.

In an action by an assignee for creditors of a defunct corporation on unpaid subscriptions for stock wherein it is necessary to show that, prior to beginning action, plaintiff had exhausted his legal remedies, which is usually done by alleging a return of execution unsatisfied, alleging issuance of execution on a certain day, and its return on the following day, was not sufficient, not showing a compliance with Code Civ. Proc. § 683, which directs that no return may be made in less than 10 nor more than 60 days after receipt of the execution by the sheriff; but the averments were made sufficient by an amendment alleging facts showing that the corporation was insolvent, and that an execution could not have been satisfied, a return nulla bona when the complaint shows the corporation wholly insolvent not being prerequisite to suit.

2. Pleading ⟹425—Demurrer and answer to amended complaint held to cure delay in filing.

Where defendants answered an amended complaint before it was filed, and after it was filed demurred and answered thereto, they waived the right to object, because it was not filed until three months after obtaining permission to file it.

3. Stipulations ⟹14(2)—Defect in service of summons held waived by stipulation of parties that summons was duly and personally served.

Where a corporation forfeited its charter for nonpayment of license tax, and was later restored to its former corporate status, and summons was served upon the person who was secretary before the forfeiture of the charter, the neglect, if any, to serve the summons upon an officer of the corporation upon whom service of summons might be made was waived by stipulation entered into by the parties to the action to the effect that the summons was duly and personally served on the corporation, giving the particulars.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by W. F. Cordes against L. C. Hammond and others. From a judgment for plaintiff, defendant Hammond and certain other defendants appeal. Reversed as to defendants Chamberlin and Hammond, and affirmed as to others.

William S. Downing, O. C. Wilson, H. L. McAllister, and Alfred J. Harwood, all of San Francisco, for appellants.

James H. Boyer and Joseph Kirk, both of San Francisco, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff, as assignee of numerous creditors of the Combined Amusements Company, a defunct corporation, on a default judgment taken against that concern, to recover from the defendants various sums on account of unpaid subscriptions to the capital stock of said corporation. Plaintiff recovered judgment against the defendants, certain of whom prosecute this appeal, namely, L. C. Hammond, W. C. Chamberlin, Adolph Lehman, R. G. Matzene, Mark H. Manning, and Wm. L. McGuire.

[1] In actions of this character it is necessary for the plaintiff to show that prior to the beginning of the action he had exhausted his legal remedies in an effort to collect the judgment; which is usually done by alleging the return of an execution unsatisfied. Here the plaintiff alleged the issuance of the execution upon a certain day and its return unsatisfied on the day following. This failed to comply with this provision of section 683 of the Code of Civil Procedure, which directs that no return on an execution may be made in less than 10 days nor more than 60 days after its receipt by the sheriff. At the trial the plaintiff amended paragraph V of his complaint by bringing it within the modification of the rule followed in Barnes v. Babcock, 95 Cal. 581, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133, and as announced in Merchants' M. Adj. Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091 (see, also, Sherman v. S. K. Oil Co., 197 Pac. 799), where it is held that, if the plaintiff does not aver a valid return of an unsatisfied execution, but does allege facts showing that the corporation defendant was insolvent, and that the execution could not have been satisfied out of its property, the averments are sufficient. The return of an execution nulla bona, says the court, is not a prerequisite for maintaining an action of this character when the complaint shows that the corporation is wholly insolvent, and has no assets upon which to levy an execution.

[2] That the complaint as thus amended states facts sufficient is not denied; but it appears that, while plaintiff obtained permission to file and serve such amended complaint, and that he served the same, he did not file it until three months later, when the

trial of the case was resumed. For this reason the appellants claim that the case rests upon the originally fatally defective complaint, and accordingly that the judgment must be reversed. Whatever merit there may have been in this point was waived by the appellants, for they not only answered the complaint as thus amended, but later, when it was in fact filed, they again demurred and answered thereto, and the parties went to trial upon the issues as thus made up.

Appellants Chamberlin, Hammond, and Matzene contend in support of their respective appeals that the evidence fails to show that they were subscribers to stock in the Combined Amusements Company. The answers of these particular defendants do not, as asserted by the respondent, admit, by failure to deny, or otherwise, that they were subscribers for stock in the corporation at the time and in the manner alleged in the complaint. On the contrary, their answers put in issue the allegations of the complaint to that effect. As to Chamberlin and Hammond, no subscription contracts entered into by them were introduced in evidence, nor does the record show that either of them entered into such an agreement. Their contention must therefore be sustained. But as to the appellant Matzene, while it is true, as just stated, that his final answer, as amended, when fairly read, does put in issue the question of whether or not he was a subscriber for stock in the corporation, and while it is also true that the subscription contract was only marked for identification, and was not in fact admitted in evidence, nevertheless there is sufficient evidence in the record admitted without objection to show that he was such a subscriber, and that he owed the amount alleged on his subscription.

[3] Appellants also contend that the judgment upon which this action is based is void, for the reason that service of summons was obtained on a person who was not at the time an officer of the corporation. From the record it appears that the Combined Amusements Company forfeited its charter March, 1916, for nonpayment of license tax; that prior to the commencement of that action, however, it had been through the method permitted by statute restored to its former corporate status. It also appears that the person on whom summons was served was secretary of the corporation at the time it became defunct. Assuming that the record shows that he had not been re-elected or reappointed as secretary upon the resuscitation of the corporation, and that for this reason, as asserted by the appellants, he was not an officer of the corporation upon whom service of summons might be made, still there is no merit in the point, for the reason that a stipulation was entered into by the parties to this action to the effect that the summons was duly and personally served on the Combined Amusements Company, giving the particulars.

For the reasons stated, the judgment is reversed as to appellants Chamberlin and Hammond, and affirmed as to the other appellants.

We concur: WASTE, P. J.; RICHARDS, J.

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55 Cal. App. 117

McKEVITT et al. v. CITY OF SACRAMENTO et al. (Civ. 3974.)

(District Court of Appeal, First District, Division 1, California. Nov. 8, 1921. Hearing Denied by Supreme Court Jan. 5, 1922.)

1. Municipal corporations 🔑108—Referendum provisions in charter held applicable only to exercise of legislative power.

The provisions of the Sacramento city charter relating to referendum are applicable only to ordinances and resolutions which constitute an exercise of legislative power, and cannot be invoked to annul or delay executive conduct.

2. Municipal corporations 🔑108—What constitutes exercise of legislative and administrative powers within referendum law.

Acts of commission of a city which are to be deemed acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence, while acts constituting a declaration of public purpose and making provision for ways and means of its accomplishment are generally classified as calling for the exercise of legislative power.

3. Municipal corporations 🔑108—Acceptance of offer to sell land for park held to involve only administrative functions not subject to annulment by referendum.

Act of commission of the city of Sacramento in accepting an offer to sell land for a public park under a trust provision in a will leaving money to the city to be expended for the purchase of land for a public park involved only administrative functions, and the resolution of acceptance could not be annulled by referendum.

4. Municipal corporations 🔑48(2)—City commission held successor of mayor and board of trustees charged with duty of administration of park fund.

The city commission of the city of Sacramento is the successor of the mayor and board of trustees under the old form of city government, and is charged with the duty of administration of a park fund left by will empowering the mayor and board of trustees of the city to expend the money for certain purposes.

5. Charities 🔑36—Park fund trust held violated by city.

A will, leaving a fund to the mayor and board of trustees of the city of Sacramento "to expend so much of said sum as may be necessary for the purchase of ground suitable for a public park, and to expend the balance of said fund in properly fixing up said grounds as a public park," was violated by the city in attempting to use it to reimburse the city for money already spent in the purchase and improvement of a park.

6. Charities 🔑20(5)—City may be trustee of park fund, and becomes amenable to same regulations as other trustees.

The city of Sacramento may accept and execute a trust created by a will leaving a fund to be used in the purchase and equipment of a public park, and when the trust is accepted the city assumes the same obligations and becomes amenable to the same regulations as apply to other trustees of such trusts, among which is the obligation to administer the fund in accordance with the expressed wish of the testator.

7. Specific performance 🔑29(2)—Description of land held sufficient.

A contract for purchase of land, "immediately north of the S. road and extends from F. road, or the extension of Twenty-First Street, on the east, to Tenth street on the west, a portion of it lying immediately east of the property now owned by the city, upon which the pumping plant stands, and comprising 238.26 acres, more or less, in the entire offering," *held* to sufficiently identify the land to entitle the seller to specific performance.

8. Specific performance 🔑29(2)—Description held sufficient to warrant specific performance of contract of sale of land.

Where property in a contract of sale may be readily identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, the description is sufficient to warrant specific performance under Civ. Code, § 1624, subd. 5, and section 3390, subd. 6.

9. Evidence 🔑460(4)—Extrinsic evidence admissible to apply description of land in contract of sale.

In an action for specific performance of contract to purchase land, extrinsic evidence is admissible to apply the description to that part of the surface of the earth which is the subject-matter of the agreement, but not for the purpose of adding to or varying the description contained in the contract.

10. Appeal and error 🔑842(1)—Sufficiency of evidence to identify land question of fact for trial court.

In action for specific performance of contract to sell land, whether or not extrinsic evidence, introduced to apply the description in the contract to that part of the surface of the earth which is the subject- matter of the agreement, is sufficient to show that the land can be identified with reasonable certainty, is a question of fact for the trial court.

11. Specific performance 🔑29(2)—Omission of state and county in description of land held immaterial.

The description in a contract is not insufficient in that no particular state or county is named, where the communication offering the land to the city is dated "Sacramento, California, December 15, 1917," and addressed to "The Honorable City Commissioners, Sacramento, California," and tenders to them, "as the legal representatives of the city of Sacramento," the land in question, to be devoted to park purposes, together with references in the description to roads, streets, and property owned by the city.

12. Frauds, statute of 🔑103(3, 4)—City records held a sufficient memorandum of contract to purchase land.

Where the city of Sacramento through its commission, by resolution duly adopted and spread on the minutes, signed by the president of the commission and attested by the city clerk, accepted an offer to purchase land, and a counter proposition, which provided for payment with United States Victory Bonds, instead of cash, was accepted by the sellers in a writing filed with the commission, there was a sufficient memorandum signed by the city, the party to be charged.

13. Reformation of instruments 🔑6—Contract with city may be reformed.

Contracts by or with a city may be reformed for mutual mistake, the same as contracts between individuals; and, where there was a mutual mistake in description of land in contract by city to purchase land, it was within the province of the court to revise the contract, and make it express what it was intended to mean, under Civ. Code, §§ 3399–3402.

14. Specific performance 🔑127(1)—Act which would prevent city from performance of agreement may be enjoined.

Where money was left to city in trust to purchase land for a park and equip it, and the proper officers entered into a contract to purchase certain land, and the sellers brought action for specific performance, it was proper for the court, when it determined that a contract existed which was capable of being specifically performed, to prevent the breach of the agreement by injunction, the city intending to divert the fund.

15. Specific performance 🔑92(2)—Enough that vendor is owner in fee at time of performance or decree requiring it.

In specific performance, where time is not of the essence of a contract to purchase land, and there is a positive agreement to buy, and not a mere option depending upon the sufficiency of showing of title, it is enough if the vendor is in fact the owner in fee, unincumbered, at the time of the performance, or at the time of the final decree.

16. Specific performance 🔑92(2)—Vendor given reasonable time to perfect title.

It is within the jurisdiction of the court to allow the vendor in a suit for specific performance a reasonable time within which to perfect his title, where time is not of the essence of the contract, and to do so will not work an injustice on the vendee.

17. Equity 🔑39(1)—Equity will do complete justice by deciding whole case.

When a court of equity has once obtained jurisdiction of an action for specific performance, it will do complete justice by deciding the whole case and determining the whole controversy between the parties.

Appeal from Superior Court, Sacramento County; Wm. M. Conley, Judge.

Action by F. B. McKevitt and another against the City of Sacramento and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. W. S. Butler, of Sacramento, B. F. Van Dyke, of Granite, Okl., and Ben P. Tabor and R. L. Shinn, both of Sacramento, for appellants.

Devlin & Devlin, of Sacramento, for respondents.

WASTE, P. J. The plaintiffs instituted this action against the city of Sacramento and the city commissioners of that municipality to reform and to enforce a purported contract for the purchase by the city of a tract of land for park purposes. They also sought an injunction to restrain the defendants from expending the proceeds derived from a certain bequest in any other manner than in accordance with the terms of the contract alleged to exist. The trial court entered an interlocutory decree in favor of the plaintiffs as prayed for, and defendants have appealed.

The undisputed facts in the case, set out in the complaint and embodied in the findings, disclose that William Land, by his last will and testament, bequeathed the sum of $250,000 to the city of Sacramento, in trust, to purchase a public park within a suitable distance of said city to be known and called "William Land Park," title to which should be vested in the city. The will authorized the mayor and board of trustees, which was the existing form of city government of the city of Sacramento at that time, to expend so much of the bequest as might be necessary for the purchase of ground suitable for a public park, and to expend the balance of the fund in properly equipping the same for park purposes. In the process of administration of the estate of the decedent, the bequest was reduced to $211,250, which amount on final distribution was paid to, and accepted by, the city of Sacramento for the uses for which it was bequeathed, and the city entered upon the administration of the trust. Thereafter, and in response to a published invitation by the city for proposals for a site for the establishment of the William Land Park, the plaintiffs in this action made a written offer to convey to the city certain lands, the purchase price of which was the sum of $146,836.45. These lands did not belong to plaintiffs, but comprised several contiguous parcels of land belonging to various individuals from whom the plaintiffs had obtained options to purchase.

On January 8, 1918, the city commission, which is the present form of government of the city of Sacramento, and successor to the mayor and board of trustees, as provided in the old charter of the city, passed resolution No. 1266, accepting the offer of plaintiffs, and proposing to pay for the lands with United States Victory Bonds, in which the Land bequest had, in the meantime, been invested. A copy of the resolution was transmitted to plaintiffs, who accepted the offer of the commission by filing with the city clerk a writing to that effect. Thereupon the plaintiffs exercised the options held by them on the lands offered to the city for the park in order to be in position to transfer the property in accordance with their contract. Subsequently a purported petition in referendum was filed with the city clerk, requesting that the resolution of acceptance, No. 1266, be reconsidered, and if not repealed on reconsideration, that it be submitted to the referendum vote of the electors of the city. The commission did not annul its former action, but eventually submitted the matter of the purchase of a park site to a referendum vote by resolution of the commission, which recited that such action was taken on the petition theretofore filed. At the election the tract of land submitted by plaintiffs, and accepted by the city commission, was rejected.

At the time William Land made his will, and continuously ever since, the city of Sacramento owned a number of parks, one of which, Del Paso Park, is situated about seven miles northeast of the city and outside its corporate limits. Upon the rejection by the electors of the offer of the plaintiffs, the city commission passed a resolution, No. 1348, by which it decided to expend the William Land fund in reimbursing the city of Sacramento for all sums theretofore paid by the city for the purchase and permanent improvement of Del Paso Park, and that the balance of the fund be used for the improvement of that park. The resolution further provided that the funds derived from the city thus reimbursing itself be placed to the credit of the board of park directors, to be expended by it as were other park funds. The city attorney was directed to take steps to carry out the purpose and intent of the resolution, and to prepare an ordinance changing the name of Del Paso Park to William Land Park.

Plaintiffs thereupon commenced this action to enjoin the city of Sacramento and the city commission from expending the William Land Fund in the manner directed by this last resolution, and from diverting or using the fund except in accordance with the contract entered into between themselves and the city. They also sought to have the contract reformed and corrected by the insertion therein of proper descriptions of the real property, which was the subject-matter of the agreement. A further prayer of the complaint was for such other, further, and different relief as might be meet and proper in the premises. The defendants demurred generally, and interposed the bar of the statute of frauds. The demurrer was overruled. answer was made, and the case proceeded to trial.

The court by its interlocutory decree revised and corrected the contract by the insertion therein of the proper description of the real property, restrained and enjoined the defendants from carrying out the purposes of the resolution whereby the William Land fund was diverted to reimbursing the city for the purchase and equipment of Del Paso Park, and from using or diverting any of the fund of the trust except in accordance with the city's contract with plaintiffs. Certain conditions as to abstracts of title, time within which to examine the same, and report any defects of title or objections, and the removal of defects of title, and examination and tender of deeds, are also provided for in the decree. It was further ordered that plaintiffs receive as the purchase price of the lands United States Victory Bonds to the amount of the purchase price, as agreed to by them in accepting the counter offer of the commission at the time of the tender of the property for park purposes.

On this appeal from the judgment the defendants assail the ruling of the lower court on the demurrer to the complaint, and interpose a number of objections to the interlocutory judgment entered in favor of the plaintiffs. Some of them, particularly those relating to the admission of certain maps, and objections made to evidence of matters of record and other rulings on the admission of evidence, are more or less technical, and may be dismissed with the suggestion that, even were the contentions of the appellants correct, no conceivable injury resulted to their case by reason of the rulings complained of. The ultimate conclusion in the matter rests upon the consideration of two vital propositions: First. Did the matter of the purchase of a site for the William Land Park involve the exercise of legislative power, thereby rendering it subject to referendum, or was it merely administrative, or executive in character? Second. If the question was not one that might be referred to the electors, did the transaction between the plaintiffs and the city commission result in a contract capable of reformation and specific performance? A number of more or less immediate contentions, corollary to the main issues, will be disposed of by the determination of the two questions suggested, and need not be specifically considered.

After the city commission had by affirmative action accepted the offer of the respondents to transfer the park site to the municipality the matter was submitted, by referendum, to the qualified electors of the city. The decision of a majority of the voters was against the acceptance of the site. The appellants take the position that the whole controversy was concluded by the result of that referendum election. There can be no question that if the acceptance of the offer of the respondents to sell a park site to the municipality was an act involving the exercise of legislative power, and if that question was legally submitted to a referendum and rejected, the respondents have no standing in court.

[1] Several questions present themselves in this connection. It is urged by the respondents in the first place that the proceedings under which the purported referendum election was held were fatally defective in certain jurisdictional matters. In the second place respondents contend that the acceptance by the city commission of the offer of the park site was only an administrative or executive act, and therefore not subject to a referendum vote of the electors. Appellants' answer to the first proposition is that, even though the attempt to initiate a referendum by petition may have failed, the city commission was authorized by the provisions of the Sacramento city charter to submit to the electors of its own motion any ordinance or measure that it might have the authority to enact. Sac. City Charter, § 271. To the second proposition they answer that, while convinced that the action of the commission relating to the park site was purely legislative in character, it makes no difference whether it was or not, for, under the section of the charter noted, any proposition, or measure, either legislative or executive, may be submitted to a referendum vote. We are of the opinion, however, that the provisions in the city charter relating to the referendum should be held applicable only to ordinances and resolutions which constitute an exercise of legislative power. To allow the referendum to be invoked to annul, or delay, executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of the city. In many cases it would entirely prevent the exercise of the executive power necessary to carry out the acts determined upon by the legislative department. Hopping v. City of Richmond, 170 Cal. 605, 611, 150 Pac. 977, 979. The charter of Sacramento contains no "clear declaration to the contrary," any more than did the city of Richmond, which was considered in that case.

This brings us to a consideration of the question whether or not the act here involved was done in the exercise of legislative power, or was merely administrative or executive in character.

[2-6] An exhaustive consideration of the

whole subject and a clear analysis of the distinction to be drawn between the legislative and administrative or executive power of a municipality is to be found in the decision of our Supreme Court in the case of Hopping v. City of Richmond, supra. Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence. As we view it, the proposal of the respondents to the city commission involved only administrative functions. Whether or not the city of Sacramento should acquire a public park and the necessity of making some provision for the means of paying for it became moot questions when the city accepted the trust imposed upon it by the will of William Land. By that acceptance the city became charged with the duty of the administration of the trust in strict accord with the terms of the instrument creating the fund, The money was distributed to the city "pursuant to the 28th provision of the last will and testament of said deceased," which, by its express terms, authorized and empowered "the mayor and board of trustees of said city to expend so much of said sum as may be necessary for the purchase of ground suitable for a public park, and to expend the balance of said fund in properly fixing up said grounds as a public park." We think it plain that the city commission, which under the present charter of the city of Sacramento is the successor of the mayor and board of trustees under the form of city government in existence when the will was made, is charged with the duty of the administration of the William Land park fund. Their acts in this regard were, and are, only incidental to the execution of the legislative policy and purpose implied from the acceptance of the trust fund, and were not proper subjects of referendum. This seems the only logical conclusion to reach in the matter. Any other deduction would render possible an entire omission to carry out the real purpose of the trust. That may well be illustrated in the present case. It is hardly to be conceived that William Land contemplated that the money he provided for the express purpose of purchasing and equipping a public park for the use of the people of Sacramento, to be and remain a monument to his name and public spirit, should be completely diverted from that purpose to reimbursing the city for money spent in the purchase and improvement of a park it already had. Had he so intended, he would have said so in his will. The contemplated action on the part of the commission amounted, in our opinion, to a clear violation of the terms of the trust. That a city may accept a trust such as that created by William Land, and may act as trustee and execute the trust, does not admit of doubt. It is equally well settled that when the trust is accepted the city assumes the same obligations, and becomes amenable to the same regulations as apply to other trustees of such trust. Among them is the obligation to administer the funds in accordance with the expressed wish of the testator. Maxcy v. Oshkosh, 144 Wis. 238, 250, 128 N. W. 899, 905, 1136, 31 L. R. A. (N. S.) 787; Higginson v. Turner, 171 Mass. 586, 591, 51 N. E. 172; 3 Dillon on Munic. Corp. (5th Ed.) par. 982; Estate of Robinson, 63 Cal. 620, 623. For these reasons we believe the city commission was well within the exercise of its administrative powers when it attempted to purchase a site for the William Land park, and may not be hampered, in the absence of fraud and abuse of its powers, in the execution of the trust, and then only in the manner usual for the prevention of an abuse of the trust. For like reasons we deem it inexpedient to consider further the alleged illegality of the referendum proceedings. The conclusion we have reached, that the question of the acceptance of the park site offered by the respondents was not a matter subject to referendum, renders further discussion of the question unnecessary.

We have examined the provisions of the charter of the city of Sacramento dealing with the power of the city to accept gifts and bequests for the acquisition of public parks, the disposition to be made of such funds, and the relation of the board of park directors of the city thereto. We are satisfied that they bear no relation to the facts of the present case. We express no opinion as to their general application to gifts and bequests not coupled with the imposition of an express trust.

[7-10] This brings us to a consideration of the question: Was there a contract capable of reformation and specific performance? Neither the writing by which the respondents offered the various tracts of land to the city, nor the resolution of the city commission accepting the same, contained an adequate description of the various parcels of land comprising the park site. Appellants argue, therefore, that the transaction between the respondents and the city did not ripen into an enforceable contract, because not containing a proper description of the subject-matter of the agreement. They contend: First, that there is no contract for the sale of real property (Civ. Code, § 1624, sub. 5); and, second, that the terms of the agreement are not sufficiently certain to make the precise act which is to be done clearly ascertainable

(Civ. Code, § 3390, sub. 6). The description in the communication to the commission reads:

> "The property embraced in this offer lies immediately north of the Sutterville road and extends from Freeport road, or the extension of Twenty-First street, on the east, to Tenth street on the west, a portion of it lying immediately east of the property now owned by the city, upon which the pumping plant stands, and comprising 238.26 acres, more or less, in the entire offering."

This is followed by a statement of the names of the owners of each of the respective tracts comprising the proposed site, and the number of acres in each tract. The resolution of the commission, which formally accepted the tender of the respondents, in its preamble refers to "the site offered by George Swanston and F. B. McKevitt, lying between the Freeport road and Twenty-First street on the east, and Tenth street on the west, and being easterly of the property now owned by the city of Sacramento at Sump No. 2, and being 238.26 acres." These descriptions of the land offered and accepted for park purposes give three boundaries, and the aggregate acreage of the land. The owners of and the acreage in the various parcels making up the tract are also given. The property might be readily identified by a competent surveyor, with reasonable certainty. When that is possible, either with or without the aid of extrinsic evidence, the description is sufficient. Best v. Wohlford, 144 Cal. 733, 738, 78 Pac. 293; Thompson v. McKenna, 22 Cal. App. 129, 132, 133 Pac. 512; Hall v. Shotwell, 66 Cal. 379, 381, 5 Pac. 683; Mann v. Taylor, 49 N. C. 127, 69 Am. Dec. 750. If it ever became necessary to establish the sufficiency of the description it might be shown by extrinsic evidence, not for the purpose of adding to or varying the description contained in the contract, but for applying the description to that part of the surface of the earth which is the subject matter of the agreement. In such cases, whether or not such evidence is sufficient to show that the land can be identified with reasonable certainty, is a question of fact for the trial court. Houghton v. Kern Valley Bank, 157 Cal. 289, 292, 107 Pac. 113; Thompson v. McKenna, supra.

[11] The body of the description of the land fails to locate the property in any particular state or county. The communication offering the park site to the city is dated "Sacramento, California, December 15, 1917." It is addressed to "The Honorable City Commissioners, Sacramento, California," and tenders to them, "as the legal representatives of the city of Sacramento," the land in question, to be devoted to park purposes. These facts, with the references in the description to roads, a street, and property owned by the city, manifestly indicate that the description deals with property in the state of California, in or adjacent to the city of Sacramento. Horton v. Murden, 117 Ga. 72, 43 S. E. 786, 787; Morris v. McKee, 96 Ga. 611, 24 S. E. 142; Butler v. Davis. 5 Neb. 521.

[12] The appellants apparently take the position that no contract between the parties in the instant case, or memorandum thereof, was signed by the parties sought to be charged. In that contention they are mistaken. The respondents made a proposition in writing, signed by them, to sell the land described. The city, through it commission, by resolution duly adopted and spread upon the minutes signed by the president of the commission, and attested by the city clerk, accepted the offer. A counter proposition, which provided for payment for the land with United States Victory Bonds, instead of cash, was accepted by the respondents in a writing filed with the commission, a contract made in such manner as fully satisfies the statute of frauds as if it had been executed by the officers or agents of the municipality, duly authorized. People v. Board of Supervisors, 27 Cal. 655, 678; Polk v. Board of Education, 74 Pac. 47;[1] Argus Co. v. Albany, 55 N. Y. 495, 14 Am. Rep. 296, 300; McManus v. Boston, 171 Mass. 152, 50 N. E. 607, 609; 2 Dillon on Munc. Corpor. (5th Ed.) par. 783; Gosport v. Pritchard, 156 Ind. 400, 403, 59 N. E. 1058.

[13, 14] Contracts by, or with a city may be reformed for mutual mistake, the same as contracts between individuals. McManus v. Philadelphia, 211 Pa. 394, 400, 60 Atl. 1001; 2 Dillon Munc. Corpor. (5th Ed.) par. 780. By apt amendment to the complaint it was alleged, and the court found, that the agreed selling price for the land is adequate, and that the contract is, as to the defendants, reasonable, fair, and equitable, and was fairly entered into between the parties. We therefore conclude that there was a contract in the instant case sufficient to satisfy the statute of frauds and one capable of being enforced. Consequently, when it appeared to the satisfaction of the trial court, as found by it, that the description of the real property contained in a contract between the respondents and the city of Sacramento, did not properly describe the property intended to be conveyed to the city, and that such description was inserted in the contract by the mutual mistake of the parties, and under the common belief that it correctly described the entire property and lands, which constituted the subject-matter of the agreement, it was within its province to revise the contract, and make the instrument express what it was intended to mean, and what were intended to be its legal consequences. Civ. Code, §§ 3399 to 3402, inc.; Carr v. Howell, 154 Cal. 372,

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 140 Cal. xvii.

376–377, 97 Pac. 885; McMee v. Henry, 163 Ky. 729, 174 S. W. 746, 748. It was also proper for the court, when it determined that a contract existed which was capable of being specifically performed, to prevent the breach of the agreement by injunction. Farnum v. Clarke, 148 Cal. 610, 619–620, 84 Pac. 166.

[15, 16] The trial court by its interlocutory decree reformed the contract between the plaintiffs and the city by inserting a correct description of the real property offered by plaintiffs as a park site, and enjoined and restrained the defendants from reimbursing the city out of the William Land fund for the purchase price and costs of improvements of Del Paso Park, and from using or diverting any of the funds of the trust in any other manner than under the contract with plaintiffs as reformed. The court went further and included in its judgment several provisions prescribing what should be done by the respective parties in order to render the decree effective. In effect the decree is one specifically enforcing the contract. When the final decree shall be entered the whole matter will be concluded. The court expressly retains jurisdiction of the subject-matter of the action and parties thereto, for the purpose of carrying out its interlocutory judgment. Among other things it directed that the plaintiffs should furnish the defendants with abstracts of title to the property contracted for within 10 days after the interlocutory decree became final, the defendants to have 30 days after receipt of the abstracts within which to examine the same and report any defects in title or objections thereto. If no defects be reported to plaintiffs in writing within the time limited, plaintiffs must within 10 days thereafter tender good and sufficient deeds granting the property to the city of Sacramento. If any defects in title were reported, plaintiffs were to have six months within which to remove the defects or objections. If any controversy shall arise by reason of its validity or reasonableness, or any objection concerning the title to the property, the court reserved to itself the right to determine the dispute, and the time for removing the defects in title was extended so that the six-month period shall not expire until final settlement of the controversy. Appellants object to these provisions in the decree as not being supported, and not being within the terms of the contract between the parties. Where time is not of the essence of the contract, and there is a positive agreement to buy and not a mere option depending upon the sufficiency of the showing of title, it is enough if the vendor is in fact the owner in fee, unincumbered, at the time of the performance, or at the time of the decree. Dore v. Southern Pacific Co., 163 Cal. 182, 195, 124 Pac. 817; Allstead v. Nicol, 123 Cal. 594, 597, 56 Pac. 452. It also seems to be the general rule that it is within the jurisdiction of the court to allow the vendor in a suit for specific performance a reasonable time within which to perfect his title where time is not of the essence of the contract, as is the fact in this case, and to do so will not work an injustice to the vendee. Van Riper v. Wickersham, 77 N. J. Eq. 232, 76 Atl. 1020. See, also, cases cited in 30 L. R. A. (N. S.) 25, Ann. Cas. 1912A, 319, under this case. In the instant case the time for the final decree has not yet arrived; the present judgment being only interlocutory in its nature and effect.

[17] The court found that the respondents had already expended large sums in securing the options for the property sold to the city, for surveying fees, and other expenses in connection with the matter. It included in its decree a provision that the plaintiffs should receive the purchase price amounting to $146,236.45 in United States Victory Bonds, together with the interest collected by the defendants on the bonds from the 19th day of February, 1918, until the transaction be closed, and that in addition the city of Sacramento pay to plaintiffs all taxes and special assessments of every kind accruing against the land during the same period. The appellants object to these provisions in the decree, but we think the court was right in seeking to determine the whole controversy between the parties. When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case and determining the whole controversy. Vierra v. Fontes, 135 Cal. 126, 129, 66 Pac. 241; Watson v. Sutro, 86 Cal. 500, 528, 24 Pac. 172, 25 Pac. 64.

For the foregoing reasons we are of the opinion that the action of the trial court in overruling the demurrer to the amended complaint was proper, and that judgment should be affirmed. It is so ordered.

We concur: RICHARDS, J.; KERRIGAN, J.

55 Cal. App. 184

MOORE et al. v. CALIFORNIA-MICHIGAN LAND & WATER CO. (Civ. 3722.)

(District Court of Appeal, Second District, Division 1, California. Nov. 14, 1921.)

1. Stipulations 🔑14(7)—Agreement as to title held modified by conditions of contract also stipulated to be correct.

Where the parties stipulated that plaintiffs were the owners of certain lots, but also stipulated that both parties traced their titles to a certain contract, and that its recitals were correct, and the contract showed plaintiffs' title was subject to an easement, the stipulation as to title should be taken as modified by the conditions shown by the contract.

2. Property 🔑9 — Ownership presumed to continue until change shown.

One shown to have had title to a lot will be presumed to have continued as such owner until a change of ownership is shown.

3. Waters and water courses 🔑156(6)—Deeds held to convey only specified part of water in existing well.

Where one not shown to have had any title to lot 8 conveyed other lots, together with eight fifty-fourths of the water in the well on lot 8, not exceeding 26,000 gallons each 24 hours, and the owner of lot 8 executed a confirmatory deed conveying "the water right described" in the earlier deed, such deed did not enlarge the right conveyed by the first deed, and the grantee acquired only the specified part of the water in the existing well on lot 8, and not such fractional part of all the water underlying lot 8.

4. Waters and water courses 🔑156(1)—Deed conveying water right described in earlier deed held sufficiently definite.

A deed purporting to convey "the water right described in deed from R. of date June, 1905, for lots 3 and 4" of a specified tract, was sufficiently definite in its reference to the right intended to be conveyed where only one deed transferring title to the designated parties to lots 3 and 4 had been made, and it was acknowledged on June 1, 1905, though dated May 31st.

5. Waters and water courses 🔑156(6)—Deed purporting to convey greater water right than grantors had could transfer only what they owned.

Where owners of lots owned only eight fifty-fourths of the water in an existing well on another lot, their conveyance could transfer only what they possessed, although describing the water as eight fifty-fourths of the water on such lot.

6. Waters and water courses 🔑156(6)—Mortgage to owner of lot by person having water right could not extend right though misdescribing it.

Where the grantor of lots 3 and 4 in a certain tract not shown to have any title to lot 8 conveyed with lots 3 and 4 eight fifty-fourths of the water in a well on lot 8, and the owner of lot 8 executed a confirmatory deed, the fact that a mortgage given the owner of lot 8 by persons holding under the conveyance described the water right as eight fifty-fourths of the water on lot 8 did not enlarge the right.

7. Waters and water courses 🔑158½(1) — Evidence held to support finding of agreement as to operating charges, etc., between owners of water of well

In a suit to establish water rights, evidence *held* sufficient to support a finding of an agreement between the owners of the water of a well apportioning the operating charges in consideration of one party's consent to the substitution of an electric motor for a gasoline engine.

8. Waters and water courses 🔑158(1) — Agreement apportioning charges for operating a pumping plant held supported by sufficient consideration.

Where plaintiffs, as appurtenant to lots owned by them, owned eight fifty-fourths of the water of a well on another lot owned by defendant, and were conceded to have the right to use an engine and pump to the extent necessary to secure such water, an agreement apportioning the operating charges between the parties was supported by a sufficient consideration, consisting of plaintiffs' consent to the substitution of an electric motor for a gasoline engine.

9. Waters and water courses 🔑158(3)—One succeeding to right of parties under contract held entitled to waive provision that water should not be conveyed to points outside tract.

Where an agreement between the owners of a tract of land and persons owning water rights therein provided that the owners of the tract and their heirs and assigns should not convey any water obtained on the tract to any place outside the tract, and thereafter defendant acquired all of such tract except two lots owned by plaintiff, and also acquired the rights of the other parties to the contract, it was in a position to waive the condition against delivery of water outside the tract, and plaintiffs could not insist on such condition.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by George A. Moore and others against the California-Michigan Land & Water Company. From a decree for plaintiffs, defendant appeals. Reversed.

Goodspeed & Pendell, of Los Angeles, for appellant.

Daniel M. Hunsaker and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondents.

JAMES, J. Plaintiffs' action was for equitable relief. They alleged that they were the owners of two certain lots of land, and the owners of the right to eight fifty-fourths of the water on and under another lot (lot 8) in the same tract; that the defendant was the owner of other water which had its source on this third lot, and that, under conditions of this ownership, defendant was not permitted to take water to points outside of the tract; that defendant had made with plaintiffs a certain agreement respecting the apportionment of operating charges of a pumping plant used to furnish water to the plaintiffs and the defendant, and had afterwards refused to abide by such agreement and had interfered with the plaintiffs in their attempt to make use of the water to which they were entitled; that water was being taken by defendant from the tract to places outside of it and sold. The prayer of the complaint was for a decree determining that the plaintiffs were the owners of eight fifty-fourths of any and all waters in or under lot 8 in the tract of land described and the owners of a proportionate interest in the pumping plant. Further relief asked for was that defendant be restrained from taking any water from the lot referred to and selling to any point outside of the tract, and be further restrained from acting otherwise than to observe the conditions of its agreement respecting the apportionment of charges incurred in the operation of the pumping plant. The decree of the trial judge was in accordance with the prayer of the complaint, and the defendant has appealed.

The facts were established in part by stipulation and in part by the introduction of evidence oral and documentary. The parties at the trial first agreed that defendant was, and had been since 1910, a corporation engaged in the business of loaning, selling, and leasing real property, and in selling, as a public utility corporation, water for domestic use and irrigation purposes to the inhabitants of certain territory, some residing in Chapman's Homestead tract and some outside the limits of said tract; that plaintiffs were, and had been since January 5, 1910, the owners of lots 3 and 4 of Chapman homestead tract, and that the defendant, since March 1, 1912, had been the owner of all of the remaining lots in said homestead tract and the owner of whatever rights Richard B. Chapman, Ruth Chapman, and Louisa Chapman had by reason of a certain contract dated March 2, 1905. It was further stipulated that the recitals in the contract of March 2, 1905, were correct as to the facts therein stated, and that both plaintiffs and defendant traced their record titles to said contract; that the facts stated in said agreement were true. The contract referred to as that of date March 2, 1905, and which, under the stipulation of the parties, determines the origin of the title to the lands of plaintiffs and defendant and defines certain water rights and restrictions attendng their enjoyment, was made between three parties, to wit: Richard B. Chapman, Ruth Chapman, and Louisa Evelyn Chapman, parties of the first part, Alfred B. Chapman, party of the second part, Catherine C. Chapman, Lettice Chapman, M. L. Wicks, A. A. Rice, W. P. Cayley, Mary Webster and Mary G. Criswell, parties of the third part. This agreement first declared that the parties of the third part owned the Chapman homestead tract consisting of 31 acres; that Catherine C. Chapman owned all of the tract except lots 1, 2, 3, 4, 5, 12, and 9; that Lettice Chapman owned lots 1, 2, 3, and 4, subject to a contract to sell the same to M. L. Wicks; that Cayley owned lots 5 and 12, and Mary G. Criswell lot 9. It was declared that parties of the first part owned in common certain rights to the water that could be developed in the Chapman homestead tract, and the party of the second part owned a certain interest in a reservoir on lot 8 called the "brick reservoir"; further, that there was appurtenant to the homestead tract a one-half interest in a well on the land of the parties of the first part, together with rights of way to reach the same.

The agreement declared that Catherine and Lettice Chapman (parties of the third part) were desirous of procuring a release of the general right of development and of way on the whole of the homestead tract, and that they desired to locate such rights on particular portions of the tract to better advantage, and that Cayley and Criswell were desirous of having such rights released as to their lands; that therefore, in view of the mutual considerations, the third parties granted to the first parties the exclusive and perpetual right to bore, dig, and construct wells for the purpose of obtaining water upon two rectangular parcels of land 40 feet square, one to be located upon lot 2 and the other upon lot 4, and the further right to erect, maintain, and operate pumping plants in connection therewith; also right of way for private road 15 feet wide extending from each of the two parcels for the purpose of ingress and egress and the perpetual right to take and extract from the wells which might be constructed upon either parcel of land all of the waters that would flow, or might be lifted, therefrom, and to convey such waters to any and all places as the parties of the first part, their heirs or assigns, might desire. By the agreement other necessary incidental rights were provided to be vested in parties of the first part. The parties of the third part, in view of the said considerations, by the agreement released all rights which they had in the well first referred to, which was located on land other than that comprised within the Chapman homestead tract. The agreement further recited that parties of the third part, in order to secure to the parties of the first part the "privileges and servitudes" granted, and to protect the parties of the first and second parts from a diminution of flow of underground waters, agreed as a covenant "running with and for the benefit of said land of said parties of the first part," and as binding on all portions of the homestead tract owned by said parties of the third part, that neither they, their heirs nor assigns, nor subsequent occupants of those portions of the homestead tract owned by them, would at any time thereafter convey any water which might be obtained from any well or wells on said homestead tract to any place outside of said homestead tract, or permit any other person or persons or corporations "other than said parties of the first part hereto, or their heirs or assigns," to convey such waters so obtained from wells on said homestead tract. The agreement further declared that it was the intention to restrict the use of water developed on the homestead tract to the land composing that tract by persons other than parties of the first part, and that parties of the first part would have the right to take and appropriate any water that should be conveyed from or should flow off from the homestead tract from any well or wells located thereon, whether such wells were constructed by the parties of the first part or not. Parties of the first and second parts, by reason of the considerations referred to in the agreement, released to the parties of the third part all rights, privileges, easements, and servitudes held, owned or possessed by them in or to the land composing the homestead tract, except as otherwise provided in said agreement.

[1, 2] It will be noted first that the agreement declared the ownership of lots 3 and 4 to be in Lettice Chapman, subject to the contract to sell the same to M. L. Wicks. It may be added that the agreement of 1905 imposed an easement upon lot 4 to the extent of giving to the first parties the right to place a well on a portion thereof 40 feet square, and this condition remains to affect the title held by plaintiffs. The stipulations of the parties, made as to the evidence, brought all of the terms of that contract before the court. The stipulation that plaintiffs were the owner of the two lots 3 and 4 should be taken as modified by such conditions as the contract referred to shows. Under the facts recited in that agreement, Catherine C. Chapman was the owner of lot 8 in said tract. A deed was introduced in evidence dated May 31, 1905, acknowledged on the 1st of June, 1905, recorded November 14, 1905. This deed was made on the part of Lettice C. Rawlinson, née Chapman, M. L. Wicks, and Douglas Rawlinson, as grantors, and August C. Fimmen and Freda Fimmen, grantees. This deed purported to convey title to lots 3 and 4 of the Chapman homestead tract, and contained the following words:

> "Together with eight fifty-fourths of the water in the well on lot eight of this tract to the extent of thirteen thousand gallons each twenty-four hours subject to a reasonable charge for pumping said water. This limit is raised to twenty-six thousand gallons each 24 hours."

Up to this point no interest is disclosed in the grantors mentioned in that deed to any part of lot 8 or any well or water thereon. As before mentioned, title to this lot was shown by the agreement first referred to to have been in Catherine C. Chapman, who will be presumed to have continued as such owner until a change of ownership is shown. On the 14th of March, 1907, it not appearing that Catherine Chapman had divested herself of ownership of lot 8, she executed an instrument of conveyance in favor of the two Fimmens, husband and wife, which, after the usual declarations as to consideration, etc., purported to convey to the grantees "the water right described in deed from Lettice C. Rawlinson, née Chapman, of date June, 1905, for lots 3 and 4 of the C. L. Chapman homestead tract as per map recorded, * * * said deed being made to these grantees subject to mortgage lien," etc. By deed dated January 5, 1910, the Fimmens transferred their interest in lots 3 and 4 to the plaintiffs. The deed was in usual form, and contained this clause:

> "Together with eight fifty-fourths of the water on lot eight of this tract."

[3-6] It will have been already noted that the deed which conveyed title to the Fimmens to lots 3 and 4 pretended also to convey "eight fifty-fourths of the water in the well on lot 8 of this tract to the extent of * * * 26,000 gallons each twenty-four hours." When Catherine C. Chapman confirmed to the Fimmens this water right by her deed of March 14, 1907, she referred to it as being "the water right described in deed from Lettice C. Rawlinson, née Chapman, of date June, 1905, for lots 3 and 4 of the C. L. Chapman homestead tract." To the terms of these conveyances we must look for the entire measure of the right acquired by the plaintiffs to any water to be taken from lot 8. Catherine Chapman, by her instrument of conveyance, confirmed to the Fimmens nothing more than the right described in the deed which they had received, which was a right to eight fifty-fourths of the water in an existing well. We attach no importance to the claim that Catherine Chapman's deed was insufficient because it referred to the conveyance to the Fimmens of lots 3 and 4, and the accompanying water right, as being evidenced by a deed "of date June, 1905." This claim is made because it appeared that that deed was in reality dated May 31, 1905. It was acknowledged on the 1st of June, 1905, and was made by the parties described in the Catherine Chapman conveyance, and was the only deed shown to have theretofore been made transferring title to the designated parties to lots 3 and 4 of the homestead tract. It was sufficient-

ly definite in its reference to the right intended to be conveyed. However, it did not in any wise enlarge the right given to the Fimmens, and we are unable to find anything in the record showing that the Fimmens (plaintiffs' grantors) ever acquired any greater interest than that indicated by the deed above referred to. To be sure, in the deed which they gave to the plaintiffs they described the water right as being "eight fifty-fourths of the water on lot 8 of this tract," but that conveyance could operate to transfer nothing more than the Fimmens already possessed. Nor does the fact that a mortgage given to Catherine Chapman by the plaintiffs herein, which was in lieu of a mortgage executed by the Fimmens, described the water right in the larger terms extend the right. The plaintiffs may be said then to have shown a clear title by chain of conveyances to a right to eight fifty-fourths of the water in the well which was located on lot 8 in 1905, such right to be limited to the use of a maximum quantity of 26,000 gallons each 24 hours. This is quite a different thing from the possession of a right to that proportion of all the waters underlying lot 8, which the trial judge determined was the right to which plaintiffs were entitled.

[7-9] The trial judge also determined that plaintiffs were the owners of a proportionate interest in the pumping plant and machinery used in connection therewith for the purpose of raising water from the well on lot 8. It appeared in testimony that when the Fimmens began to occupy lots 3 and 4 in 1905 there was at the well on lot 8 a pump and a gasoline engine, together with the necessary connections for operating the pump; that the Fimmens made use of the water in the well for their domestic purposes, and furnished gasoline and oil with which to operate the engine and pump when required. This practice continued during the whole of the time they were on the property, and the pumping plant there existed when the plaintiffs came into possession of lots 3 and 4. As to who originally paid for the engine and pump does not appear. It does appear, however, that the apparatus was made use of for the mutual benefit of the parties interested in the well, including plaintiffs' predecessors, and that the right to so use the engine and pump was conceded to be in the owners of lots 3 and 4, to the extent, at least that such use was necessary in order to entitle them to secure the water conveyed to them. The evidence showed that in 1917 the plaintiffs here being then in possession of lots 3 and 4, and having continued to make use of some of the water from the well on lot 8, made an agreement with defendant's superintendent which not only recognized to the plaintiffs a right in the well and the pumping outfit, but proceeded to fix definite terms with respect to the apportioning of further operating charges. The deposition of defendant's superintendent recited that the manager of the defendant corporation requested him to secure the consent of plaintiff George Moore to have substituted an electric motor in place of the the gasoline engine to be used in pumping the water from the well; that such consent was obtained, on certain specified conditions, all of which defendant's manager approved; that the gasoline engine was taken away and sold by the defendant and the electric motor installed, but that defendant's manager failed and refused to furnish a statement of operating charges to plaintiff George Moore, as it had been agreed should be done. Defendant offered no testimony to contradict the statement of its superintendent, and we think that this testimony prima facie established a valid contract against the defendant corporation. Plaintiffs possessed the undoubted right to use the pumping plant, as it had existed on the well on lot 8 for so many years, and a consent to change from the gasoline engine to the electric motor was sufficient consideration for the making of the agreement as the record shows its terms. The matter of apportioning the operating charges, repair or replacement bills, seems never to have been settled prior to the date of this last agreement, and, as it was not a subject determined by any term of the water right conveyance, necessarily it was left an open question, dependent upon agreements to be later arrived at. The evidence is sufficient to sustain the court's finding that the agreement was made as alleged respecting the removal of the gasoline engine and the substitution of the electric motor therefor, and as to the apportionment between the parties of the operating charge which might thereafter be incurred. The water right itself, under the evidence, cannot be enlarged from that proportion and quantity fixed in the early conveyance to the Fimmens; in other words, the interest is an interest in the water in the particular well, and not the water underlying lot 8.

Furthermore, the evidence does not sustain the judgment in so far as it is determined that defendant has not the right to sell water which it may be entitled to take from the well on lot 8 outside the Chapman homestead tract. The contract of March 2, 1905, made between the several Chapmans and others as principals, in its restrictive feature affecting the taking of water beyond the limits of that tract, expressed a condition in favor of the owners of the outside property, and not the owners of the homestead tract. The defendant here has succeeded to all of the rights of the parties in whose interest that condition was made, and hence is in a position to waive the benefit of it. In no event that occurs to our mind may the owners of any of the lots in the homestead tract, because of that ownership alone, insist that water originating thereon shall not be sold and delivered outside the confines of the tract.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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55 Cal. App. 151

MOISE v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 4017.)

(District Court of Appeal, First District, Division 2, California. Nov. 10, 1921.)

1. Injunction 🔑85(1)—Not granted to restrain enforcement of invalid ordinance imposing license tax.

Even though a municipal ordinance imposing a license tax on brokers, and requiring police officers to examine all places of business and persons liable to pay the license and see that they are taken out and make arrests for violations, etc., is invalid, an injunction will not be granted restraining its enforcement and restraining police officers from visiting a broker's place of business, causing him to be arrested, etc., where it does not appear that the broker is the owner of any real estate, or that the officers or agents of the city are trespassing on his real property or injuring his property rights.

2. Injunction 🔑105(1)—Police officers not enjoined from visiting broker's premises.

There being several penal statutes which may be violated by a broker engaged in selling stocks and bonds, the police as to all such offenses, as well as offenses provided for in an ordinance imposing a license tax, are within their rights in visiting the broker's premises, and will not be enjoined from so doing.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by W. H. Moise against the City and County of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed.

W. G. Deal, of San Francisco (Frank J. Mahoney, of San Francisco, of counsel), for appellant.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondent.

STURTEVANT, J. Plaintiff commenced an action to obtain a decree perpetually enjoining the defendant, its tax collector, agents, and employees, from collecting a license tax provided in a purported ordinance, and from enforcing the provisions of said ordinance, and to declare said ordinance null and void. The defendant city appeared and answered. Judgment went for the defendant, and the plaintiff has appealed. To support his appeal, the plaintiff has brought up the judgment roll including an agreed statement of facts in lieu of findings of fact. The agreed statement sets forth everything that is set forth in the complaint and answer and some additional matters. From the statement we are informed that the defendant is a municipal corporation; that the plaintiff is a broker engaged in selling stocks and bonds; that on July 1, 1920, an ordinance became effective under and by virtue of the terms of which a license tax is imposed upon brokers engaged in such a business as is the plaintiff; that by the terms of the ordinance all police officers are appointed inspectors of licenses and as such required to examine all places of business and persons on their respective beats liable to pay a license, and to see that such licenses are taken out, and to make arrests for the violation of the provisions of the ordinance. The police officers are further commanded to enter any place of business for which a license is required, and to demand the exhibition of such a license. It is further provided that the police officers shall cause complaints to be filed against all persons violating any of the provisions of the ordinance, and the chief of police is directed to carry into effect its provisions. The statement recites that the police officers of the city and county of San Francisco have been instructed thereupon to enter the place of business of plaintiff for the purpose of making the inspection provided for in said ordinance, and for no other purpose. It will be noted that the statement of facts does not contain any information as to whether by the terms of the ordinance, or by the terms of the charter, or otherwise, it is provided that moneys collected pursuant to an invalid ordinance may be recovered back; neither does the statement of facts directly aver that it is a misdemeanor for such persons as the plaintiff to transact business without first procuring a license. However, there are some intimations in the provisions of the ordinance which have been quoted that lead us to believe that the ordinance does contain such a provision. The appellant contends that the ordinance is invalid; the respondent replies that whether the ordinance is valid or invalid, plaintiffs were not entitled to an injunction. As this reply seems to us to be well founded, we will not attempt to discuss any other matters.

[1] It does not appear from the record before us that the plaintiff is the owner of any real estate, or that the officers or agents of the defendant city are in any manner trespassing upon the plaintiff's real property, or that they are in any manner injuring the plaintiff's property rights. Conceding, with-

out deciding, that the ordinance in question is invalid, such invalidity, standing alone, does not entitle the plaintiff to a writ of injunction. Dodge v. Osborn, 240 U. S. 118, 121, 36 Sup. Ct. 275, 60 L. Ed. 557. If the ordinance in question is valid, of course, it is the absolute duty of the police officers to enforce the same. If it is invalid and they attempt to enforce it, doing nothing more than is set forth in the foregoing statement of facts, they should not be enjoined. In 25 Cyc. 632, it is said:

> "Even though the act or ordinance imposing a license tax be alleged to be invalid or unconstitutional, injunction will not lie to restrain its collection where an adequate remedy at law exists, where irreparable injury or other ground for equitable interposition is not shown to exist, or where judgment has been taken for a license tax imposed by a void act or ordinance."

Williams v. County Court, 26 W. Va. 488, 53 Am. Rep. 94, involved a license tax. On page 497 of 26 W. Va., 53 Am. Rep. 94, the court says:

> "The bill in this case was filed to restrain the collection from the several complainants of a tax assessed against them separately in respect to the business in which each is engaged. It is a personal tax purely. It was decided at an early day in this state that equity has no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal; the ordinary legal remedies being ample for the parties' protection. Williams v. Detroit, 2 Mich. 560. The principle has ever since been regarded as not open to controversy in this state, and it was applied without its soundness being contested in Henry v. Gregory, 29 Mich. 68, decided last year. In other states it is supported by a strong preponderance of authority."

And thereupon the court cites a long list of authorities. Pacific Whaling Co. v. United States, 187 U. S. 447, 23 Sup. Ct. 154, 47 L. Ed. 253, was a case involving the collection, etc., of a license tax. There, as here, it was contended that the tax was invalid. On page 452 of 187 U. S., at page 156 of 23 Sup. Ct. (47 L. Ed. 253), the court said:

> "Something more than mere illegality is necessary to justify the interference of a court of equity. But it does not appear that the tax if unpaid would cast a cloud upon the title to any real estate, or work irreparable injury. While it may be that the failure to pay the tax would expose the petitioner to a multiplicity of prosecutions for misdemeanor, yet neither the District Court, nor the judge, nor the clerk initiates criminal proceedings, and the district attorney—the prosecuting officer—was not made a party to the suit. True, an order was entered that he be notified of the pendency of the application and he appeared as amicus curiæ. Even had he been made a party, would equity entertain a bill to restrain criminal prosecutions? In re Sawyer, 124 U. S. 200; Harkrader v. Wadley, 172 U. S. 148; Fitts v. McGhee, 172 U. S. 516."

[2] It will be observed from the statement of facts that the plaintiff would have the officers enjoined from visiting his place, from causing him to be arrested, etc. As the plaintiff is engaged in selling stocks and bonds, there are several penal statutes which may possibly be violated. As to all such offenses, as well as to offenses provided for in the ordinance in question, the police officers are within their rights in visiting the premises of the plaintiff. In Pon v. Wittman, 147 Cal. 280, 81 Pac. 984, 2 L. R. A. (N. S.) 683, a similar claim was set up as against the visits of the police department. On page 293 of 147 Cal., at page 989 of 81 Pac. (2 L. R. A. [N. S.] 683), the court said:

> "And these premises being public the police officers had the same right to enter upon and traverse the passageways within the main court, and the entrance thereto, as had any other member of the public. In fact, in the enforcement of the law, which was being persistently violated through the existence of these houses of prostitution, these officers had the legal right to be there. It would be preposterous to say that where the public may freely enter to violate the law a police officer is excluded from entering to prevent it. He may patrol these passageways to deter by his presence the commission of crime as he may patrol any other public thoroughfare, and while he does so peaceably and quietly, and in the discharge of his duty, no exception can be taken."

In the case of Sullivan v. San Francisco Gas, etc., Co., 148 Cal. 368, 371, 83 Pac. 156, 157, 3 L. R. A. (N. S.) 401, 7 Ann. Cas. 574, the court said:

> "Courts of equity will, in proper cases, enjoin the attempt to enforce a law or ordinance making certain acts a criminal offense and imposing a punishment therefor, where the law or ordinance is invalid and its enforcement will *injure or destroy the plaintiff's * * * property rights.*" (Italics ours.)

In that case the court continues by citing the case Crighton v. Dahmer, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666, and the note attached to that case. We cannot do better than repeat the citation. See, also, Fritz v. Sims, 122 Tenn. 137, 119 S. W. 63, 135 Am. St. Rep. 867, 19 Ann. Cas. 458. Bearing in mind that a superior court in California may exercise either law powers or equity powers, a further quotation from the Sullivan Case is pertinent. On page 373 of 148 Cal., at page 157 of 83 Pac. (3 L. R. A. [N. S.] 401, 7 Ann. Cas. 574), the court says:

> "The object apparently sought by the suit is a judicial determination of these questions in a court of equity, to be used as a precedent in the criminal courts upon the trial of prosecutions under section 593, or which would have the effect of deterring the defendants from beginning such prosecutions. The superior court is as competent to decide such questions when sitting as a criminal court in the trial of a criminal cause as it would be upon the trial

> of a suit in equity, and there is no reason why the plaintiffs should not be restricted to the criminal courts for the preservation of their rights and the maintenance of their defenses. However desirable and beneficial such a predetermination by a court of equity would be, it gives no right to invoke equity jurisdiction."

In Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, the court cites several cases on the point and among these, 172 U. S. at page 531, 19 Sup. Ct. 275, 43 L. Ed. 535, quotes as follows:

> "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes and misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative departments of the government."

And indeed, in California, the rule is statutory. Section 526 of the Code of Civil Procedure provides:

> "* * * An injunction cannot be granted: * * * (4) To prevent the execution of a public statute by officers of the law for the public benefit. * * *"

At an early date, Mr. Justice Field, writing the opinion of the court in Dows v. City of Chicago, 11 Wall. 110, 20 L. Ed. 65, said:

> "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

That case has been cited and followed in California from the earliest times. Crocker v. Scott, 149 Cal. 575, 594, 87 Pac. 102.

It is patent, therefore, that in this case the plaintiff was not entitled to any relief as from a court of equity.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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55 Cal. App. 137

PEOPLE v. WEBB. (Cr. 574.)

(District Court of Appeal, Third District, California. Nov. 10, 1921.)

Criminal law 🔑1178—Appeal assumed abandoned in absence of brief or appearance.

Where no brief has been filed and counsel for appellant does not appear on the day set for the oral argument, it must be assumed that the appeal has been abandoned.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

J. E. Webb was convicted of forgery, and appeals. Affirmed.

J. C. Webster, of Sonora, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of forgery. He duly moved for a new trial, and his motion was denied. This appeal is from the judgment and from the order denying such motion.

The transcript on appeal was filed herein June 4, 1921. Appellant's time to file his opening brief was extended to July 9, 1921. The cause was regularly placed on the November calendar for argument. No brief has been filed, and counsel for appellant did not appear on the day set for the oral argument. At the time set for argument, on motion of the Attorney General, the cause was submitted on the record. It must be assumed that the appeal has been abandoned. People v. Martinez, 185 Pac. 482.

An examination of the record discloses no error, and the evidence is sufficient to support the verdict.

The judgment and order appealed from are affirmed.

We concur: HART, J.; BURNETT, J.

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55 Cal. App. 179

ABBOTT v. CORONADO BEACH CO. et al. (Civ. 3737.)

(District Court of Appeal, Second District, Division 1, California. Nov. 14, 1921.)

1. Trial 🔑29(3) — Intimation by court that witness was not impeached error.

In an action for assault, where defendant attempted to impeach the testimony of plaintiff by showing that it was inconsistent with statements made by her in a criminal prosecution for the assault, the action of the trial judge in stating that there was not such a conflict as to impeach the testimony was error, Code Civ. Proc. §§ 2051, 2052, providing for the submission of questions of conflict of testimony, and the extent to which the credibility of witnesses was affected was for the jury.

2. Appeal and error 🔑1066—Prejudicial error to instruct on special damages not justified by proof.

In an action for assault an instruction that in estimating damages the necessary results to plaintiff in seeking recovery for her injuries and the time and expense should be taken into consideration was prejudicial, there being an absence of allegation and proof as to special damages and determination of the question by the jury was conjecture.

3. Appeal and error ⚷1032(1)—Party claiming error harmless must supply the record to show it.

On appeal appellee may not complain that appellant's brief did not print portion of the record showing that error was harmless, as it was his duty to point out that portion of the record.

4. Trial ⚷295(1)—Instructions examined as a whole in considering prejudicial effect of erroneous instruction.

In determining whether the prejudicial effect of an erroneous instruction is mitigated or lessened by other instructions, the instructions are examined as a whole.

Appeal from Superior Court, San Diego County; Franklin J. Cole, Judge.

Action by Rose Abbott against the Coronado Beach Company and another. From judgment for plaintiff after corporation had its motion for nonsuit sustained, defendant F. C. Williams appeals. Reversed.

V. F. Bennett, of San Diego, for appellant.
Durelle F. Glidden, of San Diego, for respondent.

SHAW, J. Action to recover damages for an assault committed upon plaintiff by defendant Williams, who is alleged to have acted under the direction of Coronado Beach Company, a corporation. At the close of plaintiff's evidence the court sustained a motion for a nonsuit against the corporation, and after evidence adduced on the part of Williams the jury rendered a verdict in favor of plaintiff for damages in the sum of $2,000, from which he has appealed.

Appellant specifies a number of errors upon which he claims the judgment should be reversed. The complaint was unverified and based upon the alleged fact that after plaintiff, who was a waitress at the Coronado Hotel, had severed her employment therewith, and while she was preparing to leave, defendant Williams, who was house detective, called upon her at the dormitory assigned to the use of such employees, at which time there was an altercation between them as to why she continued to stay, and, acting under the direction of the defendant Coronado Beach Company, he with force and violence attacked her and dragged her along the hall of said dormitory and otherwise violently maltreated her. In his answer Williams denied the making of the assault and each and every allegation of the complaint, and as a separate defense alleged that on the date of the alleged attack he called upon plaintiff at the dormitory to inquire why she had not vacated her room therein and when she would do so, at which time plaintiff, who was a strong and able-bodied woman, without any cause or provocation on the part of defendant, became excited and angry and raised a bottle, which she had in her hand, with which to strike him, whereupon he grappled with plaintiff, and, using no more force than was necessary so to do, took from plaintiff the bottle with which she was armed. It thus appears that two issues were presented to the jury for determination, the first of which was whether there was an assault made by defendant upon plaintiff, the burden of establishing which devolved upon her; and the second, assuming that he did, whether he was justified in doing so in self-defense, the burden of showing which devolved upon defendant.

[1] In the cross-examination of plaintiff, defendant's counsel, for the purpose of impeaching her testimony by showing that it was inconsistent with statements theretofore made by her, used a transcript of her testimony given in a criminal prosecution of defendant for the assault, and wherein it is claimed her statements made at the trial were materially different from her former testimony. During this examination the trial judge from the bench, and referring to the testimony which she had formerly given, stated, in the presence and hearing of the jury:

> "I hardly think there is such a conflict as to impeach the testimony given here."

That this was gross error admits of no controversy. Defendant sought to impeach the witness in the method prescribed by sections 2051 and 2052, Code of Civil Procedure, and the question as to whether there was a conflict, and, if there was, the extent to which the credibility of the witness was affected, was one solely and alone for the jury. People v. Wallace, 89 Cal. 158, 26 Pac. 650; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734. In People v. Vogel, 36 Cal. App. 216, 171 Pac. 978, the trial judge was guilty of a like act of misconduct by stating in the presence of the jury:

> "The evidence in the transcript which has been produced I do not consider as impeachment."

In referring to such statement so made by the judge, this court said:

> "His action in that regard was uncalled for. * * * His statement was distinctly prejudicial to the rights of the appellant."

Nevertheless, counsel for respondent argues that the rights of defendant were not prejudiced thereby, for the reason that, disregarding the testimony of plaintiff altogether, the facts of the assault made upon her by defendant are fully established by the testimony of other witnesses for plaintiff, citing McMinn v. Whelan, 27 Cal. 320. The record, however, does not support his contention. Other than the conflicting testimony of plaintiff and defendant, there was little or no evidence touching the question as to which of the parties was the aggressor. While other witnesses testified to what they saw after the commencement of the scuffle in which plaintiff was injured, none of them, except one whose testimony is vague and meager, was present at its inception; hence such issue for its determination was made to depend upon the weight given by the jury to the conflicting statements of plaintiff and defendant. The remark of the judge, by reason of the authoritative position occupied by him, was well calculated to impress the jury with the fact that the inconsistencies brought out upon the cross-examination of plaintiff were trivial, and should not be considered by them as affecting the credibility of plaintiff as a witness.

[2] It appears that the complaint stated a cause of action for general damages only, as to which the court instructed the jury that—

> "In estimating the compensatory damages you will take into consideration all the circumstances of the case, the position of the parties, the pain and suffering occasioned by the assault; the humiliation and shame put upon the plaintiff; *the necessary results to the plaintiff in seeking recovery from her injuries; the time and expense;* the nervous shock or condition produced by the act. You may take into consideration the public place in which the assault was committed. If you shall find that the assault was unwarranted and unjustified, it is your duty to render your verdict for such sum as will fully compensate the plaintiff for the assault, taking into consideration all the circumstances above mentioned."

The giving of the instruction was prejudicial error. Not only was there an absence of allegation as to the special damages referred to in that part of the instruction which we have italicized, and without which plaintiff was not entitled to recover therefor. (Lewiston T. Co. v. S. & W. W. R. Co., 41 Cal. 562), but there was no testimony as to what were "the necessary results to the plaintiff in seeking recovery from her injuries," expense incurred in so doing, or loss of time, other than that of herself, to the effect that she had, due to the injuries, consulted three physicians, and had for short periods of time on three or four occasions been unable to perform her duties as a waitress. This testimony, in the absence of any evidence tending to show the amount of the expense incurred in seeking recovery or the duration and value of the time lost, furnished the jury no basis for estimating the amount of money which would compensate for such loss. Duke v. Mo. Pac. Ry. Co., 99 Mo. 347, 12 S. W. 636. The determination of the question by the jury was therefore one of mere conjecture and guess. "The necessary results to the plaintiff in seeking recovery from her injuries, the time and expense," were in the nature of special damages, and, in the absence of proof, not elements to be considered by the jury in estimating the compensatory damage to plaintiff, which presumably they, as advised by the court, took into consideration in estimating the damage awarded by their verdict.

[3, 4] There is no merit in respondent's contention that appellant has failed to print in his brief such portions of the typewritten record as are necessary to illustrate the errors complained of. The facts constituting the errors which we have discussed appear from the appellant's brief, and if there is anything in the record not therein printed which would render the errors harmless, then it devolves upon respondent to direct attention to the same. While respondent makes no reference thereto, we have examined the instructions, as a whole, given by the court, and find nothing which would mitigate or lessen the prejudicial effect of the instruction which we have held to be erroneous.

Since the judgment must be reversed for the reasons assigned herein, we deem it unnecessary to discuss other alleged errors presented by appellant.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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55 Cal. App. 244

ANTELOPE VALLEY UNION HIGH SCHOOL DIST. OF LOS ANGELES COUNTY v. McCLELLAN. (Civ. 3717.)

(District Court of Appeal, Second District, Division 1, California. Nov. 17, 1921.)

1. Municipal corporations ⚷1 — Legislature can create or abolish at will.

Municipal corporations are subordinate subdivisions of the state government over which the state has plenary power, and they may be created, altered, or abolished at the will of the Legislature acting directly or under general laws through local board or council.

2. Constitutional law ⚷278(2)—Due process does not require notice before annexation of territory to high school district.

Due process of law does not require notice of the creation or alteration of a school district, and, since Pol. Code, § 1734, authorizing annexation of school districts to a high school district, does not require notice to be given, such notice is not necessary to a valid annexation.

3. Schools and school districts ⚷97(4)—Publication of notice of bond election held sufficient.

Publication of a notice of a bond election held on April 16 which was first made on March 26 and thereafter on each succeeding day up to and including April 15, complied with Pol. Code, § 1745, requiring publication not less

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

than once a week for 3 successive weeks and first publication not less than 21 days before the election.

4. Schools and school districts 🔑97(4)—Notice of bond election held not objectionable specifying a dual purpose.

A notice of a bond election, which stated the purposes for which the bonds were to be voted in the language of Pol. Code, § 1745, which also provides that the bonds for the purposes stated may "be united and voted upon as one single proposition," is not objectionable as specifying a dual purpose.

5. Evidence 🔑83(2)—Bonds presumed to be within district debt limit.

In mandamus to compel the chairman of the county supervisors to sign bonds regularly authorized by a high school district, the court will not assume, in the absence of any showing of such fact, that the bonds so authorized exceed the legal amount which may be issued; the presumption being to the contrary.

Original application for writ of mandamus by the Antelope Valley Union High School District of Los Angeles County against R. F. McClellan, chairman of the Board of Supervisors of the County of Los Angeles. Writ granted.

A. J. Hill, Co. Counsel, and Jerry H. Powell, Deputy Co. Counsel, both of Los Angeles, for petitioner.

O'Melveny, Millikin & Tuller and Sayre Macneil, all of Los Angeles, and Paul E. Schwab, of Ontario, for respondent.

Jas. McLachlan, of Los Angeles, and Frank H. Snyder, of Glendale, amici curiæ.

SHAW, J. This proceeding is one in mandate to compel the respondent, as chairman of the board of supervisors of Los Angeles county, to sign certain bonds which petitioner proposes to issue for high school purposes. An alternative writ was issued, the return to which is made by demurrer to the petition.

The chief ground of opposition to granting the relief sought is the alleged irregularity in the procedure for the annexation of certain intermediate school districts to petitioner high school district, and without which, as constituent parts of said high school district, it is conceded the bonds could not be legally issued. These intermediate school districts, the annexation of which is attacked, are those of Leona, Palmdale, and Alpine school districts, all of which were annexed by orders of the board of supervisors made long prior to the election at which the bonds were voted and upon proceedings had and taken in all respects as provided by section 1734 of the Political Code. This section provides that—

"Whenever a majority of the heads of families or a majority of the electors residing in any school district contiguous to a high school district, in the same or in adjoining counties, as shown by the affidavit of one or more of the petitioners, shall present to the superintendent of schools who has jurisdiction over said high school district, a petition for the annexation of such school district to such high school district, accompanied by an agreement signed by a majority of the members of the high school board of the high school district to which annexation is desired, and by a majority of the trustees of such school district, consenting to such annexation and setting forth the terms thereof, such superintendent of schools shall, after verifying the signatures thereon and finding them sufficient, transmit such petition and agreement to the board of supervisors of his county with his recommendations thereon. Such board may thereupon, in their discretion, make an order annexing such school district to such high school district upon the terms agreed on."

As stated, the order of the board of supervisors was made after a full compliance with the statute, which, however, contains no provision requiring that, as a condition of making the order of annexation, notice must be given to the owners of land within or residents of such districts which it is proposed to annex. In the instant case none was given at any stage of the proceedings. By reason of such omission, respondent insists that the orders annexing the territory of Leona, Palmdale and Alpine school districts to the high school district were ineffectual for the purpose and the same never became part of the high school district; and further insists that if section 1734 be construed as not requiring notice, then it is unconstitutional in that it contemplates the taking of private property without due process of law.

[1] Municipal corporations are subordinate subdivisions of the state government over which the state has plenary power, and they may be created, altered, or abolished at the will of the legislature acting directly or under general laws through a local board or council to which the exercise of such power is granted. People v. Town of Ontario, 148 Cal. 625, 84 Pac. 205; People v. Los Angeles, 154 Cal. 220, 97 Pac. 311. "A school district, when organized as provided by the Political Code, is a public corporation of a quasi municipal character, possessing such authority as has been conferred by the Legislature, to be exercised in the mode and within the limits prescribed by the statute. The power to change the boundaries of a district, as well as to define them in the first instance, is of legislative origin, and, whether exercised immediately by the legislature or mediately by the board of supervisors—the local Legislature—is * * * a legislative act." Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Worthington School Dist. v. Eureka School Dist., 173 Cal. 154, 159 Pac. 437; Pass School District v. Hollywood, etc., School Dist., 156

Cal. 416, 105 Pac. 122, 26 L. R. A. (N. S.) 485, 20 Ann. Cas. 87.

[2] In discussing the establishment of permanent road districts, which in character are not unlike school districts, the court, in Potter v. County of Santa Barbara, 160 Cal. 349, 116 Pac. 1101, said:

> "The Legislature can create them, or cause them to be created, without giving any person a voice or hearing upon the matter."

The establishment of a system of public instruction throughout the state is a governmental function, as to which the state reserves to itself the means of giving it complete effect and full efficiency without regard to the wishes of the people "deficient in proper appreciation of its advantages." Cooley on Taxation (3d Ed.) vol. 2, p. 1299. Possessing such power to create, alter, or abolish districts, the function, governmental in its nature, may be exercised immediately by the Legislature or by subordinate bodies to whom the matter is delegated, subject to such conditions, and without notice, as it may impose. In the absence of constitutional restrictions, and there are none affecting this case, the question as to whether boards of supervisors may exercise such delegated power without notice is a question solely for the determination of the Legislature, and in its wisdom it has not required the giving of notice. Indeed, our attention is directed to no authority wherein it is held that the inhabitants of an intermediate school district are entitled to notice of a hearing upon the proposition as to whether the territory thereof shall be annexed to a high school district. In Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, it is said:

> "There is nothing in the essential nature of such a corporation (irrigation district), so far as its creation only is concerned, which requires notice to or a hearing of the parties included therein before it can be formed. It is created for a public purpose, and it rests in the discretion of the Legislature when to create it, and with what powers to endow it."

While the language quoted was used in discussing the creation of an irrigation district, it is equally applicable to the creation of or annexation of territory to a high school district.

While counsel for respondent concedes the principles enunciated in the authorities cited, he insists the decisions of the Supreme Court in Brookes v. City of Oakland, 160 Cal. 423, 117 Pac. 433, and People v. Van Nuys Lighting District, 173 Cal. 792, 162 Pac. 97, Ann. Cas. 1918D, 255, are inconsistent therewith. Conceding that in discussing the questions before the court in those cases language was employed which may afford some justification for respondent's contention, nevertheless what was said therein must be taken as applicable to the facts there involved and which was the subject considered. In the Brookes Case the question discussed was the power of the city council, under an act in which there was no provision for notice and hearing to persons whose lands were affected, to create a sewer district and construct sewers therein from the proceeds of bonds issued upon the lands in the district. It was held that, under the constitutional provision that no person shall be deprived of his property without due process of law, the Legislature could not confer upon the city council authority to create local assessment districts for taxation to pay for local improvements without some provision for notice to persons interested and a hearing upon the question of the limits of the district and as to whether their property would be benefited by the improvement. The case of People v. Van Nuys Lighting District was an action in quo warranto to determine the validity of the organization of a lighting district under the act of March 20, 1909 (Stats. 1909, p. 551), which authorized unincorporated towns and villages to establish and maintain systems of street lighting on public highways. The district as organized comprised about 50,000 acres of land within which were two unincorporated towns: That of Van Nuys, occupying about 640 acres and having 350 inhabitants, and the other the town of Owensmouth, covering 320 acres and having a population of 100 inhabitants; the balance of the territory consisting of farming and grazing lands and unproductive mountain land. The court construed the act as authorizing the formation of lighting districts only within the limits of an unincorporated town or village, and excluded from the district a tract of 4500 acres of land owned by the relator and devoted to farming and not inhabited as a village. In discussing the curative act of May 29, 1915 (Stats. 1915, p. 939), it held the same could not operate to validate previous proceedings of the district for the reason that no provision was made in the act for notice and hearing as to benefits to be derived from including lands in such local improvement district, without which the proposed tax would constitute a taking of property without due process of law. Neither case involves the determination of questions the decisions of which support respondent's contention. While in both cases it is true the acts contemplated the levy of a tax upon all the property in the district, nevertheless such tax was for local improvement and upon the theory that the property in the district would be benefited by the local improvement, and as to which, supported by all the authorities, the owners were entitled to a hearing. In neither case was the question of benefits considered as a basis for taxation, nor was there any discussion had of the question as to the power of the board or council in such cases to levy a general tax upon all the property in the district.

In our opinion, the power of the board of supervisors to annex the territory of an intermediate school district to a high school district is measured by section 1734, above quoted; that since it requires no notice to be given residents or owners of property in the district annexed, none is necessary; and that the board of supervisors has discretionary power to act whenever it appears that the provisions therein contained have been fully complied with.

[3] In the issuance of high school bonds, section 1745, Political Code, provides that the notice shall be published not less than once a week for 3 successive weeks; that the first publication of said notice shall be not less than 21 days before said election. In the instant case it appears that the bond election was held on April 16, 1920. The first publication of notice thereof was made on March 26, 1920, and it was published on each succeeding day thereafter up to and including April 15th. The notice was therefore published not less than once a week for 3 successive weeks, and the first publication made on March 26th was 21 days before the day of such election. The language of the statute is almost identical with that construed in the case of Cosgriff v. Board of Election Commissioners, 151 Cal. 407, 91 Pac. 98. We regard the decision in that case as determinative of the question.

It appears that bonds numbered 1 to 8 matured on June 1, 1921, and, since that date has passed, respondent insists that such bonds constituting overdue paper may not now be issued. We cannot assume that such bonds will be included in the proposed sale, nor that, if so included, other than the principal and interest accrued at maturity will be paid.

[4] The notice of election, in the language of section 1745, Political Code, specifies the purposes for which the bonds, $200,000 in amount, were to be voted, which statute also provides that the bonds for the purposes stated may "be united and voted upon as one single proposition." There is no merit in the contention that the notice specified a dual purpose for which the bonds were to be issued, since the whole sum voted was for the purposes named in the notice. Moreover, were this not the case, the alleged irregularity is cured by the validating act designated chapter 336 and found in Statutes of 1921, p. 456.

[5] Neither can we assume, in the absence of any showing of such fact, that the amount of the bonds voted is in excess of the amount of 5 per cent. upon the preceding equalized assessment of the district. On the contrary, the presumption is that the bonded indebtedness of the high school district, including that of the bonds proposed to be issued, is, as required by law, not in excess of 5 per cent. of the total assessed valuation of all taxable, nonoperative property therein.

Our conclusion upon the points discussed renders it unnecessary to consider other questions presented.

The alternative writ of mandate heretofore issued is made peremptory.

We concur: CONREY, P. J.; JAMES, J.

(55 Cal. App. 228)

CYPRESS LAWN CEMETERY ASS'N v. LIEVRE et al. (Civ. 3933.)

(District Court of Appeal, First District, Division 1, California. Nov. 16, 1921.)

Municipal corporations ⚷671(7) — One may maintain suit to abate nuisance on street interfering with passage to his grounds.

Defendants' maintenance on the sidewalk near the entrance to plaintiff's cemetery of a flower stand resulting in interruption of traffic and interference with passage to and from plaintiff's grounds, while partaking of the nature of a public nuisance, also inflicting on plaintiff a peculiar injury different in kind and not merely in degree from that suffered by the general public, it may maintain an action for abatement of the nuisance.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Cypress Lawn Cemetery Association against Gaston Lievre and others for injunction. Judgment for plaintiff, and defendants appeal. Affirmed.

Swart & Lyon, of Redwood City, for appellants.

Joseph J. Bullock, of Redwood City, for respondent.

WASTE, P. J. The plaintiff brought this action to enjoin the defendants from maintaining along the state highway in front of and adjacent to its cemetery in San Mateo county, portable stands for the sale of flowers and floral decorations, and from obstructing the entrances to the cemetery grounds. The lower court determined that the maintenance of these stands and the selling of flowers therefrom created a nuisance by interrupting traffic and interfering with plaintiff's ingress and egress, and with the passage of its patrons to and from the highway, and in and out of the cemetery. It granted a perpetual injunction, from which judgment the defendants appeal.

The respondent owns land on both sides of the Mission road, a public highway in San Mateo county, for a distance of some 2,500 feet. Part of it is occupied as a cemetery, which extends far back on both sides of the road. On a portion of the property adjacent to the highway, and about 100 feet from it, respondent erected a building containing its business offices and a flower store, which was conducted in the premises. It has constructed and maintained an entrance in front of this building from the highway, which connects with and joins the main entrance to the cemetery, which, in turn, is the main and only public entrance to the cemetery on both sides of the roadway.

Until and prior to about six months before the filing of this action the appellant Marie Lievre had for a period of 17 years maintained a movable flower stand on the side of the highway at a point directly in front of the present location of the recently erected office building. When that structure was completed Mrs. Lievre was ordered away from that point. She thereupon moved her stand to a point on the roadway about nine feet away from the northerly entrance to that structure, where she continued to maintain her stand for the sale of flowers. The lower court found that the appellants, who it appears are all members of one family, on each morning placed on the sidewalk of the public highway, immediately in front of the cemetery of respondent, and in close proximity to the entrance thereto, large portable stands with projecting shelves, large and unsightly boxes and baskets in which were great quantities of greens, ferns, cut flowers, wreaths, wire holders, and other like materials, and also brought bottles, tin tubs, glass and crockery, jars, and other like receptacles which they filled with water, and from which, from time to time, they splashed water upon their wares and upon the highway, causing the road to become slippery, dangerous, and unsafe for pedestrians, and that the selling of the flowers by the appellants from their stands created a nuisance, by causing the stopping of automobiles, interrupting traffic and interfering with the plaintiff's ingress and egress, and with the passage of its patrons to and from the highway and in and out of the cemetery, to such an extent at times that funeral processions cannot enter the main entrance or driveway to the cemetery, but are obliged to use another roadway, and that the action of the appellants prevents plaintiff from carrying on its business of burying the dead with proper regulation, and from having unobstructed use of its premises. It was further found that the appellants throw large quantities of greens, withered plants, and flowers upon the highway in front of the entrance, and make and cause great noise and confusion in and about the place, and impede, obstruct, annoy, and frequently insult persons who enter the grounds.

On the foregoing complete and comprehensive findings, which are amply supported by the evidence, the trial court rested its judgment. We think its conclusion was correct. The acts of the appellants, while partaking of the nature of a public nuisance, undoubtedly inflict upon the respondent a peculiar injury, different in kind, and not merely in degree, from that suffered by the general public. Under such circumstances the party thus injured may maintain an action for the abatement of the nuisance. Cushing-Wetmore v. Gray, 152 Cal. 118, 121, 92 Pac. 70, 125 Am. St. Rep. 47; Brown v. Rea, 150 Cal. 171, 174, 88 Pac. 713; Hargro v. Hodgdon, 89 Cal. 623, 628, 26 Pac. 1106; Helm v. McClure, 107 Cal. 199, 205, 40 Pac. 437.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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55 Cal. App. 209

UNITED STATES FIDELITY & GUARANTY CO. v. CITY OF LOS ANGELES et al. (Civ. 3198, 3199.)

(District Court of Appeal, Second District, Division 2, California. Nov. 15, 1921.)

1. Subrogation 🔑33(1)—Surety on contractor's bond cannot claim benefit of assigned assessment.

A surety on contractor's labor and material bond given pursuant to Vrooman Act, § 6½, as added by St. 1899, p. 23, has no right to claim the benefit of the diagram, warrant, and assessment issued under that act to reimburse itself for the amount of claims paid by it, as against assignees of the contractor for value, and before it sought to compel payment, in the absence of bad faith in the assignment.

2. Assignments 🔑87—Proof of bad faith of contractor and assignee of assessment.

An assignment given by a contractor of diagram, warrant, and assessment issued under the Vrooman Act, § 6½, as added by St. 1899, p. 23, to a company financing him, was not shown to have been made in bad faith as against surety on contractor's bond, which was required to pay claims for labor and material, by proof that assignee had knowledge of the contractor's obligations and of the surety's rights, and continued to advance money to the contractor with knowledge that small claims had not been paid, applied money from one contract to the other, deducted 5 per cent. from the face of the warrant in purchasing it, and permitted contractor to use $420.86 for his own living expenses and to pay alimony to a former wife.

3. Subrogation 🔑33(2)—Provision in contractor's bond held not to change surety's rights.

Surety on bond of municipal contractor under the Vrooman Act, § 6½, as added by St. 1899, p. 23, possessed no greater right than he otherwise possessed as against an assignee of warrant and assessment by reason of a provision in the contract between the city and the contractor, whereby the contractor agreed "that he will at his own cost and expense furnish all necessary materials and labor for said work, and that the material used therein shall comply with the said specifications, and be to the satisfaction of the said board of public works, and that he will within the time hereinafter fixed turn the said work over to the said board of public works complete and ready for use as a public street, and free and discharged of all claims and demands whatever, for or on account of any and all labor and materials used or furnished to be used in said improvement."

4. Assignments ⚷131—Pleading of surety held not to allege bad faith of contractor or his assignee.

Complaint of surety on contractor's labor and material bond under Vrooman Act, § 6½, as added by St. 1899, p. 23, to restrain issuance of warrant to assignee of the contractor, *held* to show no sufficient allegation of fraud or fraudulent intent on the part of the contractor or the assignee.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by the United States Fidelity & Guaranty Company against the City of Los Angeles and others. Judgment for plaintiff, and certain defendants appeal. Reversed.

Albert J. Sherer and Robert Young, both of Los Angeles, for appellants.

Bowen & Bailie and Jas. E. Degnan, all of Los Angeles, for respondent.

CRAIG, J. These two actions between the same parties, and involving the same issues, were tried together. Pursuant to stipulation, the appeals from the two judgments in favor of the plaintiff are being taken and heard together. There is but little controversy concerning the facts, which, in so far as they are material to this decision, except as they concern findings bearing upon the good faith of defendant, are as follow:

One H. V. Gentry entered into two separate contracts with the board of public works of the city of Los Angeles for street improvement work. This was done pursuant to the Vrooman Act. One contract concerned Sunset drive and the other Marathon street in Los Angeles. They were executed on the 29th day of June, 1916, and the United States Fidelity & Guaranty Company, a corporation, on the same date became surety thereon. Also, contemporaneously with this transaction, the Municipal Securities Company entered into an agreement to finance the contractor Gentry in the carrying out of each contract, and to receive an assignment from him as security therefor of his rights to the diagrams, warrants, and assessments issuable under section 7 of the Vrooman Act (St. 1885, p. 152), as amended by St. 1911, p. 627. At the same time that this last-mentioned contract was made, Gentry, by a separate instrument, assigned said diagrams, warrants, and assessments to the Municipal Securities Company. Thereafter this company advanced to Gentry $4,778.74 in the Sunset drive case and $7,325.51 in the Marathon street contract. Gentry eventually completed both contracts, this being accomplished on Sunset drive December 20, 1916, and on Marathon street February 20, 1917. After completion the Municipal Securities Company assigned all its right, title, and interest in the warrant, assessment, and diagram issuable on the Sunset drive contract to the Pacific Bond & Mortgage Company. This was done at the request of Gentry, and the assignee paid 95 per cent. of the amount of the warrant for the same. The warrant, assessment, and diagram evidencing the contract price for the Marathon street improvement had not been issued at the time of the filing of this action.

Gentry left unpaid claims for labor and material on the Marathon street contract amounting to $924.72 and on the Sunset drive contract aggregating $1,587.29. He is conceded to have been practically insolvent when performance of the contract was completed. It appears that the surety did not know of the principal's financial condition until January 22, 1919, and at that date caused notice to be served on the city of the contractor's default in payment for labor and materials, and directing the city to withhold the delivery of the warrant, assessment, and diagram in connection with each contract until the city should have proof filed with it of the payment by the contractor of his obligations incurred in the carrying out of the contracts. Nevertheless, as heretofore stated, the city delivered one warrant, etc., as to the Sunset drive improvement, which was subsequently withdrawn, and had issued and was about to deliver a new warrant thereon, and also one for the Marathon street contract, when this suit was instituted by the surety.

The purpose of the action is to restrain the payment of the proceeds of the contracts to the contractor or his assignees, and to compel their application to the satisfaction of the labor and material claims incurred in the performance of the work. Certain of those to whom Gentry owed claims were made defendants, and during the trial, when their claims were established, plaintiff surety company paid the amounts thereof.

Pursuant to stipulation entered into after the actions were begun, the Municipal Securities Company was appointed receiver to take over the warrants and to hold $2,500 in the Sunset drive case and $2,300 in the Marathon street case of the proceeds collected thereunder until the issues in the proceedings were finally determined. The court gave judgment for plaintiff, and directed the receiver to pay the plaintiff sufficient to reimburse it for the payments which it had made as surety for the contractor to discharge the obliga-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tions of the latter for labor and material. It is from this judgment that the defendants appeal.

[1] The principal question involved is this: Has the plaintiff, as a surety on the contractor's labor and material bond, given, pursuant to section 6½ of the Vrooman Act, as added by St. 1899, p. 23, a right to claim the benefit of the diagram, warrant, and assessment issued under that act to reimburse itself by reason of it having been called upon to pay claims for labor and material furnished under the contract, as against defendants, who are assignees of the contractor for value, and before the plaintiff sought to compel payment? This question and principles affecting it, as applied to the facts of this case, have been passed upon partly in Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880, and partly in Los Angeles Rock & Gravel Co. v. Coast Construction Co., 197 Pac. 941.

Adamson v. Paonessa established the law to be that the surety on such a contract as the one here involved possesses no right of subrogation to the lien or claims of materialmen and laborers. Plaintiff asserts that it does not base its cause upon the theory of subrogation, but that the suit is to enforce an equitable exoneration. The first fact necessary to the maintenance of such a cause of action is the existence of funds or property belonging to the principal. If the principal has such an estate the surety may, in a proper case, subject it to the payment of the debt. Pomeroy, Eq. Juris., § 1419. In the instant case, the contractor had assigned his right to the proceeds of the contracts before these actions were instituted. In so far as the surety might have a claim to exoneration against such proceeds, they are not distinguishable from any other property which the principal might have formerly owned, but have sold before action was begun. The assessments to be collected under the Vrooman Act "are the property of the contractor, free from claims arising in connection with work called for by the contract." Los Angeles Rock & Gravel Co. v. Coast Construction Co., supra.

> "There is no provision [of the Vrooman Act] which gives such claimant any right or lien, equitable or otherwise, upon money or bonds coming to the contractor." Adamson v. Paonessa, supra.

Where the contractor has assigned before the surety sues to require the application of the debt, the surety cannot succeed as against the assignee. Los Angeles Rock & Gravel Co. v. Coast Construction Co., supra. But the respondent calls attention to the fact that in the case just cited the court said:

> "There is nothing to indicate that the assignee had any knowledge that any claim would not be paid by the contractor."

From this it is argued that, had the assignee in that case possessed such knowledge, the proceeds in its hands might have been followed by the surety for the purpose of exoneration. The language quoted mentions such lack of knowledge as incidental only to the statement made previously that "the bona fides of the assignment is not attacked." Further, the decision says:

> "The mere fact that the assignee knew of the existence of plaintiff's claim at the time of the assignment does not in itself indicate lack of good faith in the making of the assignment."

[2] In order that the surety may succeed in the instant case, it must attack the bona fides of the assignment. Bad faith must be shown. To meet this burden it is said that, while not a party to the suretyship, the assignee was not a total stranger thereto; that it had knowledge of the principal's obligations and of the surety's rights. But the court, in Los Angeles Rock & Gravel Co. v. Coast Construction Co., supra, holds that such information does not constitute a basis for a claim of bad faith.

It is further pointed out that the officers of the Municipal Securities Company knew of some bills that were not paid as early as October, 1916, and yet continued to advance money to the contractor. Our attention is not called to any evidence showing bills contracted after that time, and which were not paid. But, even though the securities company had information that the contractor had failed to pay one bill, or even two or three comparatively small claims, it does not follow that knowledge will be imputed that any other bill to thereafter become due would not be paid.

It is said that Municipal Securities Company appropriated $420.86 from the Sunset drive contract, and applied it to the Marathon street contract. Such a transfer was provided for in the financing contracts executed June 29, 1916. The application made was of money belonging to Gentry. He raised no objection. It was the payment of a debt owing by him. No action for exoneration had then been instituted.

The fact that the Pacific Bond & Mortgage Company deducted 5 per cent. from the face of the warrant in purchasing it is not evidence of bad faith. That company must collect the assessments as provided by the Vrooman Act, and there would be no object in their making the purchase except to make a profit. The record shows that the contractor arranged the assignment to the Pacific Bond & Mortgage Company, and there is nothing to indicate that the Municipal Securities Company participated in this transaction except to execute the formal assignment at Gentry's request.

It is asserted that the contractor was permitted by the defendant, Municipal Securities Company, to use $420.86 for his own living expenses, and paying alimony to his former wife, and other private purposes. The fact is not disputed that Gentry used valuable equipment of machinery and horses in the work, and devoted his own time for a period of about 8 months to directing these improvements. Respondent avers that the contractor was short of funds, at least from October, 1916, until the completion of the work. Without living expenses of as moderate amount as appears to have sufficed him, it is difficult to understand how he could have carried out the contract at all. Surely it was not unfair for him to use $420.86 during the period in question for personal purposes, or for his assignee not to have deprived him of such use. Of course, there is no question but that Gentry and the Municipal Securities Company acted entirely within their legal rights in this behalf.

[3] Respondent repeatedly urges upon our attention the fact that the Municipal Securities Company must be charged with knowledge of the provision in the contract that—

> "The party of the first part further agrees * * * that he will at his own cost and expense furnish all necessary materials and labor for said work, and that the material used therein shall comply with the said specifications, and be to the satisfaction of the said board of public works, and that he will within the time hereinafter fixed turn the said work over to the said board of public works complete and ready for use as a public street, and free and discharged of all claims and demands whatever, for or on account of any and all labor and materials used or furnished to be used in said improvement."

The law is established beyond argument that such a provision in the contract adds nothing to the obligation of the contractor, and therefore can give the surety no greater rights than he possessed without it. Adamson v. Paonessa, 180 Cal. 157, 179 Pac. 880.

But the court, in finding 8 of the Sunset drive case and finding 8 of the Marathon street case, concluded in substance that the assignments executed by Gentry to the "Municipal Securities Company," June 29, 1916, were at the time of their execution a part or a plan or scheme by which "the entire proceeds of said contract might be applied to the benefit of the defendant, Municipal Securities Company, and imposing upon the plaintiff the duty of paying all labor and material claims which said contractor might leave unpaid upon the completion of said work without recourse to the proceeds of said contract," and by finding 10 of the Sunset drive case and 9 in the Marathon street case that "on the 7th day of March, 1917, said Municipal Securities Company demanded of said board of public works, and of the members thereof, the delivery to it of the new warrant, assessment, and diagram, so directed to be issued, * * * and without the intent of appropriating to its own use the amount remaining due upon said warrant, and that said board of public works, with full knowledge of the failure of said contractor to comply with the provision in said contract requiring him to turn over said work freed and discharged of all claims and demands of every nature and kind whatsoever, for labor performed or material furnished in connection with said improvement, and notwithstanding the notice so served by plaintiff as aforesaid stated that it would deliver to said Municipal Securities Company, or upon its order, said warrant, assessment, and diagram unless restrained by order of this court," and finding 15 in the Sunset drive case and finding 14 in the Marathon street case that, while it is true that in the first case the Municipal Securities Company had paid subsequent to the 29th day of June, 1916, and up to about the 13th day of January, 1917, the sum of $4,778.74, and in the Marathon street case between the 29th day of June, 1916, and up to or about the 15th day of August, 1917, the sum of $7,325.51, that at the time said company "paid said money and every part thereof it knew that the plaintiff was surety upon the labor and material bond so given by it as aforesaid, and it paid said money under the plan and with the intent in paragraph VIII herein found. * * * It is not true that the moneys so advanced by said Municipal Securities Company to or for the account of said contractor was expended by said contractor or by said company for labor or material furnished to or used by said contractor in the performance of the work of said public improvement, but, on the contrary, a part thereof in excess of the claims of materialmen hereinbefore found to be unpaid was applied by said Gentry to the knowledge of said Municipal Securities Company to the payment of his own personal living expenses and to the performance of said contract."

Respondent asserts that these findings establish facts which remove the instant case from the control of the principles announced in Los Angeles Rock & Gravel Co. v. Coast Construction Co., supra. Appellant claims that the evidence is insufficient to justify such findings in so far as they determine the attempted perpetration of fraud upon the surety, and that if the element of fraud be eliminated, the decision of the case at bar must be controlled by the case of Los Angeles Rock & Gravel Co. v. Coast Construction Company, supra.

[4] The complaint contains no allegation of fraud or of fraudulent intent upon the part of Gentry or the Municipal Securities Company in the making of the assignments. Paragraph XIV of complaint in the Sunset drive case alleges in part as follows:

> "That on or about the 29th day of June, 1916, said H. V. Gentry filed with the board of public works of the city of Los Angeles an assignment of said contract to the Municipal Securities Company, a corporation, defendant herein."

In addition to this, paragraph XXVI reads:

> "But plaintiff alleges that such assignment, if any, is void as against plaintiff in that it was accepted by said Municipal Securities Company with full knowledge of the terms and conditions of said contract and of the right of plaintiff to have any funds or credits in the hands of said city or of any of its officers, arising out of the contract aforesaid, applied to the payment of the claims of laborers and materialmen before resort could be had to the bonds so given by plaintiff."

The complaint thus limits its attack upon the assignment to the single ground of knowledge upon the part of the assignee of the rights of the surety under the contract and bond. This Los Angeles Rock & Gravel Co. v. Coast Construction Co., supra, holds is not sufficient to defeat the assignment of the contractor's interest in such a transaction as the one here involved. During the progress of the trial, counsel for the surety company replied, "No, your honor," to the court's question, "I do not think the good faith is questioned in the matter, is it? You do not question the good faith, do you, Mr. Degnan?" The "matter" being discussed was the entire financing agreement.

The Municipal Securities Company agreed with the contractor to provide funds up to a maximum amount named in each instrument necessary to carry out the contracts. It took the assignments in question from him as security until it had advanced, from time to time, $4,778.74 on the Sunset drive contract and $7,325.51 on the Marathon street contract. The terms upon which the money was supplied were openly and clearly set forth in written instruments. Subsequently the Municipal Securities Company proceeded to use the assignments for the purpose for which they had been taken, namely, to reimburse itself for the money thus advanced, with the ordinary rate of interest as provided in the contracts. It used such reasonable precautions as were necessary for its own protection to see that the debts incurred by the contractor were paid; in this behalf it owed no duty to the surety based upon the suretyship or the financing contract, because the surety was a stranger to the latter agreement and the Municipal Securities Company had no part in the execution of the bond. There was no contractual relationship existing between them. The assignments which were taken were contemplated by the Vrooman Act, for it provides that to said assessment there shall be attached a warrant and that the said assessment, warrant and diagram shall be recorded in the office of said superintendent and thereafter shall be delivered to the contractor or his agent or assigns on demand, upon the payment of the incidental expenses not previously paid. The contractor arranged with the Pacific Bond & Mortgage Company to supply him enough money to finish the contract, and in carrying out that arrangement, it took an assignment from the Municipal Securities Company. The transactions between the contractor and his assignee were of a purely business character, each party safeguarding his own interests; neither company charged an exorbitant rate of interest for the use of their money, and Gentry substantially applied the funds which they advanced to the completion of the street improvements, so that his assignees were fully protected. There is nothing in the record to indicate a conspiracy on the part of these parties to defraud the surety, and nothing in their conduct which measures up to fraud as against the surety. Of course the surety took some risk when it executed the bonds. Presumably it received compensation for such hazards and investigated the financial standing and character of the man whose fulfillment of his contracts they guaranteed before becoming sureties on his bonds. This is not a case where the surety is asking the court to require the principal to pay the labor and material claims from funds belonging to him. It is an attempt to follow such funds after they have ceased to be the principal's property and have passed into the hands of assignees who paid value and received the property in good faith.

With no pleading alleging fraud or facts from which fraud must be inferred, and the plaintiff's distinct disavowal of any claim that the Municipal Securities Company had acted in bad faith, and without an application for the amendment of pleadings having been made or the defendant having been in any way enlightened so that it could defend itself against a charge of bad faith, it would be eminently unfair to construe the findings complained of as findings of fraud unless such a meaning were clearly expressed.

If such construction were to be placed upon them, they must be treated as surplusage, because they do not bear upon any issue presented by the complaint. Yet without them the plaintiff can have no right to a claim upon the proceeds of the warrant, diagram, and assessment in an action for exoneration begun after assignment for value.

However, the evidence to support a possible finding of fraud as summarized by respondent is that the Municipal Securities Company took the assignments with knowledge of the security's obligation, of the necessity of the contractor to employ labor and proper material, of the contractor's financial limitations, and of the provision in the contract requiring the work to be taken over free and clear of claims.

As we have previously pointed out, such knowledge as shown by evidence in this case does not make the acceptance of an assignment fraudulent.

The judgment is reversed and the superior court directed to dissolve the injunction.

We concur: **FINLAYSON, P. J.; WORKS, J.**

(55 Cal. App. 138)

ANDREWS v. FIRST NAT. BANK OF LOS ANGELES. (Civ. 3732.)

(District Court of Appeal, Second District, Division 1, California. Nov. 10, 1921.)

1. Bills and notes ⚷430—Renewal note does not extinguish debt.

A renewal does not extinguish a debt represented by a note for which it is given in lieu, unless there is a distinct and unqualified agreement that it shall so operate.

2. Limitation of actions ⚷167(1)—Passage of time does not require return of security pledged.

Neither a pledgor nor his representative possesses the right to require the return of pledged property until the debt for which it was given as security is paid and satisfied, regardless of the length of time that has elapsed since the debt was created.

3. Corporations ⚷123(6)—Agreement as to holding for future advances becomes inoperative on death of one joint debtor.

Where two persons each deposited corporate stock to secure past indebtedness and indebtedness that might be incurred in the future, upon the death of one of such pledgors the agreement that the security should be holden for future advances became inoperative, and stock of the deceased person could not be held to secure indebtedness created subsequent to his death.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Florence A. Andrews, as executrix of the estate of Joseph E. Marsh, deceased, against the First National Bank of Los Angeles. Judgment for defendant, and plaintiff appeals. Reversed.

Willedd Andrews and Tanner, Odell & Taft, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for respondent.

JAMES, J. By this action plaintiff in her representative capacity sought to secure a judgment requiring the defendant to deliver to her a certificate for 150 shares of stock in a California corporation, alleged to be of the value of $15,000. Incidental relief, that pending the determination of the action defendant be restrained from converting said stock or disposing of the same in any way, was prayed for. Defendant had judgment. Plaintiff appeals.

The stock in question had been deposited with the defendant, along with other securities of Robert Marsh and J. E. Marsh, prior to the death of J. E. Marsh, plaintiff's testator, which occurred on April 1, 1917. On November 11, 1914, J. E. Marsh and Robert Marsh, being then indebted to the defendant in various amounts, deposited with the latter six certificates representing the ownership of shares in various corporations, together with six promissory notes of third persons, altogether and on their face representing in value a large amount of money. Among the stock was a certificate for 300 shares of California Delta Farms, Inc., which was in the names of J. E. Marsh and Robert Marsh. This stock was afterwards divided and, in lieu of the one certificate, two certificates were made a part of the deposit; each representing 150 shares and being issued in the names respectively of J. E. Marsh and Robert Marsh. All of the securities mentioned were deposited subject to the terms of a written pledge agreement which was at the date last mentioned executed by J. E. Marsh and Robert Marsh. This agreement recited that—

> Whereas the parties were indebted to the defendant bank "in sundry amounts, real and contingent, due and to become due, and expect from time to time to incur further indebtedness to the said bank, now, therefore, we the undersigned, Robert Marsh and J. E. Marsh, pledge and deposit with the First National Bank of Los Angeles as collateral security for the payment of each and every liability, or liabilities, of the undersigned Robert Marsh and J. E. Marsh, or either of them, to the said First National Bank of Los Angeles, due or to become due, or that may be hereafter contracted, whether represented by notes, drafts, acceptances, or in open account, whether real or contingent, the following property."

An enumeration of the securities followed the provision quoted, and the agreement proceeded with this recital:

> "With this condition that the First National Bank of Los Angeles has the right to call at any time for such additional security as it may deem proper, and on the nonpayment of any liability or liabilities as above mentioned according to the terms and conditions thereof, the First National Bank of Los Angeles, its successors or assigns, is given full power and authority to collect or sell, assign or deliver the whole or any part of the above-named securities, or any substitute therefor, or any addition thereto, at public or private sale, at any time or times hereafter, without demand, advertisement or notice, such demand, advertisement or notice being hereby expressly waived, and upon such sale the said First National Bank of Los Angeles, or the holder thereof, may become the purchaser of the whole or any part of such personal property, discharged from any right of redemption; and after deducting all legal or other costs and expenses for collection, sale and delivery may apply the residue of the proceeds of such collection, sale or sales, to pay any, either or all of said liabilities, as said First National Bank of Los Angeles, its successors or assigns, shall deem proper, returning the overplus to the undersigned. And the undersigned agrees to pay the holder thereof any deficiency upon demand."

At the time of the death of J. E. Marsh there was apparently due to the defendant amounts represented by two promissory notes which were secured by the pledged property, to wit, one note for the principal sum of $11,937.50, dated March 7, 1917, signed by Robert Marsh & Company and Robert Marsh; also indorsed by Robert Marsh. The second note was for the principal sum of $8,000, dated March 20, 1917. From the transcript of the testimony we are unable to determine definitely by whom the latter note was signed, although it is stated in the briefs of appellant that it was made by Robert Marsh & Company. Subsequent to the death of J. E. Marsh, there was collected and credited on the $8,000 note the sum of $4,000, and several renewal notes were taken covering the amounts remaining unpaid on the two notes. These renewal notes were signed variously by Robert Marsh & Company, Inc., Robert Marsh & Company and Robert Marsh. It is stated in the briefs that there existed the corporation known as Robert Marsh & Company and also the individual business name of Robert Marsh & Company not incorporated. The testimony does not fully disclose the distinction between the two. However, we think it is immaterial to any of the questions presented as to whether the renewal notes were by the alleged corporation or by the fictitiously designated "company." The fact remains undisputed that at the time of the death of J. E. Marsh there was an apparent undischarged indebtedness on account of the two notes for which the shares of stock sought to be recovered had been given in security. Appellant's first contention rests upon the assumption that the renewal notes taken after the death of J. E. Marsh discharged the indebtedness existing at the date of his death and became new engagements.

[1, 2] Conceding that the pledge agreement hereinbefore referred to would not be binding upon the estate of J. E. Marsh for any obligation of Robert Marsh incurred subsequent to the former's death (a question which is further referred to in connection with appellant's second contention), and that the only claim of the bank against the security sought to be recovered is on account of such new obligation, then the defendant is without right to the possession of the stock. But it is fully established that a renewal note does not extinguish the debt represented by a note for which it is given in lieu, unless there is a distinct and unqualified agreement that it shall so operate. In its evidence this case is like that considered in Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273, where the court says:

> "There is no evidence which tends to show an express, or any, agreement that the new note should be received as payment. * * * 'Unless received by express agreement as payment, it did not extinguish the debt'"—citing Griffith v. Grogan, 12 Cal. 317.

In Sather Banking Co. v. Briggs Co., 138 Cal. 724, 72 Pac. 352, discussing the effect of a renewal note, the court there said:

> "It was the same indebtedness, and the renewal of it was simply a prolongation of the original contract for its payment. The general rule is that the renewal of notes does not amount to payment. Savings Bank v. Central Market Co., 122 Cal. 35. The presumption is that they were not so taken."

Decisions which treat of the release of sureties and guarantors whose obligations are strictly limited are not applicable in this case. Both of the Marshes entered into the pledge agreement with the bank as principals; presumptively they were engaged in a joint enterprise attended by considerations mutual as between themselves. The entire agreement is so characterized by its terms, and the defendant had the right to rely upon the conditions thereof. Assuming that the plea of the statute of limitation might have some place under the facts of the case as is suggested by appellant, still the pledgor, or his representative, would possess no right to require the return of pledged property until the debt for which it was given as security is paid and satisfied, regardless of the length of time which may have elapsed since such debt was created. This proposition is settled beyond the reach of dispute by California decisions. Puckhaber v. Henry et al., 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844; Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 Pac. 67.

[3] That the terms of the pledge agreement cannot be extended so as to bind the estate of J. E. Marsh for advances made by defendant bank to Robert Marsh or on his behalf subsequent to the death of said J. E. Marsh seems not to be a matter seriously disputed by the argument presented. Indeed, it must be admitted as an unanswerable legal proposition that, upon the death of J. E. Marsh, that term of the pledge agreement providing that the security should be holden for future advances became then inoperative. It is in view of this situation that counsel for appellant make their second contention against the validity of the judgment. It is by them insisted that the evidence shows that portions of the securities deposited under the pledge agreement were converted into cash and applied upon new indebtedness of Robert Marsh or Robert Marsh & Co. created after the death of J. E. Marsh. If it is a fact that the notes bearing date subsequent to the death of J. E. Marsh were in fact renewals, the evidence disclosed by the record does not so establish. The testimony of the bank officer was clear enough to the point that the notes, for which the stock sued for was being held, were in fact renewal notes of indebtedness accruing prior to the death of J. E. Marsh; but the same testimony was not

given as to the indebtedness which the bank discharged by the sale of securities subsequent to the death of said Marsh. For instance, in a written memorandum admitted in evidence as "Exhibit A," an executive officer of the bank set forth that 175 shares of mortgage guaranty stock standing in the name of Robert Marsh were sold on dates in 1918, 1919, and 1920 and proceeds applied on notes of Robert Marsh dated variously in July, 1917, April and May, 1919. The aggregate sum of money collected upon the sale of this stock exceeded $17,000. There was also noted the sale of 150 shares of Delta Farms stock, for which $8,997 was received, which money was applied on a $20,000 note of Robert Marsh & Co. dated April 13, 1919. It appeared by the testimony of the same witness that J. E. Marsh had, after the pledge agreement was made, executed both individual notes and notes in other form, but that these notes had all been paid. Upon the face of the testimony of the bank official, we think that it was established prima facie that application of pledge security money was made in discharge of indebtedness of Robert Marsh or Robert Marsh & Co. created subsequent to the death of J. E. Marsh, and that the amount realized on such securities was in a sum in excess of that still claimed to be due the bank on the unpaid notes before mentioned. If that evidence represents the true situation, then the bank must be deemed to have in its hands money realized upon the sale of pledge securities more than sufficient to satisfy all of the remaining debt which arose under the pledge agreement. Hence it would follow that the stock, to recover which this action is brought, would be freed from any charge arising on account of the contract of J. E. Marsh, deceased. From the conclusions expressed it follows that plaintiff is entitled to a new trial.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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54 Cal. App. 776

CALDWELL v. WESTERN DEVELOPMENT CO. et al. (Civ. 3774.)

(District Court of Appeal, First District, Division 2, California. Oct. 31, 1921. Rehearing Denied Nov. 30, 1921. Hearing Denied by Supreme Court Dec. 29, 1921.)

1. Appeal and error 🔑194(2)—Sufficiency of denials of answer not questionable for first time.

The sufficiency of denials in an answer not questioned in the trial court cannot be raised on appeal.

2. Partnership 🔑225—Partnership agreement properly silent as to termination or continuance of lease to firm on retirement of partner.

Whether either partner could terminate a lease to the firm any time by withdrawing from the firm, or whether the other partner could continue it, are matters concerning the lessor, to be provided for in the lease, if at all, and as to which the partnership agreement is properly silent.

3. Landlord and tenant 🔑24(1) — Lease of business definite as to what lessees were to receive therefrom.

Provision of lease of ranch with a business of raising, buying, and fattening stock, and then selling it, that the lessees "for a full and final remuneration for their services and investment were to receive one-half of the gross proceeds," is not ambiguous and void under Civ. Code, § 1598.

4. Landlord and tenant 🔑24(1)—Under lease of business lessees to return an equal number in kind.

Under such lease, it is clear that the lessees are not to retain the specific stock and return it to the lessors at termination of lease, but return an equal number in kind.

5. Landlord and tenant 🔑24(1)—Termination of lease by one of the parties authorized.

The provision of such lease that, if any of the parties shall wish to terminate it, the retiring party shall recompense the others for any loss sustained by such retirement, authorizes one of them to terminate it, and so was not uncertain in that respect.

6. Landlord and tenant 🔑24(1)—Lease properly silent as to partnership matter of one of the parties.

Such lease was properly silent as to how, if it is terminated, the members of a partnership, constituting one of the parties, should settle between themselves; this being a partnership matter.

7. Landlord and tenant 🔑24(1)—Under lease, lessor held to have right to direct that alfalfa be not planted.

Under the provision of such lease that the lessees are to sow 10 acres of alfalfa each year, and that the welfare of the operations of the ranch shall be under the personal supervision of the lessor, it has the right to direct, in any one year, that the alfalfa need not be sown.

8. Landlord and tenant 🔑24(1)—Under general covenant to return articles in good condition, no excuse.

Under lease of buildings and personal property providing, without any exception, for return of everything in as good condition as at time of leasing, there is no excuse for not doing so.

9. Contracts 🔑9(1)—Enough that intention can be ascertained.

A contract is not void for ambiguity if so framed that one can readily ascertain the parties' intention by following the well-established rules governing the interpretation of contracts stated in Civ. Code, §§ 1635–1661.

10. Contracts 🔑9(1)—Not wholly void where vague only as to some of its objects.

A contract which has several objects, and is not "so vaguely expressed" as to all those objects "as to be wholly unascertainable," is not wholly void, as, under Civ. Code, § 1598, is a contract having but a single object so vaguely expressed.

11. Appeal and error 🔑843(2)—Clauses as to which contract has become an executed contract not to be questioned.

After a contract has become an executed contract as to all the clauses except the one as to division of the "gross proceeds," the other clauses cannot be questioned, since they present only moot questions.

12. Trusts 🔑33, 359(1)—Delivery of personalty for management or liquidation created a trust; trustee acting within rights in selling liable only to account and not for conversion.

Where the lessees of a stock-raising business with consent of the lessor turned it over to a third person to look after for the benefit of all, he became a trustee of the lessees to manage, or liquidate, as the necessities might demand, so that in selling the personal property he was acting within his rights, and not guilty of conversion, though, in a proper case, accountable to the lessees for matters during his trusteeship.

13. Judgment 🔑249—In action for conversion, judgment held properly for defendants where any right was only for accounting by trustee.

Where, though any liability of defendant was to account as trustee to plaintiff and his partner, plaintiff sued for conversion, successfully met demurrers and motions based on the necessity of the partner being a party, made no motion to make him a party, and produced no evidence that defendant had received any money for which it should account, there was no error in not ordering an accounting, instead of rendering judgment for defendants.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Orville R. Caldwell against the Western Development Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

F. H. Dam, of San Francisco, for appellant.

C. W. Humphrey and E. F. Conlin, both of San Francisco, for respondents.

STURTEVANT, J. Plaintiff commenced an action to recover a money judgment against the defendants; a trial was had, the court sitting without a jury; the defendants had judgment; and the plaintiff appealed under the new method.

In his complaint the plaintiff alleged that the Western Development Company was a corporation; that defendant W. S. Gray owned all of the stock of the corporation and was executive officer and manager; that in May, 1917, acting on the suggestion of the defendant W. S. Gray, the plaintiff and John C. Gray (son of W. S. Gray) as partners, and the corporation, executed a lease or agreement; that at the same time plaintiff and John C. Gray executed a partnership agreement; that thereafter the corporation turned over to the partnership live stock estimated at $1,446.50 and purchased other stock which, added thereto, aggregated $3,253.31; that plaintiff paid $1,084.40; that he devoted his time from May 21 until December 22, 1917, of the reasonable value of $510; that he expended $240 on feed and supplies; that on the 26th day of December, 1917, the plaintiff discussed with "the defendant W. S. Gray the question whether plaintiff would be subject to conscription in the United States Army; that thereupon and on said day, the defendant W. S. Gray stated to the plaintiff that both plaintiff and the said John C. Gray probably would be subject to such conscription and that it would be better for the plaintiff and said John C. Gray to enlist at once in such branch of the service as they respectively preferred; that said defendant further stated to plaintiff, as an inducement to such enlistment on the part of plaintiff, that said defendant would make a fair and just settlement with plaintiff of all that would be coming to plaintiff out of said farming enterprise in which the said parties were then, as aforesaid, engaged; and that said defendant then and there further stated, as an additional inducement for plaintiff's enlistment in the military service of the United States, that if necessary, the said defendant, himself, would go up to said ranch and actively manage and operate the same for the benefit and advantage of the said several parties interested therein." It is further alleged that on the 2d day of January, 1918, plaintiff did enlist and subsequently remained in the said service; that thereafter the said W. S. Gray "sold all of the cattle, hogs, and other live stock, and all of the personal property of whatsoever kind hereinabove mentioned and has converted the money and the whole thereof received therefór"; that defendants have failed and refused to account to plaintiff. Thereupon plaintiff prays judgment for $1,834.40, being the amount of the moneys by him invested, and the value of his labor. The defendants each answered separately; no demurrer was interposed to the answer of either one. In one answer the pleading is:

"Denies that defendant W. S. Gray did, or now does, or at any time mentioned in the complaint on file herein, own all of the stock of the Western Development Company, a corporation, and in this connection defendant alleges that he only owned five per cent. of stock in said company."

The other answer is worded:

> "Denies that at any time mentioned in said complaint that W. S. Gray owned more than above five (5) per cent. of stock of the Western Development Company."

[1] During the trial no question as to the sufficiency of such denials was presented to the trial court. Such denials must now be considered as sufficient. Grogan & Lent v. Ruckle, 1 Cal. 193, 196; 2 Hayne New Trial and Appeal, § 280. With the exception of the allegation as to ownership of stock, the trial court found in the language of plaintiff's complaint in plaintiff's favor on every allegation which we have mentioned above, but gave judgment in favor of the defendants. Both in the trial court and in this court the defendants have contended that the plaintiff may not maintain this action, or any action, regarding the subject-matter except that he make John C. Gray a party, and then, and in that event, the only proper action for the plaintiff to maintain is an action for an accounting. The plaintiff has contended that such would ordinarily be the rule, but that both of the instruments, the lease and the partnership agreement, are void as being wholly ambiguous. Civ. Code, § 1598. If this contention on the part of the plaintiff is well founded, then it may be assumed, without going into the matter, that the judgment should be reversed; but, if the plaintiff is mistaken in such contention, then the judgment must be affirmed.

[2] We shall take up first the consideration of the attack made on the partnership agreement. It is: You cannot tell from the partnership agreement (1) whether either partner could terminate said lease at any time, by withdrawing from it, or (2) whether the other partner could continue the lease by settling with the one withdrawing. As to the first item, the instrument is, very properly, silent. Such subject should be provided for in the lease, if at all. The lessor would be entitled to be heard before the lease could be terminated. As to the second item, the instrument is, very properly, silent. If one partner retires from the contract it is a matter concerning the lessor and the remaining lessee what the future terms are to be—not a subject to be inserted in a dissolved contract. The instrument provides, in the event the lease is terminated, how the partners may settle between themselves. The passage is reasonably clear and is not attacked by the plaintiff.

In elucidating his contention that the lease is void for ambiguity the plaintiff enumerates: That it cannot be ascertained whether the lessees were to divide the gross returns, gross receipts, profits, or receipts; whether the lessees were to retain and later return the specific stock or whether certain portions were to be sold from time to time; whether any one of the three parties had the right to terminate the lease; whether, upon the termination of the lease, the parties were entitled to share in the profits or only in losses; and whether it was the duty of the lessees to check and sow ten acres of alfalfa each year in any event, or, only by direction of the lessor. The plaintiff also enumerates: That it cannot be ascertained whether damage by fire is to be borne by the lessees in the first instance, and thereafter shared by the lessor; whether the duty of restoring burned buildings applies to all fires or merely fires caused by the fault or negligence of the lessees; whether the lessees are to make good all stock that dies from any cause or only stock that dies by the fault or negligence of the lessees; and whether it is the duty of the lessees to furnish necessary feed even though feed must be purchased at great cost.

[3-9] The foregoing attacks, in the order stated, we shall now consider. The lease provided that the lessees "for a full and final remuneration for their services and investments were to receive one-half of the gross proceeds." That passage clearly answers the first attack. The evidence showed that the lessor had been engaged in the business of raising, buying, and fattening stock and then selling the same, and that it was such business which he leased to the lessees and which they were to conduct. Therefore it is clear that the lessees were not to retain and return the specific stock, but were to return an equal number in kind. It is provided:

> "This lease shall terminate on the first day of March, 1920, and if for any reason, any or either party to this lease shall, for any reason, wish to terminate the same, the retiring party shall suitably recompense the remaining party for any loss that they may sustain by reason of such retirement."

In the event of a termination of the lease the instrument is silent as to the manner in which the partners should settle between themselves. This is as it should be. Such a matter was a concern of the two partners and not a concern between the lessor and the lessees. It is provided in the lease that the lessees are "to properly check and sow ten acres of alfalfa each year," and it is also provided in legal effect that the welfare of the operations of the ranch shall be under the personal supervision of the defendant corporation. Therefore the defendant corporation had the right to direct, in any one year, that the alfalfa need not be planted. The lease covered certain lands and buildings, and certain personal property thereon and to be added thereto, and it further provided:

> "To return all stock, tools, buildings, equipments, horses, and everything in as good con-

dition as they received it, at the expiration of this lease * * * to abandon and give peaceable possession of the premises, stock and tools, in as good a condition, and the same kind, as there now are on these premises."

No exception whatever was written into the contract. It follows that the meaning of the contract is exactly what is written on the face thereof. A similar question was presented in Polack v. Pioche, 35 Cal. 416, and at page 422 (95 Am. Dec. 115), the court said:

> "A general covenant to repair is binding upon the tenant under all circumstances. If the injury proceeds from the act of a stranger, from storms, floods, lightning, accidental fire, or public enemies, he is as much bound to repair as if it came from his own voluntary act. Such has been the settled rule since the time of Edward III. (2 Platt on Leases, 186, 187, and cases there cited.) If the tenant desires to relieve himself from liability for injuries resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operation of his covenant."

The principle is applicable alike to covenants regarding personal property as well as to real property. That case was cited with approval in Ahlgren v. Walsh, 173 Cal. 27, 32, 158 Pac. 748, Ann. Cas. 1918E, 751. In support of his contention concerning ambiguous instruments, the appellant cites to us a number of cases; some of them do not deal with so-called ambiguous instruments, but do deal with and consider inchoate instruments. Donnelly v. Adams, 115 Cal. 129, 46 Pac. 916; Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 Pac. 1000; Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897; Durst v. Jolly, 35 Cal. App. 184, 169 Pac. 449. The case of Peerless Glass Co. v. Pacific, etc., Co., 121 Cal. 641, 54 Pac. 101, does deal with an ambiguous instrument but is not otherwise helpful. Van Slyke v. Broadway Ins. Co., 115 Cal. 644, 47 Pac. 689, 928, is more nearly in point. But in that case the Supreme Court remanded the case to the trial court to enable the plaintiff to plead and prove the omitted parts of the contract, if any had been omitted. In the instant case, the instrument is not so frail; on the other hand, each instrument is so framed that one can readily ascertain the intention of the parties by merely following the well-established rules governing the interpretation of contracts. Civ. Code, §§ 1635–1661; Sutliff v. Seidenberg, Stiefel & Co., 132 Cal. 63, 64 Pac. 131, 469.

[10] Again, each instrument contained several objects. Neither instrument was "so vaguely expressed" as to each and all of those several objects "as to be wholly unascertainable." Neither instrument then, was wholly void. Civ. Code, § 1598.

[11] Moreover, when on December 26, 1917, the defendant W. S. Gray took over the management of the business, each of the instruments became executed contracts as to every clause except the division of the "gross proceeds." The time then expired during which any of the other clauses could be questioned. To discuss them now is to discuss moot questions.

[12] The plaintiff and John C. Gray were partners. As such partners they were the lessees down to the date in December when they enlisted. In taking the step of leaving the ranch and turning the same over to W. S. Gray, as alleged and found by the trial court, they did not act wrongfully, but all parties acted by agreement. Thereupon W. S. Gray became the trustee of the partners to manage, or liquidate, as the necessities might demand. When thereafter he sold the personal property he was acting within his rights as such trustee and was not guilty of conversion. Bragg v. Martenstein, 25 Cal. App. 199, 143 Pac. 79. However, in a proper case, he could have been required to account to the two partners for matters arising during his trusteeship.

[13] The plaintiff complains because the trial court did not order an accounting instead of the judgment which it did order. The attack is wholly without merit. When the defendants appeared they presented long demurrers. It was the very gist of each and all of the demurrers that plaintiff's complaint showed the existence of a copartnership, that John C. Gray was a partner and a necessary party, and that the plaintiff's rights could not be ascertained until John C. Gray was made a party and an accounting was had. The plaintiff resisted those attacks and induced the trial court to overrule the demurrers. During the course of the trial the defendants made objections to various questions, the force of the objection being that the subject-matter was immaterial if John C. Gray was not a party. All of such objections were countered by the plaintiff. Finally the defendants made a motion for a nonsuit and in the motion they included the same attack. That motion was opposed by the plaintiff and later it was withdrawn, and the case was submitted. It is patent that John C. Gray was a partner. However, before it can be adjudged that he was a partner, and that an accounting should be had, he is entitled to be made a party and to be heard on that very issue. At the end of the plaintiff's case the trial court did not have the jurisdiction to order amendments, and to order John C. Gray to be brought in and made a party except that the proceedings, theretofore had and taken, be had anew. No such motion by the plaintiff was ever made in the trial court, but, on the other hand, such procedure was by him at all times opposed. At this time he may not

change his position. Again, it does not appear that a fund exists for which an accounting should be had. The plaintiff asserts the fact was admitted by the pleadings. In this assertion we think he is in error. In the trial court he treated the pleadings as making an issue as in conversion, but he never produced any evidence that the defendants received any moneys for which they should account.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: LANGDON, P. J.; WASTE, Justice pro tem.

On Petition for Rehearing.

LANGDON, P. J. In petitioning for a rehearing, the appellant has earnestly contended that the statement of facts contained in the opinion heretofore filed precludes him from properly presenting the matter to the supreme court of this state upon application for a hearing there. The following portions of the pleadings are asked to be made a part of the opinion of this court:

The complaint alleges that—

> "W. S. Gray, without obtaining or asking the consent of the plaintiff, and without notice to plaintiff, has sold all of the cattle, hogs and other live stock and all the other personal property of whatsoever kind hereinabove mentioned and has converted the money and the whole thereof received therefor to the use of the said defendants; that defendants have failed and refused and do now fail and refuse to account to plaintiff therefor; * * * but said defendants have appropriated and do now appropriate the same and the whole thereof to their own benefit and advantage."

The defendant corporation answered the foregoing allegation as follows:

> "Denies that this defendant without obtaining or asking the consent of plaintiff or without notice to plaintiff sold all of the cattle and hogs and live stock and all other personal property whatsoever on said ranch; * * * denies that this defendant has appropriated the whole or any part of any money or thing of value which belongs to or in which plaintiff is interested to its own use and benefit or advantage."

Defendant W. S. Gray answers the foregoing allegations of the complaint as follows:

> "Denies that this defendant converted the money and the whole thereof obtained from the sale of said cattle and the personal property to his own use."

The foregoing extracts from the pleadings are hereby made a part of the opinion heretofore filed herein, for the benefit of the appellant.

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55 Cal. App. 268

BENNETT v. BENNETT. (Civ. 4001.)

(District Court of Appeal, First District, Division 1. California. Nov. 19, 1921.)

1. Divorce ⚷27(18)—Intoxication and loose habits may be cruelty.

Frequent intoxication in public places and at home and loose habits of the husband with other women, even though they are insufficient as grounds for divorce as habitual intemperance or infidelity, may entitle the wife to divorce for cruelty, where the evidence shows they caused her great mental anguish and serious physical and nervous disorder.

2. Appeal and error ⚷994(3) — Attack on credibility of testimony accepted by trial court not sustained.

On appeal from a judgment an attack on the testimony of witnesses, who corroborated the testimony of the plaintiff, and whose testimony was accepted by the trial court, can have no influence.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action for divorce by Susie H. Bennett against George E. Bennett. Judgment for the plaintiff, and defendant appeals. Affirmed.

L. L. James, Jr., and C. A. S. Frost, both of San Francisco (Francis V. Keesling, of San Francisco, of counsel), for appellant.

Scrivner & Hettman, of San Francisco, for respondent.

RICHARDS, J. [1] This appeal is from an interlocutory decree in an action for divorce. The complaint alleged and the trial court found extreme cruelty on the part of the defendant as the basis of the action and decree. The appellant attacks the findings of the trial court upon this issue as not sufficiently supported by the evidence, and also upon the ground of insufficient corroboration to satisfy the requirements of the Code. We have examined the record with respect to both of these contentions, and we do not find that either of them can be sustained. The parties to this action intermarried in San Francisco on April 11, 1889. At the time of their marriage the defendant was employed in a stevedore and ballasting business, then chiefly owned by a man named Hazeltine, at a salary of $90 a month. He continued in this employment for about two years, when his wife, the plaintiff herein, by mortgaging some property of her own was enabled to assist him in forming a partnership with his employer. From this on the defendant appears to have prospered financially until at the time of the final separation between the parties hereto in 1919 he had acquired valuable interests in several corporations, and was in receipt of a salary from these aggregating about $400 a month, besides being possessed of several pieces of real estate. With this increasing prosperity came convivial habits, which grew into intemperance with frequent intoxication, often in public places, and at home, causing his wife much humiliation and distress of mind. While thus intoxicated upon one occasion he undertook to drive an automobile upon a public highway in Marin county, with the result that it was overturned, a lady guest of himself and wife was killed, and both his wife and himself severely injured. He also took to loose habits of living, remaining often away from his home overnight and being seen with other women in restaurants and places of resort. These lapses, while they may not have furnished ground for divorce either upon the ground of habitual intemperance or of infidelity, were alleged and shown to have caused his wife great mental anguish and serious physical and nervous disorder. They thus furnished sufficient basis for an action for divorce upon the ground of extreme cruelty. Geierson v. Geierson, 156 Cal. 434, 105 Pac. 120, 134 Am. St. Rep. 137.

[2] Upon the question of corroboration of the evidence of witnesses other than the plaintiff herself, it was we think ample to satisfy the section of the Code requiring additional evidence in divorce cases. The attack which the appellant makes upon certain of these witnesses might possibly have served its purpose in the trial court, but it could have no influence here, since the trial court accepted the testimony of these witnesses and found the facts to be in accord with it. Taking the record as a whole, we think that the findings of the trial court were justified by the evidence, and that its interlocutory decree was correct.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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55 Cal. App. 219

AUTOMOBILE, TRUCK, TRACTOR & IMPLEMENT CO. et al. v. SALLADAY.

(Civ. 2252.)

(District Court of Appeal, Third District, California. Nov. 15, 1921.)

1. Replevin 🔑8(4), 68—Plaintiff must show present right, and may not amend to show right subsequently accruing.

A plaintiff in replevin on commencing his action must show a present right of recovery, consequently lessor of automobile, suing to recover possession by reason of an alleged default in payment of installments of rent, was not entitled to file a supplemental complaint and set up failure to pay installments due after the taking of the car by the sheriff.

2. Bailment 🔑18(1)—Lessor cannot withhold chattel and collect rent money.

Lessor cannot collect rent for the use of a chattel after he has repossessed himself thereof and elected to terminate the lease by reason of an alleged default in payment of an installment, at least in the absence of an express covenant to that effect, and nonpayment of installments due after the retaking of the chattel cannot be assigned as a basis for forfeiture.

3. Master and servant 🔑72½—Salesman held entitled to traveling expenses.

Where a letter employing salesman at a certain salary and commission to sell trucks, tractors, and other goods did not intimate that the salesman was to travel or discharge his duties at any place other than the one indicated in the caption of the letter, the salesman was entitled to show that he was entitled to payment of certain expenses incurred by reason of his being sent to various counties to sell goods.

4. Evidence 🔑210 — Defendant in replevin held entitled to prove statement of plaintiff in deposition.

In replevin by lessor of automobile based on an alleged default, wherein defendant claimed certain credits by reason of expenses incurred in his employment with plaintiffs when traveling, the defendant was entitled to prove as an independent statement or admission, and wholly without reference to impeachment, a statement of one of the plaintiffs in a deposition that plaintiffs had agreed that defendant was to have "any expenses of going out of town, hotel bills, or anything incidental to the business."

5. Payments 🔑25—Credits applied on obligations without agreement.

Where automobile was leased by one employed as salesman by lessor, the salesman had the right to credit on rent installments any items or credits to which he was entitled, arising in the course of his employment with the lessor; the law supplying the contract that they should so apply, in view of Code Civ. Proc. §§ 437, 438, 440.

6. Bailment 🔑33—Charge that jury might find alleged lease was absolute sale properly refused, where contract was clear.

In replevin by lessor of automobile under a writing, which was plain, clear, and wholly free from ambiguity, and provided for a lease and not a sale, court did not err in refusing to charge the jury that they might find that the alleged lease was in fact an absolute sale.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Automobile, Truck, Tractor & Implement Company and others against L. O. Salladay. Judgment for plaintiffs, and defendant appeals. Reversed.

Weldon & Wessels, of Ukiah, for appellant.

Charles Kasch, of Ukiah, and W. F. Cowan, of Santa Rosa, for respondents.

PREWETT, Justice pro tem. This case involves an alleged forfeiture of a lease of a Nash touring car. The respondents, by an instrument in writing, on March 18, 1919, leased to appellant the car in question for an agreed rental of $1,720 payable as follows: $270 in cash, $700 in two months, and the balance in monthly installments of $62.50. It is provided in the lease that there should be a monthly payment of $62.50 on May 18th, making the payment for that date $762.50; but both the complaint and answer show that this provision is a mistake, and that only $700 was to be paid on that date. It is expressly provided that the lease shall terminate on May 18, 1920. An important provision of the lease reads:

> "Lessee acquires no interest or title to said property, *it being distinctly understood that this is a lease.*" (The italics are ours.)

A further provision reads:

> "If the lessee fails to make any payments herein provided * * * then this lease shall ipso facto become immediately terminated, without any notice whatsoever to the lessee, and the lessors may take immediate possession of said property without legal proceedings," etc.

Time is declared to be of the essence of the contract.

The respondents received from the appellant a certain Grant car on the $700 payment, and credited appellant with about $475 on account thereof. A further credit for gasoline used by appellant in his work for the respondents, and a further sum of $100 due him as salary, brought the entire credits up to $624.87, leaving due, according to the claims of the respondents, a balance of $75.13 on the $700 payment, which, as above set out, became due on May 18, 1919. The action was commenced on June 8, 1919, and before any other or further defaults had accrued. Hence the entire cause of action turns upon the existence of this alleged default. It is admitted that the appellant has never paid this balance of $75.13 in cash. He claims, however, that it was fully and more than compensated by certain counter demands for salary, gasoline, hotel bills, use of his car, and extra commissions earned by the sale by him of certain pleasure cars, all aggregating several hundred dollars in excess of the amount due at the time of the alleged default. The court, on motion, struck out his defense founded thereon, and the alleged error of the court in so doing will be noticed further along.

On June 10, 1919, two days after the commencement of this action the respondents caused the property in question to be seized by the sheriff and delivered to them, and thence hitherto have held and possessed the same. On May 8, 1920, about 11 months after filing the original complaint, the respondents filed a supplemental complaint, wherein they allege a succession of defaults covering all the 11 payments that were provided to be made in the interval from June 18, 1919, to April 18, 1920, both dates inclusive, and aggregating $687.50. Upon these 11 alleged defaults, the respondents base additional claims of forfeiture. It is expressly averred in the supplemental complaint that these additional sums became due "as rental for the use of the automobile." The appellant moved the court to strike out the supplemental complaint on the grounds that the complaint showed that the lease had been terminated on June 8, 1919, and that he was not liable for rent while deprived by the owners of the use of the car. The court denied the motion and overruled a demurrer urging the same grounds. The court, over objection admitted evidence to sustain the allegations of the supplemental complaint, and instructed the jury, in its third and seventh instructions, that they must find for the respondents if said sum of $687.50, or any part thereof, was unpaid at the time of trial.

[1] In these rulings and instructions prejudicial error was committed. It is settled law in this state that a plaintiff in replevin on commencing his action must show a present right of recovery. Of a large number of authorities in support of this principle, attention may be directed to Afferbach v. McGovern, 79 Cal. 268, 21 Pac. 837, Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750, and Holly v. Heiskell, 112 Cal. 174, 44 Pac. 466. If the original complaint in this action did not show in respondents a present right of possession, the action was premature, and there was nothing to supplement. On the other hand, if the complaint did show such right of possession by reason of the alleged default, no subsequent defaults could show that fact in any greater degree. If their right to the property had then vested, it was because of the election by them, under the terms of the lease, to terminate the right of the appellant and, in fact, to terminate the lease itself. The lease is especially strong in its provisions that a default by the appellant terminates both his right and the lease itself.

It is thus seen that, although the respondents by their own act deprived the appellant of the use of the property, they nevertheless attempt, by this supplemental complaint, to charge him for the use of the auto for the many months during which they withheld such use from him. And they have sought to predicate still further forfeitures upon his default in failing to pay for such deprived use. The trial court in its instructions has gone even further, and has, in effect, charged the jury that, although they may find that the original default as to the $75.13 never occurred, still, if they find that some or any of these 11 later defaults occurred, they must find for the respondents.

[2] It needs no citation of authorities to show that a lessor cannot collect rent for the use of a chattel after he has repossessed himself of the chattel and terminated the lease. He cannot, at least in the absence of an express covenant to the contrary, withhold the chattel and still collect rent money for its use. If the respondents were not entitled to collect rent for this 11 months' period, it follows that they cannot assign the nonpayment thereof as a basis for a forfeiture. Our attention has not been drawn to any California case wherein personal property was involved which fully covers this principle. No difference, however, in this regard can be discovered between leases involving real property and those involving chattels. Each party is estopped to claim both the possession of the leased property and compensation for its use. Each, when he voluntarily terminates the lease, and, by regaining the property places it out of the power of the lessee to use it, terminates the lease for all purposes.

In Morse v. Tochterman, 21 Cal. App. 726, 132 Pac. 1055, this court uses the following language:

> "The neglect of the landlord to keep the premises in a condition suitable for the purpose for which they were rented may be treated as an eviction by the tenant and he may refuse to pay rent."

Skaggs v. Emerson, 50 Cal. 3, is referred to with approval in many of the later cases. On page 6 thereof the court says:

> "But if the averments of the answer, which were stricken out by the court below, are true, no recovery could be had upon the covenant to pay rent, since defendant had been evicted by the plaintiff from a substantial part of the demised premises. * * * As he was not liable to pay rent if the averments of the answer are true, the lease was not forfeited by reason of the nonpayment, whatever notice or demand was given or made."

Brandt v. Phillippi, 82 Cal. 640, 23 Pac. 122, Dengler v. Michelssen, 76 Cal. 125, 18 Pac. 138, and Kelley v. Long, 18 Cal. App. 159, 122 Pac. 832, are to like effect. The respondents had an election of remedies, and, having elected to repossess themselves of the property and terminate the lease, they cannot collect rent that was never earned, nor assign its nonpayment as a ground of forfeiture. This rule heaps no hardship upon respondents, since they had the use of their property during this entire period of 11 months. The contrary rule would deprive the appellant of the property and still hold him for unearned rentals. We conclude that the respondents were not entitled to rent after they took possession of the property, nor to avail themselves of alleged defaults occurring after that event. It is impossible to determine whether the jury found for the respondents by reason of these subsequent defaults or on account of the original default in failing to pay the aforesaid balance of $75.13. It seems probable, if we may be permitted to conjecture, that the verdict was based upon some of the subsequent defaults. The acts of the court in sustaining the supplemental complaint, in admitting evidence in support thereof, and in instructing the jury that it might found its verdict thereon, constitute fatal errors, for which the judgment must be reversed.

In instruction numbered 7B the court instructed the jury as follows:

> "In the letter from Mr. Weldon to Mr. Held the defendant claims a credit of $83.80 for tires for the Grant and Nash cars. When a witness in his own behalf, defendant stated that he no longer claimed such a credit. Therefore in determining the indebtedness of Mr. Salladay to the plaintiffs you should charge him with $83.80 for said tires."

The appellant insistently claimed that he was not to be charged with these tires, and at no time did he testify to the contrary. Not only is the charge erroneous for this reason, but it implies the existence of an indebtedness from the appellant to the respondents—one of the very facts in issue.

The court in one of its instructions (7D) instructed the jury as follows:

> "The defendant when on the witness stand admitted that the statement in one of his verified answers that he is now indebted to the plaintiffs in the sum of $165.12 is true," etc.

These alleged admissions are mere affirmative answers to certain questions propounded to the appellant by the attorney for the respondents in the course of the cross-examination. A careful reading of pages 90 to 94 and of page 113 of the transcript shows clearly that the appellant did not intend to be so understood. In the light of his vehement insistence that he owed nothing at all, it was an invasion of the province of the jury to charge that he owed that sum. Moreover, the charge advises the jury that this admission was made in a verified answer. The record before us does not justify this statement.

Since the case must go back for a new trial, it is proper that we notice some other points, which will probably arise in the course of the subsequent proceedings. About six weeks prior to the date of the lease the respondents hired the appellant as a salesman. The respondents insist and the court instructed that the terms of this hiring are fully shown by the following letter:

> "Santa Rosa, Cal., January 30, 1919.
>
> "L. O. Salladay, Ukiah, Cal.—Dear Sir: Confirming our conversation of a few days ago, please be advised that you are hereby engaged as of Feb. 1, 1919, by this company to sell trucks, tractors and such other articles as we now handle, on the following basis: Salary, $200 per month, semimonthly, with a commis-

sion of 7 per cent. on net factory price on all sales over $3,500 per month. This applies to trucks and tractors only. Other arrangements regarding pleasure cars will be made at some future date. Yours very truly, Automobile Truck, Tractor and Imp. Co., by B. M. Levy, Trustee."

[3, 4] That portion of the controversy that revolves around this contract of employment concerns certain items incurred by the appellant while in the discharge of his assigned duties for the respondents. These other items do not involve the services rendered by appellant, but are incidental thereto, such as hotel bills while traveling for respondents, use of auto, bills for gas, oil bills, and tires. It will be noticed that there is no provision or intimation in above letter that the appellant is to travel or, in fact, to discharge his duties at any place other than the one indicated in the caption of the letter. When, therefore, the respondents sent the appellant into various counties to sell goods such directions were over and above and independent of the terms contained in the letter itself. It is immaterial whether these directions involved express or implied contracts for reimbursement. In either event they constituted legitimate demands against the respondents. The respondents implied as much when they gave the appellant credit for part of the bill for gasoline and a balance of $100 due on monthly salary. The appellant sought to show that one of the respondents had testified in his deposition that they had agreed with appellant that he was to have "any expenses of going out of town, hotel bills or anything incidental to the business." The court sustained an objection to proof of this admission on the ground that no basis for impeachment had been laid. The appellant was entitled to prove this as an independent statement or admission made by a party to the suit and against his own interest, and wholly without reference to impeachment.

Another and a very important item of offset is the claim of appellant to $120 commission on the sale of one pleasure car and $175 on another. These commissions, it will be observed, are expressly reserved in the letter of employment above quoted. There seems to be no possible cavil that the appellant was entitled to offset this demand against the alleged deficit of $75.13 on the $700 payment. The appellant turned in a Grant car at $700 on the rental for the Nash car in suit. There is no dispute that he was to receive this credit, and that it was to go on the $700 payment that became due on May 18, 1919. However, the respondents claim that, while they nominally allowed him credit for the full sum of $700, they were entitled to deduct, and did deduct, therefrom various items of repairs expended on the Grant car by them. In this way, the actual credit was reduced to less than $500. The appellant filed an answer wherein he set up these various items as cross-demands or set-offs to the demand of the respondent for rent. He set up also an alleged agreement that he was to have credit for the Grant car in the full sum of $700. These defenses were all stricken out on motion of the respondents. We are at a loss to understand upon what theory this order can be sustained, and we receive no aid thereon from the respondent's brief. These various demands are sufficient in amount, if sustained by evidence, to meet and far more than compensate the demands of respondents for rent. The court repeatedly struck out or excluded evidence offered by the appellant for the purpose of proving these demands. This was in line with its policy in striking out the allegations of the answer concerning them.

[5] In this answer it is averred that some of the demands were to constitute payment on the rent, while, as to others, it is merely averred that they were contracted in favor of appellant. It is manifestly immaterial, save as to the method of proof, whether the parties expressly contracted that they were to constitute payment pro tanto, or whether they were mere contract obligations existing in favor of appellant, since in the one event they extinguish and in the other they compensate and thus extinguish the demand of respondents. The law supplies the contract that they should be so applied. There can be no dissent from the doctrine that one who owes money to another on a written or other contract may meet its demands by setting off counter obligations arising on contract and existing in his own favor. In the face of the express provisions of sections 437 and 438 of the Code of Civil Procedure allowing such counterclaims it would be idle to discuss the point. Section 440 of the same Code provides that such demands shall be deemed compensated so far as they equal each other. This in turn implies that the facts showing such compensation may be pleaded in defense. If allowed and proved, the appellant would not have been in default on his payment of $700 due before June 8, 1919, on which day this action was commenced. The order of the court in striking out these defenses was based upon the ground that they were "redundant, immaterial, repetition, and irrelevant." It may be gathered from the many rulings of the court excluding evidence offered in support of these defenses that the chief factor in the mind of the court was the contention of respondents that these defenses sought by parol to modify the terms of a written contract. But the answer did not show that the agreements set up therein were oral, nor did it, as to nearly all of them, show that they were a part of the contract of lease. So far as appears from the answer itself, these agreements were quite independent of the contract of lease. It is said, however, that the answer to the supplemental complaint

contains these defenses, and that any error of the court in striking them from the answer to the complaint was thereby cured. The appellant was entitled to plead these defenses as against the cause of action set out in the complaint, which was that he had made default, in that he had not paid the deficit of $75.13 claimed as due on the $700 payment. Nor can it be said that the case was tried on the assumption or theory that these defenses were properly before the court. It is true that some testimony of the appellant himself got before the jury as to some of the defenses, but much was stricken out or otherwise excluded, and the little that was produced was uncorroborated, because the court refused to permit other witnesses to testify concerning these matters. That the trial court understood that these defenses were not before the jury is shown by the fact that it refused instructions, offered by appellant, advising the jury that they might consider them.

[6] The court committed no error in refusing to charge the jury that they might find that the alleged lease was in fact an absolute sale. The writing is plain, clear, and wholly free from ambiguity. Its terms provide for a lease and not a sale, and it is distinctly stated in the writing itself that the lessee acquired no interest in or title to the property, and that the transaction constituted a lease. In the absence of an imperfection in the writing this is conclusive.

The appellant is entitled to amend his answer to show that these counter demands exist, and that they compensated the demands of the respondent.

The judgment is reversed.

We concur: FINCH, P. J.; BURNETT, J.

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55 Cal. App. 270

HOLMBERG v. CITY OF OAKLAND.
(Civ. 3907.)

(District Court of Appeal, First District, Division 1, California. Nov. 21, 1921.)

1. Statutes 🔑263 — Not retrospective unless such intention clearly appears.

Statutes are not construed to be retrospective unless the intention to make them so clearly appears from their terms.

2. Municipal corporations 🔑176(3)—Charter provision for surgical aid to policemen held not retrospective.

The provision of a city charter that any policeman injured while in the performance of his duty shall be entitled to recover expenditures for medical, surgical, and hospital treatment, and that the council shall allow such officer full pay during disability, not only fails to show an intention to make it retrospective, but by the use of the future tense indicates an intention it shall be prospective only, and therefore it does not entitle a policeman to surgical expenses incurred after the provision was adopted for treatment of an injury received before such adoption.

3. Master and servant 🔑349—Compensation law in force at time of injury governs.

The general rule of construction applied to compensation laws is that the law at the time of the injury is to be taken as the measure of the right of recovery.

4. Municipal corporations 🔑187 — Aggravation since charter of injury previously received does not entitle policeman to surgical fees.

A policeman cannot recover surgical expenditures for treatment of an injury received by him before the charter provision allowing such expenditures was adopted, even though he continued to perform his duties and the injury was thereby aggravated after the adoption of the charter provision so as to render the operation necessary if such aggravation would have been caused by any walking, and did not arise peculiarly out of the performance of his duty.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Ernest Holmberg against the City of Oakland. Judgment for defendant, and plaintiff appeals. Affirmed.

Ostrander & Carey, of Oakland, for appellant.

Leon E. Gray, City Atty., and Markell C. Baer, Deputy City Atty., both of Oakland (T. J. Ledwich, of Oakland, of counsel), for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the defendant in an action brought by the plaintiff to recover the sum of $358.75 alleged to be due for surgical services, hospital bills, etc., incurred and paid by the plaintiff while under treatment for injuries suffered by him while a patrolman on the police force of said city.

The date of the plaintiff's said injuries was October 3, 1914, and he continued to suffer therefrom up to and including March 16, 1920, at which date the operation was performed and the hospital and other medical bills contracted which form the basis of the present action.

The plaintiff rests his right of recovery upon the provisions of section 92½ of the city charter which reads as follows:

"Any officer or member of the police department sustaining an injury while in the performance of his duty shall be entitled to receive in addition to the benefits otherwise provided in article 14 of this charter such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members, as may be required during the continuance of his disability, the same to be provided by the city; and the council shall allow such officer or member so injured full pay during the continuance of his disability, or until such time as he may be retired on a pension."

The defendant resists the plaintiff's claim upon the sole ground that the foregoing section of the city charter was enacted and went into effect on January 18, 1919, and that said section of the charter is not retroactive so as to be given application to injuries sustained prior to the said date when it became effective.

[1] We are entirely satisfied that this contention must be sustained. It is a well-settled rule of this and many other states that legislative acts are not to be considered retrospective unless the intention to make them so clearly appears from their terms. Willcox v. Edwards, 162 Cal. 460, 123 Pac. 276, Ann. Cas. 1913C, 1392; Vanderbilt v. All Persons, 163 Cal. 507, 126 Pac. 158; Gurnee v. Superior Court, 58 Cal. 88. The authorities on this subject are thus summed up in the Encyclopedia of Law and Procedure:

> "It is a rule of statutory construction that all statutes are to be construed as having only a prospective operation, unless the purpose and intent of the Legislature to give them a retrospective effect is expressly declared, or is necessarily implied from the language used. In every case of doubt the doubt must be solved against the retrospective effect." 36 Cyc. 1205.

[2, 3] When we look to the terms of the foregoing section of the charter upon which appellant relies we find, not only that retrospection is not expressed in its terms, but, on the contrary, its use of the future tense imports that it was only intended to apply to conditions and remedies arising after the date of its adoption. This conclusion is further enforced by the construction which has been quite uniformly applied to compensation laws, which is to the effect that the state of the law at the time of the injury is to be taken as the measure of the right of recovery of the injured person. It was so held by our Supreme Court in the case of Hyman Bros. B. & L. Co. v. Industrial Accident Comm., 180 Cal. 423, 181 Pac. 784, and the rule therein stated follows in the line of the general authority in other jurisdictions (Arizona, etc., Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305; Soderstrom v. Curry, 143 Minn. 154, 173 N. W. 649; Schmidt v. O. K. Bak. Co., 90 Conn. 217, 96 Atl. 963; Baur v. Court of Com. Pleas, 88 N. J. Law, 128, 95 Atl. 627; Diebeikis v. Link Belt Co., 104 N. E. 211).

[4] The appellant further contends that while his original injury was admittedly sustained prior to the enactment of the section in question, his injuries thus suffered, and by which his right knee was affected, were aggravated by the use of his injured limb in the continued performance of his duties as a patrolman, and that the operation for the recovery of the expense of which he brings this action was necessitated by this aggravation of his original injury, and that such operation was performed after the taking effect of the foregoing section of the charter. It must be conceded by the appellant that his affliction, however long continued and however aggravated by the ordinary use of his limb in walking, whether as a patrolman or otherwise, is referrable to the original injury to his knee, and is in no sense a new and independent injury—such an outcome and consequence as would have followed had the appellant not been a patrolman, but had been using his limb in the ordinary exercise of walking. It was therefore such an aggravation of his injury as did not arise peculiarly out of the performance of his official duty. This being so, the continuance and even increase of his disability with the resultant operation must be held to be referrable to the original injury sustained by him on October 3, 1914, over four years before the section of the charter in question went into effect. Such section not being retrospective, it follows that the appellant was not entitled to the relief which he seeks in this action by virtue of its terms.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

187 Cal. 638

GUMILLA et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 10090.)

(Supreme Court of California. Dec. 24, 1921.)

1. Certiorari ⚷16—Only final adjudications reviewable.

A writ of certiorari does not lie to review an order made in a matter prior to the final adjudication thereof.

2. Master and servant ⚷417(3¼)—Certiorari will not lie to review order granting rehearing in compensation case.

In a proceeding under the Workmen's Compensation Act, where the Industrial Commission, after awarding compensation, made an order granting a rehearing on petition allowed to be filed nunc pro tunc, such order was not reviewable on certiorari until after final decision of the case on the rehearing.

In Bank.

Application for certiorari to review and annul an order of Industrial Accident Commission.

Proceedings under Workmen's Compensation Act (St. 1917, p. 831) by Elias Gumilla and others for compensation for the death of Miguel Gumilla, opposed by California & Hawaiian Sugar Refining Company, employer, and others. Award made by the Industrial Accident Commission. Application by employer for rehearing granted, and petitioners bring certiorari. Writ denied.

Russell P. Tyler, of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

SHAW, C. J. On August 26, 1921, the Industrial Accident Commission made an award in favor of the petitioners herein allowing them compensation as dependents of one Miguel Gumilla, on account of the death of said Gumilla from an injury received by him while in the employment of the California & Hawaiian Sugar Refining Company. Notice of this award was served upon the adverse parties on the same day. The time for filing a petition for rehearing by the adverse parties expired on September 16, 1921. No petition was filed within that time, but on September 20, 1921, the said adverse parties filed with the industrial Accident Commission a petition for a rehearing of the award made on August 26th aforesaid. Thereafter, on November 16, 1921, an affidavit was filed on behalf of said parties in effect showing that the failure to file the said petition for rehearing in time was the result of the inadvertence or neglect of their attorney. Thereupon, on November 19, 1921, the Industrial Accident Commission made an order declaring that the failure to file the petition within the 20 days allowed by the law was the result of inadvertence, surprise, and excusable neglect sufficient to excuse the failure, and thereupon it made an order as follows:

> "It is ordered that the petition for rehearing be, and it is hereby, ordered filed nunc pro tunc as of September 16, 1921."

At the same time the Industrial Accident Commission made an order granting the application for a rehearing, and ordered the case to be submitted on the testimony already taken without further hearing. No decision of the matter on such submission has been made, and the matter is still pending. The matter now before the court is the petition of Elias Gumilla and Paulina Gumilla to review and annul the order of the Industrial Accident Commission granting a rehearing, and that this court thereupon order that the findings and award originally made are final.

[1, 2] A writ of certiorari does not lie to review an order made in a matter prior to the final adjudication thereof. The Industrial Accident Commission proposes to decide the case again after the order granting the rehearing, but it has not yet done so. Final action thereon has not yet been taken. Under these circumstances, the application for a writ of review of the order granting a rehearing is premature. Holabird v. R. R. Comm., 171 Cal. 691, 154 Pac. 831; Gauld v. Board, 122 Cal. 18, 54 Pac. 272. The petitioners' remedy in such a case is to await the final decision and ask for a rehearing of the matter. This, of course, will search the record for lack of jurisdiction, and, if there is such lack anywhere down the line which deprives the Industrial Accident Commission of jurisdiction to make the final decision, the proceedings will be annulled so far as may be necessary to give the petitioners appropriate relief. But until such final decision of the Commission we cannot consider the validity of the order granting the rehearing in this manner.

It may be that effectual relief could be given by this court or the District Court of Appeal under its general jurisdiction by means of a petition for a writ of prohibition. As the question is not before us, we express no opinion on that subject.

For the reasons above set forth, the petition for a writ of review is denied.

We concur: SHURTLEFF, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; WASTE, J.

187 Cal. 640

Ex parte HOLMES. (Cr. 2367.)

(Supreme Court of California. Dec. 28, 1921.)

1. Licenses 🔑16(11)—Ordinance forbidding sale of secondhand "goods, wares, and merchandise" without a permit construed to apply to books.

Under a city ordinance forbidding the sale of secondhand goods, wares, and merchandise without a permit from the board of police commissioners, a sale of secondhand books without such permit is illegal, as they must be considered included in the terms "goods, wares, and merchandise," which mean the objects of commerce; whatever is usually bought and sold in trade or market, or by merchants; wares, goods, or commodities.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Goods.]

2. Licenses 🔑7(1)—Ordinance requiring dealer in secondhand books to get permit not an unreasonable exercise of police power.

Under Const. art. 11, § 11, granting power to municipalities to make and enforce all such local, police, sanitary, and other regulations as are not in conflict with general laws, an ordinance requiring a dealer in secondhand books to get a permit from the board of police commissioners before engaging in business is not unconstitutional as an unreasonable and improper exercise of the police power.

3. Municipal corporations 🔑591—Ordinance giving board of police commissioners unqualified power to grant or refuse permits to trade in secondhand goods held constitutional.

An ordinance conferring on the board of police commissioners unqualified power to grant or refuse permits to trade in secondhand goods is not unconstitutional as an attempt to confer arbitrary power since it is not to be assumed that the board in the exercise of the power so granted will act arbitrarily or otherwise than in the exercise of a sound discretion.

Wilbur, J., dissenting in part.

In Bank.

Application for writ of habeas corpus by Harold Holmes to be directed to the sheriff of the City and County of San Francisco to secure the release of petitioner from custody. Writ dismissed.

F. D. Brandon and R. P. Henshall, both of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and I. M. Golden, Deputy Dist. Atty., both of San Francisco (Jos. A. Pritchard, of San Francisco, of counsel), for respondent.

PER CURIAM. The petitioner herein applied for and was granted a writ of habeas corpus by which he sought to have determined the legality of his arrest and detention upon a complaint filed in the police court of the city and county of San Francisco charging him with having engaged in the business of buying, selling, and exchanging secondhand books in said city and county of San Francisco without having obtained a municipal license so to do, and in violation of the provisions of section 63 of Ordinance No. 5132 of said city and county, requiring such license, and of his conviction and imprisonment under said charge.

Upon the hearing of said application it was stipulated that the complaint upon which the petitioner was arrested and convicted sufficiently charged the commission of the act alleged therein as constituting said offense, thus leaving as the only matters for our determination the construction of the provisions of the charter of said municipality under the terms of which the ordinance under which the petitioner was convicted was drawn, and of the said ordinance for the alleged violation of which such conviction was had.

In article II, chapter II, section 15, of the charter of San Francisco, it is provided that the board of supervisors shall have power:

"15. To impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person who, at any fixed place of business in the city and county, sells or manufactures goods, wares, or merchandise, except such as require permits from the board of police commissioners as provided in this charter."

In article VIII, chapter III, section 9, of said charter, it is provided that the board of police commissioners shall have power:

"9. To grant or refuse to grant permits to any person engaged or desiring to engage in business as pawnbroker, peddler, junkshop keeper, dealer in secondhand merchandise, * * * and such other characters of business or callings as may hereafter be required by ordinance enacted by the board of supervisors to obtain permits from this board."

In article VIII, chapter IV, section 7, of said charter, it is provided that:

"7. The chief of police shall possess powers of general police inspection, supervision and control over all pawnbrokers, peddlers, junkshop keepers, dealers in secondhand merchandise, auctioneers and intelligence office keepers. All persons engaged in said callings must first procure permits from the commissioners."

On July 1, 1920, the board of supervisors of said municipality adopted an ordinance entitled, "License Ordinance No. 5132, New Series," imposing license taxes on certain businesses, callings, trades, or employments within the city and county of San Francisco.

"Secondhand Goods.

"Sec. 63. Every person, firm or corporation engaged in the business of buying, selling or exchanging secondhand goods, such as provisions, goods, wares, merchandise, medicines,

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drugs, jewelry, precious metals or wares, shall (after securing a quarterly permit from the board of police commissioners to carry on the business), pay a license of twenty-five (25) dollars per quarter."

It was under the foregoing ordinance, and for the alleged violation thereof, that this petitioner was arrested, convicted and confined. It is his contention that as a person engaged in the business of dealing in secondhand books he does not come within the terms of said ordinance, and hence could not legally be made the subject of conviction thereunder. He makes the further contention that the business of a dealer in secondhand books is not such a business as requires regulation under the police power of the municipality, or the application for an issuance of permits as a condition precedent to the right to conduct such business; and, finally, the petitioner contends that the grant of power to the police commission to issue or deny permits to conduct such business is illegal as conferring arbitrary powers upon said board.

[1] The appellant's first above contention involves an inquiry as to the meaning of the words "goods, wares, and merchandise" as employed in the several sections of the charter of San Francisco above quoted, and as to the scope and meaning of the same term as found in the ordinance under the provisions of which the petitioner was convicted and confined. The appellant's first contention is that the words "goods, wares, and merchandise" as used in the sections of the charter and of the ordinance above set forth are not to be construed either singly or collectively as including books. This contention cannot be sustained. The word "goods" is defined in Webster's New International Dictionary as "movables; household furniture; personal or movable estate; wares; merchandise; commodities bought and sold by merchants and traders." The earliest definition of the word "goods" is to be found in Bailery's Large Dictionary, issued in 1732, which defines it as "merchandise." Samuel Johnson, the next English lexicographer, defined "goods" as "movables in a house; wares; freight; merchandise." The term "wares" is also defined in the dictionaries as a synonym of "merchandise," while the term "merchandise," is defined by Webster and the other lexicographers as "the objects of commerce; whatever is usually bought and sold in trade, or market, or by merchants; wares, goods, commodities." In the case of Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199, in construing the meaning of the word "merchandise," as used in section 1768 of the Civil Code, stated that it "covers all kinds of personal property which is bought and sold in the market." The term "merchandise" as used in acts and ordinances relating to taxation has been construed to cover all kinds of personal property. Loeber v. Leininger, 175 Ill. 487, 51 N. E. 703; Wynne v. City of Eastman, 105 Ga. 614, 31 S. E. 737; City of Pittsburg v. Kalchthaler, 114 Pa. 547, 7 Atl. 921. The phrase "goods, wares and merchandise" when thus used in conjunction have been given an even more inclusive meaning, since it is stated in Cyc. under that title that "these words are constantly used in legal and common parlance to distinguish whatever species of property is not embraced in the phrase lands, tenements and hereditaments." Cases almost without number might be cited as embracing and approving these general definitions of these words. The following may be referred to as bringing these definitions somewhat nearer to the particular form of personal property involved in this proceeding: In the case of Smith v. Wilcox, 24 N. Y. 353, 82 Am. Dec. 302, it was held that the words "goods, wares, and merchandise," as used in a statute prohibiting the sale of "goods, wares, and merchandise" on Sunday, included the sale of newspapers on that day, while in the case of Commonwealth v. Nax, 54 Va. 789, it was held that a dealer in published music was bound to obtain a license under a statute requiring merchants selling at any store or place "any goods, wares, and merchandise" to take out such license, the court saying that this phrase as used in the statute was "applicable to the kinds of merchandise to be found exhibited for sale in the store of every bookseller and stationer in the country." The case of Eastman v. City of Chicago, 79 Ill. 178, relied upon by the petitioner, does not militate against the foregoing cases, for the reason that in that case it appeared that the dealer was generally engaged in the business of selling legal blanks, stereoscopes, engravings, paintings, and children's toys and games, and, incidental thereto, had for sale a few rare and old imported books which were rather to be classed with paintings or works of art than as secondhand books, in the sense in which that term is usually understood; while in the case at bar it is stipulated that the petitioner is engaged in the business of buying, selling, and exchanging secondhand books, not as a mere incident to some other occupation, but as his principal business.

It is needless to pursue the subject further than to say that, if the construction to be placed upon the phrase "goods, wares, and merchandise" as contended by the petitioner were to be adopted, dealers in books would be generally exempted from taxation under the common form of assessment of "goods" or of "goods, wares, and merchandise" contained in their stores.

[2] Appellant's next contention is that the business of dealing in secondhand books is not such a business as requires or should be subjected to regulation under the police pow-

ers of the municipality, and hence that the requirement that such persons shall procure permits from the board of police commissioners before engaging in such business is an unwarranted and illegal regulation. This contention is also, in our opinion, without merit. Secondhand goods, wares, and merchandise have always been deemed the proper subjects of police regulation by municipalities. See "Constitutional Law," 8 Cyc. 875, and cases cited. And the grant by the Constitution in article 11, § 11, thereof, to municipalities "may make and enforce * * * all such local, police, sanitary, and other regulations as are not in conflict with general laws," is very broad and liberal. The business of buying and selling secondhand books cannot be differentiated from the business of buying and selling other forms of secondhand personal property which, being movable, valuable, and passing easily from hand to hand, are often made the subject of purloining and petit larceny and of disposal in secondhand places of business. Such places of business have therefore been made the proper subjects of police inspection and regulation. It is a matter of common knowledge that public libraries all over the country are continually subjected to the depletion of their shelves through loss of books which find their destination in secondhand stores, and that precautions against such loss may be observed in the equipment and administration of every well-appointed public library in the land. It cannot be said, therefore, that the requirement in section 7 of the charter, above quoted, that "the chief of police shall possess powers of general inspection, supervision, and control over all * * * dealers in secondhand merchandise," and that "all persons engaged in said callings must first procure permits from the commission," is an unreasonable form of regulation. This subject might be pursued into the domain of health regulation, since it may be said to be also a matter of common knowledge that books, magazines, and like publications which pass through many hands, and perchance through many households, have frequently been found the prolific carriers of infectious diseases. For both of the foregoing reasons we hold that the subjection of dealers in secondhand books to police regulation to the extent of requiring such persons to procure permits as a prerequisite to engaging in the business of selling such secondhand merchandise is a proper and reasonable regulation.

[3] The petitioner's next contention is that the investment of the board of police commissioners with the general and unqualified power to grant or refuse permits to dealers in secondhand merchandise, as contained in the provisions of the charter above quoted, is unconstitutional as an attempt to confer arbitrary power upon that body to grant or refuse permits at their whim or pleasure. The best answer to that contention is to be found in Dillon on Municipal Corporations (5th Ed.) p. 937, wherein the learned author says:

> "Many cases are to be found sustaining ordinances prohibiting acts, or even the following of trades or occupations, without procuring permits which may be issued at the discretion of the council, mayor, or some other city officer or department, and the fact that the dispensing power was apparently conferred without restraint or qualification has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permit shall be given or the dispensing power exercised. It has been said that it is not to be assumed that the council or officer, in exercising the dispensing power, will act arbitrarily, or otherwise than in the exercise of a sound discretion."

The appellant, however, insist that this court has decided in the case of In re Dart, 172 Cal. 47, 155 Pac. 63, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1127, that the grant of arbitrary power to municipal boards or officials to grant or refuse permits is void. It is to be noted, however, that whatever was said in that case with respect to the grant of such powers had reference to the facts of that particular case, and that this court, in the case of Gaylord v. City of Pasadena, 175 Cal. 433, 166 Pac. 348, pointed out that the Dart Case dealt with the control of charitable institutions and charities, and that the decision in that case went not alone to the unreasonable and arbitrary grant of power conferred by ordinance upon a charity commission, but to the fundamental proposition that the city council of Los Angeles had empowered this board to do acts which the city council itself, the source of power, could not legally do. In both of the foregoing cases the earlier decisons of this court are cited and distinguished as having relation to things which in their nature are, or may be, injurious to public health, safety, comfort, or welfare. The cases of Ex parte Fiske, 72 Cal. 125, 13 Pac. 310, and In re Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529, are referred to particularly in the concurring opinion of Mr. Justice Shaw, as upholding the view that, as to those kinds of occupations or businesses which are the proper subjects of police surveillance and regulation, the delegation of power to municipal boards or officials to grant or refuse permits will be sustained. In Gaylord v. City of Pasadena, supra, the court quotes approvingly from the case of In re Flaherty, supra, these words:

> "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously or for purposes of oppression or mischief."

If this petitioner had applied for a permit under the requirement of the section of the charter above quoted, and been either whimsically or arbitrarily refused such permit, he might then, as is shown in Gaylord v. City of Pasadena, supra, have had recourse to the courts for relief from such unjust and arbitrary action.

The appellant's final contention, that secondhand book dealers ought not now to be required to obtain permits and pay licenses because they have not heretofore been required to do so during the years that have passed since the charter of San Francisco went into effect, is not worthy of serious consideration.

Writ dismissed, and petitioner remanded.

SHAW, C. J., and LENNON, WASTE, SHURTLEFF, and SLOANE, JJ., and RICHARDS, Judge pro tem., concur.

WILBUR, J. I concur in the judgment. The sole question in this case is the validity of the ordinance imposing a license tax upon the petitioner's business. It is conceded that under the general power of taxation this might be done. It is contended, however, that, under the provisions of the charter of San Francisco, that power is expressly taken away from the board of supervisors. This question turns upon the provisions of the charter concerning a permit. If the business is one requiring a permit, it is taxable; if not, it cannot be taxed. As shown in the main opinion, the business in question is one for which, under the provisions of the charter, a permit may be required. It follows that the business is properly subject to a license tax. Whether or not the provisions of the charter or ordinances passed in pursuance thereof requiring a permit are valid as an exercise of the regulatory power over such business vested by the Constitution and charter in the city government is not involved in this case. The use of the term "permit" in the charter is of no significance in the case at bar except in so far as it describes the character of business he is conducting. What is said in the main opinion concerning the propriety of requiring a permit and vesting the power to grant or withhold the same in the sound discretion of some municipal officer or body is immaterial. It is for that reason that I do not concur in the main opinion. The rules with reference to the authority of municipalities to grant or withhold permits are thoroughly established in this state and need not be discussed. I do not think that under these rules the arbitrary power to grant or withhold permits for the conduct of the business of a secondhand bookstore can exist. As the point is not involved in the case, and the law is well settled, I deem it unnecessary to say more upon this subject, and have only said this much in order to indicate my reason for not fully concurring in the main opinion.

187 Cal. 649

UTAH CONST. CO. v. RICHARDSON, State Treasurer. (S. F. 9324.)

(Supreme Court of California. Dec. 28, 1921. Rehearing Denied Jan. 26, 1922.)

1. Constitutional law 🔑62—Taxation 🔑365—Power properly delegated to state board of equalization to value of franchise assessment of franchise tax not invalid for absence of legislative rule prescribing method of ascertaining value under mandate of Constitution.

Const. art. 13, § 14, providing that franchises shall be assessed at their actual cash value "in the manner to be provided by law," was complied with by St. 1911, pp. 530, 541, which provided for the furnishing to the state board of equalization of information enabling it to ascertain the value of franchises, and committed to the board the selection of the method of ascertaining the value of the total assets and tangible property of corporations.

2. Taxation 🔑319(2)—Evidence too indefinite to overcome presumption of proper assessment by board.

In an action to recover franchise taxes paid under protest, evidence *held* not to overcome presumption of Code Civ. Proc. § 1963, subd. 15, that the board had properly performed its official duty in assessing the tax.

3. Taxation 🔑319(2)—In absence of evidence that assessment of franchise was made by fraud or improper method, court will not consider complaint of excessiveness.

Where there is an absence of evidence that assessments of franchises were fraudulently or mistakenly made, or that an improper method of valuation was used, the court will not consider the complaint that the taxes were excessive.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Actions by the Utah Construction Company, a corporation, against Friend William Richardson, State Treasurer. From judgments for defendant, plaintiff appeals. Affirmed.

B. M. Aikins, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondent.

LENNON, J. The Utah Construction Company, a corporation organized under the laws of the state of Utah and transacting business in Utah, California, and elsewhere, appeals from judgments rendered against it in two actions instituted by the said corporation against the treasurer of the state of California for the recovery of taxes paid to the state under protest in the fiscal years 1914–1915 and 1915–1916. The taxes were paid pursuant to assessments made by the state board of equalization, and are, respectively, $4,000 and $2,268 in amount. With the exception of dates and figures, the pleadings, evidence, and findings in the two cases are practically the same, and by stipulation the evidence and judgment roll in both cases are before this court in a single transcript.

[1] Section 14 of article 13 of the state Constitution, pertaining to taxation, is a new section adopted in November, 1910. The pertinent portion of this section reads as follows:

> "(d) All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, *in the manner to be provided by law*, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state." (Italics ours.)

The italicized words afford the basis for the attack in the instant case, for appellant contends that legislative regulation of the manner of making an assessment is a prerequisite to a valid assessment when the Constitution requires such legislation (McHenry v. Downer, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737); that the Legislature failed to prescribe the manner in which franchises were to be assessed; and therefore that the state board of equalization was without authority to assess appellant's franchise. Whether or not there has been a compliance with the constitutional requirement in this respect is the first question for consideration.

In a statute expressly enacted for the purpose of carrying into effect the provisions of section 14, art. 13, of the state Constitution, the Legislature has, among other things, provided for the furnishing to the state board of equalization of information deemed important in ascertaining the value of franchises, that the board shall determine the value of the franchises from the information thus supplied, and that the apportionment of taxes shall be based upon the value obtained. Stats. 1911, pp. 530, 541. Consequently in so far as the prescribing of the "manner" in which assessments are to be made imports the regulation of details of administration, the Legislature has left little to be desired in its compliance with the constitutional mandate that such administrative machinery for making assessments be provided by law. Therefore appellant necessarily takes the position that the expression quoted from the Constitution refers not only to the general procedure for assessing franchises, but that the term "manner" also signifies the rule to be followed by the board in determining the value of the franchises, or, in other words, that the Constitution places upon the Legislature the duty of specifying the weight to be accorded the various facts required to be reported and the mathematical process to be adopted by the board in arriving at a valuation of a franchise from the information before it.

In this connection it must be noted that this court held, in the case of Miller & Lux v. Richardson, 182 Cal. 115, 127, 187 Pac. 411, 415, that—

> "When the Constitution, in article 13, § 14, subd. (d), provides for the assessment and taxation of corporate franchises, it means the so-called corporate excess, although such is not the usual, nor, strictly speaking, a proper, use of the word 'franchise.'"

"Corporate excess" is defined in the case cited as—

> "The difference between the value of its [the corporation's] outstanding stocks and bonds as determined by market quotations, the earnings of the company, or otherwise, and the value of its tangible or physical properties. The theory is that the value of the company's outstanding stocks and bonds represents the value of its total assets, so that the difference between this total and the value of the company's physical properties represents the value of the company's intangible assets, and an assessment of the corporate excess, that is, of this difference, is an assessment of all the company's so-called intangibles." Miller & Lux v. Richardson, 182 Cal. 115, 117, 187 Pac. 411.

It follows from this decision that, by the very use of the word "franchises," the Constitution itself dictates, in a measure, the process to be pursued by the board of equalization in estimating the value of the property to be taxed. The Constitution itself further provides that the franchises shall be taxed at their actual cash value. The scope of appellant's attack is therefore confined to the single point that the Legislature has failed to select and prescribe a particular rule for appraising the total assets and the tangible property of the corporations—items which must be considered in ascertaining the "corporate excess."

The Legislature has provided for the filing by the owner or holder of every taxable franchise of a written report containing detailed information concerning capital stock, bonds, debts, property, and other matters which the Legislature evidently regarded as essential to a proper assessment of the value of franchises. Stats. 1911, pp. 530, 541. No attempt was made to direct the board of equalization as to how it should employ such information in arriving at the value of the total assets and tangible property of the corporations; the selection of the method calculated to lead to the most accurate valuation was left to the discretion of the said board. As a general rule, it is not essential that the Legislature prescribe the method of valuation to be employed, but it may delegate to its taxing officers the power to adopt a suitable method, and, in the latter case, the assessors must value the property according to their best judgment and with honest purpose.

Western Union Tel. Co. v. Missouri, 190 U. S. 412, 425, 23 Sup. Ct. 730, 733, 47 L. Ed. 1116; Mexican Petroleum Corporation v. Bliss (R. I.) 110 Atl. 867, 871; 1 Cooley on Taxation (3d Ed.) p. 754. The general requirement in the state Constitution that the Legislature fix the "manner" in which the assessment is to be made does not limit the power of the Legislature to invest the taxing board with the right to choose a rule of valuation. This question was passed upon in State v. Wells Fargo & Co., 38 Nev. 505, 150 Pac. 836, where the state Constitution provided:

> "The Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory. * * *"

The court said:

> "It is further contended, however, that the Legislature has failed to adopt any rule or regulation governing the manner of determining the value of the intangible property of the appellant corporation, and without such rule or regulation having been prescribed by the Legislature, the revenue officers of the state are unauthorized to make an assessment. We think this objection sufficiently answered by the decision of this court in State v. Cent. Pacif. R. R. Co., 10 Nev. 47, 63. This court, speaking through Beatty, J., said: 'No principle of valuation of property for purposes of taxation is prescribed by the laws of this state. The statutes define the different species of property, and provide that every species shall be assessed at its "actual cash value." But, as to the mode of ascertaining the cash value, our law is silent. No subsidiary principles of valuation are laid down to guide the owner in making his statement in those cases where he is required to specify values; and the assessor is left equally unrestricted in making his estimates. It follows that owners and assessors must be guided by those general principles which everywhere determine the valuation of property, independently of statutory rules.'"

In Commercial Electric Light & Power Co. v. Judson, 21 Wash. 49, 56 Pac. 829, 57 L. R. A. 78, it was held that the taxing authorities had power to assess property in the absence of the adoption of any rule of valuation by the Legislature, although the Constitution required that property "shall be taxed in proportion to its value to be ascertained as provided by law." Bearing in mind that these holdings were under state Constitutions which required that the Legislature "shall prescribe such regulations as shall secure a just valuation," or that the "value" is "to be ascertained as provided by law," there can be no doubt that, under the less specific provision of our own Constitution to the effect that the assessment shall be made "in the manner to be provided by law," it was permissible for the Legislature to commit to the board of equalization the duty of selecting the mode of ascertaining the cash value of the different elements dealt with in determining corporate excess instead of requiring the board to compute assessments according to a value finding rule prescribed by the Legislature.

[2] Appellant next contends that the proceedings whereby the taxes in question were imposed were void, for the reason that there was no assessment, that is, no actual valuation, of appellant's franchise. It is claimed that, instead of ascertaining the cash value of the franchise from the data before it, the board of equalization first estimated the amount of the tax which the members considered the corporation should pay, and then some clerk figured out an assessment which would yield a tax equal to the desired amount. This contention is based upon the testimony of the secretary of the board of equalization to the effect that the members of the board determine the amount of the tax and indorse this on the back of the corporation's franchise tax return, and that afterwards some clerk "will figure the assessment, whatever it may be, from the tax." The secretary further testified, however, that he was seldom present when the members of the board were assessing franchises, and that he was not present when appellant's franchise was assessed in 1914. There was no evidence as to whether or not he was present at the 1915 assessment. Only one person who was present when the franchise was assessed was called as a witness. He was a member of the board, and not a single question was asked of him as to what method the board had followed in fixing the amount of the tax, or as to whether or not the franchise had been valued by the board and the amount of the tax determined in accordance with the value thus arrived at. He was questioned merely as to what evidence was before the board when the assessments were made, and he testified that the board had before it appellant's franchise tax returns. Nowhere in the record is there any evidence concerning the method followed by the board in arriving at the amount of the tax.

It is a rule applicable to assessors and to boards having assessing powers that it is presumed that the assessing officers have properly performed the duties intrusted to them, and, consequently, that their assessments are both regularly and correctly made. Code Civ. Proc. § 1963, subd. 15; Reclamation Dist. v. Wilcox, 75 Cal. 443, 17 Pac. 241; In re Oklahoma Gas & Electric Co. (Okl.) 171 Pac. 26. The secretary was not present when the 1914 assessment was made, and, in all probability, was absent when the franchise was assessed in 1915. Moreover, even conceding that he was qualified to testify as to what was done by the board, he did not testify as to the manner in which the board arrived at the "amount of the tax" which was indorsed on the franchise tax returns, and it must therefore be presumed that the board determined this amount in the only legitimate way, that is, by first ascertaining the value of the franchise. Nor does this interpretation of the testimony fail to account for the fact that it was customary for a clerk to figure the assessment from the amount of the tax, for the board may have adopted this means of verifying or checking up its own calculations in computing the amount of the tax upon the assessed value of the franchise. At any rate, the state was not required to prove that the board did, in fact, base the tax upon the value of the franchise; the burden of showing the contrary rested upon appellant, and the only evidence adduced in this connection, namely, the testimony of the secretary of the board, was too indefinite and unsubstantial to overcome the presumption that the board had properly performed its official duties.

[3] Inasmuch as there is not a particle of evidence that the assessments were fraudulently or mistakenly made, or that an improper method of valuation was pursued, we cannot consider appellant's complaint that the taxes were excessive. Miller & Lux v. Richardson, 182 Cal. 115, 128, 187 Pac. 411.

The judgments are affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.; RICHARDS, Justice pro tem.

55 Cal. App. 308

JULIUS LEVIN CO. v. SHERWOOD & SHERWOOD. (Civ. 3752.)

(District Court of Appeal, First District, Division 1, California. Nov. 22, 1921.)

New trial ⚷170—On retrial of issue of damages only court erred in reversing findings and judgment on every issue.

Since an order limiting the scope of a motion for new trial to a specified issue opens for examination only that issue, and the determination of the other issues remains in the record, and cannot be retried, the court, on resubmission of a cause on evidence confined, by its order, strictly to the question of damages, erred in finding against plaintiff on every issue it had formerly found in its favor, and in rendering judgment directly the reverse of that rendered in the first trial, even though the action itself was for damages; the trial court's power to change its findings at any time before the entry of judgment being inapplicable.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Julius Levin Company against Sherwood & Sherwood, a corporation. Judgment for defendant, and plaintiff appeals. Reversed.

Louis H. Brownstone, of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick and Geo. K. Ford, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from the judgment in favor of the defendant.

The plaintiff commenced this action against the defendant to cover damages for a breach of contract. In its complaint, after setting forth the corporate character of the respective parties, it was alleged that on the 28th day of February, 1916, a contract was made between the plaintiff and the defendant whereby the defendant sold and the plaintiff purchased 750 cases of whisky, which the defendant failed to deliver, whereby the plaintiff was damaged in the sum of $2,179.50, the difference between the sale price of said whisky and the market value thereof when delivery should have been made. The defendant in its answer denied having made or entered into any such contract, and admitted that it had not delivered the whisky referred to in the plaintiff's complaint. The defendant then proceeded in a separate answer to set up a special defense, which was to the effect that it was the San Francisco agent of John Dewar & Sons, Limited, of Perth, Scotland, and that as such agent, and not otherwise, it had received an order from the plaintiffs for 750 cases of the whisky of said firm, which order was entirely subject to the approval and confirmation of said foreign firm; that previous to the receipt of such order the defendant had notified the plaintiff that said firm of Dewar & Sons had advanced the prices of all its liquors owing to unsettled war conditions, and that said plaintiff with such knowledge gave its said order; that shortly thereafter the said defendant had received a circular from said firm to the effect that it could only execute orders on the condition that the prices chargeable therefor would be those current at the date of the filling of the order; that said plaintiff was made aware of the contents of said circular, and had thereafter requested the postponement of the shipment of the goods in question to the month of November, 1916; that subsequently when the said goods arrived in San Francisco the defendant notified the plaintiff of their arrival and requested plaintiff to take delivery thereof and to pay therefor the advanced price of $4,581.50 required by said foreign firm. This the plaintiff refused to do, but offered to pay the defendant for said goods the former price of $4,105.50, claiming that this was the price agreed upon and was the only amount due as the purchase price of said goods; that defendant refused to deliver said goods at said last-named price. The defendant follows these averments with certain denials having reference to the market price of the goods in question at the time their delivery was to have been made. In a subsequent amendment to its answer the defendant amplifies somewhat its denials as to the market value of the goods in question by specifically denying that the market value of the goods at the time when delivery was to be made above the alleged purchase price thereof was the sum of $2,179.50, as alleged by the plaintiff, or was any sum in excess of the sum of $476.

The cause went to trial upon the pleadings as thus presented. Upon its submission the trial court made its findings of fact and conclusions of law. By its said findings of fact the court specifically found in favor of the plaintiff upon all of the allegations of its said complaint and found that by reason thereof the plaintiff had been damaged in the sum of $1,278.49. The court then proceeded to make certain findings upon the averments of the defendant's answer, but in respect thereto expressly found that at the time the plaintiff placed its order for the goods in question with the defendant the said defendant did not inform the plaintiff as to the uncertainty in prices of the goods ordered nor the attitude and action of Dewar & Sons as to the prices to be charged upon the filling of such orders. The court concluded its said findings with the express finding "that the transaction between the plaintiff and the defendant was one of purchase and sale, that the minds of the parties met in the contract, and that the plaintiff acted in perfect good faith in all things in connection with said order." As a conclusion of law from its aforesaid findings of fact the court found that the plaintiff was entitled to judgment against the defendant for the sum of $1,278.49, together with its costs. Judgment was accordingly entered in the plaintiff's favor for said sum. Thereafter the defendant moved for a new trial upon all of the grounds permitted by the Code, including the ground that the damages awarded by said judgment were excessive. Upon the submission of this motion the court made and entered the following order:

> "It is ordered that said defendant's motion be, and the same is hereby, granted on the issue of damages."

The case thereafter came on for trial, at the opening of which counsel for plaintiff made the following statement:

> "I call the court's attention to the fact that this is the second trial of this case, and that when a new trial is granted herein on the issue of damages the testimony will therefore be confined to that issue."

In this statement the court and counsel for the defendant evidently acquiesced. The plaintiff thereupon called one witness, who testified that the difference between the cost of the goods according to the plaintiff's claim and the market value at the time of delivery was $1,837.01. The plaintiff thereupon rested, whereupon the defendant called one witness, who testified that the difference between the cost of the goods according to the plaintiff's claim and the market value at the time of delivery was $476. The matter was thereupon submitted and taken under advisement by the court.

Some time later the court made and filed an entirely new set of findings, wherein every issue in the case formerly found in favor of the plaintiff was found in favor of the defendant, and as a conclusion of law therefrom the court found:

> "That the minds of the parties never met, and that there was no contract made between the parties in the above-entitled action. Let judgment be entered accordingly for the defendant."

The judgment was accordingly so entered, and from that judgment the plaintiff prosecutes this appeal.

The sole question presented upon this appeal is as to the effect of the order of the trial court in granting the defendant's motion for a new trial "upon the issue of damages." Whatever of uncertainty there might have been in the form and as to the scope of this order would seem to have been entirely removed by the construction which the parties to the action and the trial court itself placed upon it by their action and conduct at the time of the second trial of the case. The order in question was treated as an order limiting the second trial of the cause to the single issue as to the amount which the plaintiff was entitled to recover in damages. The respondent herein still considers this to be the effect of said order, since in the opening sentence of his brief herein respondent's counsel says:

> "The facts of this case so far as are necessary for this appeal are substantially stated in appellant's brief. It is true that the new trial was granted on the one issue of damages, and the only evidence received on the new trial was on the question of the amount of damages."

The new trial herein having thus concededly and actually been confined to this single issue, there is no confusion in the authorities as to the effect of such an order, or as to the limited power and functions of the trial court upon the retrial of the cause. It has long been settled law that the trial court may by its order granting a new trial limit the issues to be considered upon a retrial of the cause. San Diego Land Co. v. Neale, 78 Cal. 64, 20 Pac. 372, 3 L. R. A. 83; Duff v. Duff, 101 Cal. 2, 35 Pac. 437; Cohen v. Canada Land Co., 151 Cal. 689, 91 Pac. 584; 11 L. R. A. (N. S.) 752; Estate of Everts, 163 Cal. 451, 125 Pac. 1058.

In Estate of Everts, supra, the Supreme Court says:

"It is within the power of the trial court, where there is more than one issue of fact in a case and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others. [Citing the above-mentioned cases.] These cases declare also that when such new trial is granted, it opens for examination only the issue upon which it is ordered, that the determination of the other issues remains in the record and that they cannot be retried. The only remedy of the moving party as to those issues is to appeal from the part of the order denying the motion for a new trial as to them."

The respondent herein, however, contends that the rule above stated has been changed by the fact that the defendant has no longer under the Code the right of appeal from such an order in so far as it amounted to a denial of the motion for a new trial as to all of the other issues in the case save only the issue of damages. We do not think, however, that such a sweeping effect should be given to the change in the Code in respect to appeals from orders denying motions for a new trial, since to do so would entirely do away with the power of the trial court, and even of appellate courts, to order new trials upon limited issues. We therefore regard the last above cited case as authority for the proposition applicable to this case that when, upon motion for a new trial, an order is made limiting the scope of the motion to a certain specified issue, "it opens for examination only the issue upon which it is ordered; that the determination of the other issues remains in the record and that they cannot be retried."

It is the further contention of the respondent herein that, since this was an action for damages, the order of the trial court should be construed as opening for retrial every issue upon which the plaintiff's asserted right to recover damages depends. This construction, however, would not only render idle and meaningless the language of the order granting the new trial "upon the issue of damages," but it would also be a construction contrary to the interpretation which both the trial court and the parties placed upon said order upon the retrial of the cause. Had the parties understood that the order granting a new trial was a general order as to all of the issues in the case, they would doubtless have pursued the uniform practice of reproducing all of the evidence in the case, together with such new and additional evidence as might seem advisable in view of the court's action in generally reopening the case for retrial. That they did not do so, and that the trial court acquiesced in their interpretation of the limited scope of its order, leaves no room for the construction which the respondent now seeks to place upon it. To now adopt such a construction would be manifestly unfair to the plaintiff in the case, who, if such was to be its effect, was clearly misled as to the issues to be tried and the evidence to be presented upon the retrial of the cause. By direct sequence it follows that an even greater injustice was done to the plaintiff in the case when, without any opportunity being afforded to repeat, and, if need be, to strengthen its proofs, the trial court upon the resubmission of the cause on evidence confined strictly to the question of damages undertook to find against the plaintiff upon every issue in the case which it had formerly found in its favor, and upon such findings to render a judgment which was directly the reverse of that which it had rendered upon the first trial of the cause. We are entirely satisfied that the trial court was in error in so doing. The cases cited by the respondent touching the power of a trial court to change its findings at any time before the entry of judgment in a case have no application to the state of facts presented in the case at bar, as a careful reading of Estate of Everts, supra, will show.

Judgment reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

55 Cal. App. 314

FULLER v. MONTAFI et al. (Civ. 3947.)

(District Court of Appeal, First District, Division 1, California. Nov. 23, 1921.)

1. Tenancy in common ⚷51 — Tenants not bound by contract of cotenant without ratification.

One tenant in common is not bound by a contract executed only by her cotenant, nor are her rights in the property affected by such contract unless she had by her acts ratified the contract.

2. Appeal and error ⚷1011(1)—Finding on conflicting evidence not disturbed.

The finding by the trial court on an issue as to which the evidence was sharply and substantially in conflict will not be disturbed.

3. Tenancy in common ⚷55(5)—Claim against plaintiff and cotenant for collusion to break contract held proper cross-complaint.

In a suit to restrain waste brought by one tenant in common against those cutting timber under a contract with the other tenant in common, a cross-complaint charging that the plaintiff and her cotenant were acting in collusion to defeat the rights of defendant under the contract and seeking damages presented a proper matter for cross-complaint under Code Civ. Proc. § 442.

4. Tenancy in common ⚷26—Cutting of tanbark on tenancy held waste of nonconsenting tenant's interest.

The cutting of tanbark oak trees, a large part of which were young second-growth trees, too immature for cutting, was waste as against the right and interest of the tenant in common not consenting to the contract of her cotenant permitting such cutting.

5. Tenancy in common 🔑26—Tenant cannot impair cotenant's rights.

A tenant in common of real estate cannot lawfully do any act which would impair the rights of his cotenant.

6. Tenancy in common 🔑39—Tenant cannot convey right to do what he cannot do.

A tenant in common of real estate cannot lawfully transfer to another a right to do with respect to the property held in common that which the tenant himself could not lawfully do.

7. Tenancy in common 🔑51—Contractor with one tenant cannot recover for injunction obtained by cotenant without collusion.

Parties who contracted with the tenant in common for permission to cut timber from the land, knowing it was held in common, and that the cotenant had not consented to such cutting, cannot recover damages from the tenant, who contracted with them for breach of contract after the cotenant had enjoined the cutting of the timber under the contract, in the absence of collusion or fraud by the contracting tenant.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by India M. Fuller against P. Montafi and others, in which Kneeland L. Fuller was brought in as cross-defendant by the original defendants' cross-complaint. Judgment for the plaintiff against the original defendants, and those defendants appeal. Affirmed.

L. G. Scott, of Sebastapol, for appellants.
Wallace L. Ware, of Santa Rosa, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff in an action brought by her to enjoin the defendants Montafi, Giudici, and Donati from committing waste, consisting in the cutting by them of tan oak timber upon certain lands and premises of which the plaintiff was the owner of an undivided interest as a tenant in common with one Kneeland L. Fuller, her son, who owned the other undivided interest therein. The said plaintiff did not join her said son as a party plaintiff in the action, but the defendants undertook to make him a party thereto through the filing of a cross-complaint in which he was named as a cross-defendant. In their answer herein the defendants denied generally and specifically the averments of the plaintiff's complaint as to her ownership of the premises in question and as to any damage caused by their acts in cutting the tan oak timber upon the same. In their cross-complaint the said defendants set forth affirmatively that they had gone into the possession of said premises, and had cut and carried away certain tan oak bark under and by virtue of a contract in writing between themselves and said Kneeland L. Fuller giving them the right so to do; and they further averred that, having entered upon said premises in pursuance of said contract and partly performed the same, they were prevented from further proceeding with the performance of said contract through the fraudulent coercion of said plaintiff with said Kneeland L. Fuller, to their damage in a large sum. They asked that said Kneeland L. Fuller be made a cross-defendant in the action, and they prayed that the plaintiff take nothing by her complaint but, that the defendants have judgment against her and against said cross-defendant for damages in the sum of $1,460.

Upon the trial and submission of the cause the trial court made and filed its findings of fact and conclusions of law, and in so doing found that the plaintiff was, and for several years prior to June 20, 1918, had been, the owner of an undivided one-half interest in the premises described in her complaint; that upon said 20th day of June, 1918, there were standing and growing thereon certain tan oak timber of the value of about $2,000, and that on or about said last-named date said defendants, without permission or authority from said plaintiff and in violation of her rights and interests in said premises, and without her will, wish or consent, entered upon said premises and proceeded to cut the said tan oak timber thereon; that between said date and the 1st day of September, 1918, they cut and removed from said property some 27 cords of tanbark, of the value of $810, and in so cutting and removing said tanbark they also cut and destroyed many young second-growth tan oak trees, to the great damage of said plaintiff. The court further found that on March 1, 1919, the said defendants again entered upon said premises and resumed the cutting of tan oak timber thereon, and were proceeding with their unauthorized activities in so doing, to the plaintiff's irreparable damage, when this action was instituted by her.

The court then proceeded to make findings upon the issues presented by defendants' cross-complaint, and in so doing found that the cross-defendant Kneeland L. Fuller had for some years prior to May 28, 1918, been, and was on said date, the owner of an undivided one-half interest in the premises described in the plaintiff's complaint; that on said date he entered into the following contract with the defendants Montafi, Giudici, and Donati, namely:

> "Know all men by these presents that I, K. L. Fuller, have this day sold to P. Montafi, Sperindio Giudici, and N. Donati, all the tanbark and wood belonging thereto on what is

known as the C. E. Fuller ranch in Bodega township, county of Sonoma, Cal., for and in consideration of the sum of one hundred and fifty dollars, and ten cords of tanbark wood, the receipt whereof is hereby acknowledged as paid. I, the party of the first part hereby agree to extend the time for a period of three years to the said party of the second part as named above in which to cut and peel the wood and tanbark above referred to.

"We, the parties of the second part, viz. P. Montafi, Sperindio Giudici, and N. Donati, hereby agree to all the conditions and terms of this contract above set forth."

The court further found that the tanbark and wood referred to in said contract was the tanbark and wood growing upon the premises described in the plaintiff's complaint; that the sum of $150 named in said contract as a part consideration therefor was paid at the date thereof to the cross-defendant, but that no portion of the tanbark wood constituting the remaining portion of said consideration had been delivered; that said defendants had suffered no damage by reason of any fraudulent collusion of said cross-defendant with the plaintiff, his mother, in refusing to permit said defendants to remove any more tanbark or wood from said premises or to continue cutting the same; and that said cross-defendant and his said mother had not been guilty of any fraud or collusion in the premises.

As a conclusion of law from said findings of fact the trial court found that the plaintiff was entitled to the relief prayed for in her complaint, and that the defendants were entitled to no relief upon their cross-complaint.

The defendants have appealed from such judgment and urge the following points upon said appeal: First, that the evidence is insufficient to justify the findings of the trial court upon the plaintiff's alleged cause of action; and, second, that the defendants were entitled to a judgment for damages against the cross-defendant, Kneeland L. Fuller, upon the undisputed evidence in the case.

[1] As to the first of these points we are satisfied from a careful review of the evidence in the case that the appellants' contention cannot be sustained for the reason that the evidence is undisputed that the plaintiff was at all times the owner of an undivided one-half of the premises in question as a tenant in common with her son, Kneeland L. Fuller, and is also undisputed that she did not sign or execute the contract made with the defendants by her said cotenant; she could not therefore be bound by said contract, nor could her rights in the substance of said real estate be invaded through the making of the same with her cotenant, unless it could be shown that she had by her acts and conduct ratified and confirmed said contract and was thus estopped to maintain this action.

[2] The evidence on this branch of the case is sharply and substantially in conflict. The plaintiff herself testified that she never acceded to the making of said contract or accepted the same nor any of the fruits thereof, but had always disapproved the same, and that she had informed the defendants of her said disapproval and warned them off the premises. She is supported by other witnesses in so testifying; and the trial court evidently believed her story and made its findings in her favor upon this branch of the case accordingly. In this state of the record we shall not under the well-settled rule disturb the findings and judgment of the trial court upon this branch of the case.

The appellants' next contention is that the trial court was in error in its refusal to award the defendants judgment for damages against the cross-defendant, Kneeland L. Fuller.

This cross-defendant was not a party to the original action but was attempted to be brought in as a party thereto by the defendants' amended answer and cross-complaint, wherein it was asserted that the cross-defendant, Kneeland L. Fuller, had made the written contract above referred to with the defendants, and that the plaintiff had ratified, confirmed, and adopted the same. The proceedings attending the filing of this answer and cross-complaint and the bringing in of this cross-defendant as a party to the action were irregular for the reason that the procedure outlined in sections 389 and 442 of the Code of Civil Procedure was not followed. The plaintiff and the cross-defendant each filed separate demurrers to the defendants' amended answer and cross-complaint upon several specified grounds, but otherwise urged no objection to the same or the filing thereof upon the ground of noncompliance with the aforesaid sections of the Code of Civil Procedure. The court overruled these demurrers, and the cause proceeded to trial without further objection as to the irregularity of said cross-defendant's injection into the case.

[3] It may be noted in passing that one of the grounds specified in said demurrers was that the defendants were attempting by their cross-complaint to improperly inject an action at law for damages against the cross-defendant, Kneeland L. Fuller, into an action in equity for an injunction to prevent threatened waste. This objection would probably have been good if the defendants had cross-complained merely against cross-defendant, Kneeland L. Fuller, praying for damages for his breach of the contract in no way related to the plaintiff's action to enjoin waste; but this they did not do, since the gravamen of their cross-complaint was that the plaintiff in the action had confirmed and thus become a party to the contract which her cotenant had made. The prayer for relief in damages

was therefore against both the plaintiff and the cross-defendant, and the cross-complaint thus set up a cause of action against both of said defendants for the breach of a contract the performance of which upon the part of the defendants plaintiff was seeking to enjoin. It therefore presented proper matter for a cross-complaint under section 442 of the Code of Civil Procedure. This being so, and the trial court having acquired jurisdiction over the whole subject in controversy, it had power to grant the cross-complainants whatever relief the law and the evidence showed them to be entitled to.

The evidence in the case shows practically without conflict that the cross-defendant by his written contract with the cross-complainants sold to the latter all of his interest in the tanbark and wood upon the Fuller ranch for a consideration of $150 in cash and 10 cords of tanbark wood, giving to said parties three years within which to cut and peel the said bark and wood. The cross-complainants paid the cash consideration, went upon the premises, cut approximately 200 cords of tanbark wood, and peeled therefrom about 62 cords of tanbark, of which they removed and sold 27 cords for approximately $800. The remaining tanbark and wood was not removed or sold because of the injunction issued herein, and the 10 cords of tanbark wood to be delivered to the cross-defendant under said contract were not delivered, probably for the same reason. It was testified that the tanbark wood upon the premises would, if sold, have realized to the cross-complainants a profit of approximately $800, and the remaining tanbark a profit of $700. From these undisputed facts it would seem to follow that if the cross-complainants were entitled as a matter of law to any relief against the cross-defendant, they will be entitled to substantial damages, which the trial court denied them. But were the cross-complainants entitled as a matter of law to any relief against the cross-defendant upon the whole facts of this case?

We think not. In entering into their contract with Kneeland L. Fuller the cross-complainants were knowingly dealing with a tenant in common of the real estate described therein, and were seeking to obtain from him the right to cut and carry away a large portion of the timber then growing upon said premises.

[4] The evidence sufficiently shows, and the court found, that a large part of said growing timber was of young and second-growth tanbark oak trees too immature for cutting, and the cutting and destruction of which would and in fact did work great and irreparable injury to the said real estate. That the cutting of such timber would constitute waste as against the right and interest of the cotenant not consenting thereto may be taken to be settled law. 2 Blackstone's Commentaries, 281; Buckelew v. Estell, 5 Cal. 108; Silva v. Garcia, 65 Cal. 591, 4 Pac. 628; Pardee v. Camden Lumber Co., 70 W. Va. 68, 73 S. E. 82, 43 L. R. A. [N. S.] 262.

[5] It is also well settled that a tenant in common of real estate cannot lawfully himself do any act which would impair the rights of his cotenant in real estate. Tiffany, Real Prop. § 993; Nevels v. Kentucky Lumber Co., 108 Ky. 550, 56 S. W. 969, 49 L. R. A. 416, 94 Am. St. Rep. 388.

[6] If this be true, it follows that a tenant in common of real estate cannot lawfully transfer to another a right to do that which he cannot lawfully do in respect to said real property. It has accordingly been held that a tenant in common of land has no power to convey to a stranger the right to divert water from the land (Pfeiffer v. Regents, etc., 74 Cal. 156, 15 Pac. 622), or create an easement in the common estate against his cotenant (Waterford Irr. Dist. v. Turlock Irr. Dist., 194 Pac. 757; Southern Investment Co. v. Postal Telegraph Co., 156 N. C. 259, 72 S. E. 361, Ann. Cas. 1913A, 224; Moore v. Moore, 4 Cal. Unrep. 190, 34 Pac. 90).

[7] It follows from these authorities that Kneeland L. Fuller, the cross-defendant herein, could not lawfully have granted to the cross-complainants herein the right to enter upon the premises in question and do acts thereon in the way of cutting and removing the aforesaid growing timber therefrom, which acts, if done without first obtaining the agreement or consent of his other cotenant, would constitute waste which the latter would be entitled to enjoin. The cross-complainants in taking such contract and in attempting to execute the same did so at their peril, and hence would have no right to complain nor to recover damages against the other party to said contract when, without any fraud or collusion on his part, his cotenant in common rightfully enjoined them from committing or continuing acts of waste upon said real estate in the course of the execution of the terms of said contract. The trial court expressly found that there was no fraud or collusion as between the cross-defendant and the plaintiff herein. We think, therefore, that the trial court was correct in holding that the cross-complainants herein were not entitled to recover damages against the cross-defendant herein.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

54 Cal. App. 113

FIVE STATES TIMBER CO. v. DWINNELL.
(Civ. 2332.)

(District Court of Appeal, Third District, California. Aug. 30, 1921. Hearing Denied by Supreme Court Oct. 24, 1921.)

1. Appeal and error ⚷712—Superior court rules not made a part of the record not considered.

Where rules of the superior court are not made a part of the record, they cannot be considered on appeal.

2. Appeal and error ⚷917(1)—Presumption that there was no court rule as to notice of hearing on demurrer.

In the absence of record showing the contrary, it is assumed in support of a judgment that there was no court rule requiring notice of hearing on demurrer, and the question of right to notice must be determined in accordance with Code Civ. Proc. § 594.

3. Pleading ⚷218(2)—Notice of hearing on demurrer not necessary.

Code Civ. Proc. § 594, authorizes the court to hear and decide the issue of law raised by the demurrer without notice to plaintiff.

Appeal from Superior Court, Siskiyou County; Jas. F. Lodge, Judge.

Action by the Five States Timber Company against G. W. Dwinnell. From an order refusing to vacate judgment for defendant, plaintiff appeals. Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

Taylor & Tebbe, of Yreka, for respondent.

FINCH, P. J. This is an appeal from an order refusing to vacate a judgment for defendant.

The original complaint was filed June 14, 1920, and demurrer thereto was sustained September 25th. On November 6, 1920, by leave of the court, an amended complaint was filed, and on the same day defendant interposed his demurrer thereto. Without notice to the plaintiff or its counsel, the demurrer was placed on the law calendar to be heard November 20th, and on that day, in the absence of plaintiff and its counsel, the demurrer was submitted without argument, and was sustained by the court without granting leave to amend, and judgment was thereupon entered in favor of defendant. On January 27, 1921, plaintiff filed notice of motion to vacate the judgment on the ground that the plaintiff had no notice of the hearing. Attached to the notice was the affidavit of plaintiff's counsel reciting the foregoing facts, and stating that affiant had no notice of the placing of the demurrer on the calendar or of the action of the court thereon prior to January 22, 1921; that affiant's office at all times mentioned was in the city of Sacramento; and "that affiant believes that plaintiff herein has a good and valid and sufficient cause of action as set forth in said amended complaint, and affiant avers he would have appeared to defend said amended complaint if he had notice that said demurrer was set down for argument." No counter showing was made by the defendant. The court denied the motion.

[1-3] Counsel for appellant argues that he was entitled to notice of the time set for the hearing on the demurrer. Defendant replies that the court rules of Siskiyou county provide that Saturday of each week shall be law day, on which all demurrers "shall be disposed of, unless otherwise ordered by the court," and that "parties shall be deemed to have notice that on law day any demurrer that has been on file for five days prior thereto will be argued and submitted for decision." The court rules have not been made a part of the record, and therefore cannot be considered. Johnston v. Callahan, 146 Cal. 212, 79 Pac. 870. It must be assumed in support of the judgment, however, that there was no court rule requiring notice of the hearing on the demurrer, and the question of right to notice must be determined in accordance with the provisions of section 594 of the Code of Civil Procedure, which reads as follows:

> "Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial."

The provision requiring notice of trial of an issue of fact was added in the year 1899. In the case of Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798, it was held, under the law as it stood prior to the amendment, that—

> "It is not an abuse of discretion for the trial court to deny a motion to vacate a judgment rendered in the absence of the parties against whom the judgment is given, on the ground of excusable neglect, where the application to set it aside simply shows that such parties had no notice of the setting of the case for trial; that they relied upon the belief that they were entitled to notice, as they were nonresidents of the county."

The section has not been changed relative to notice of the trial of an issue of law, and hence the case of Dusy v. Prudom is authority for the action of the trial court in this case. In the case cited the trial of a question of fact was had in the absence of the defendant, and judgment rendered against him. The determination of the trial court in that case, if based on conflicting evidence, would have been conclusive on appeal, whereas in this case the question of law presented by the demurrer was as fully open for consideration on appeal as in the trial court. The effect of granting appellant's motion would have been to permit argument of the demurrer. If the court was satisfied that the demurrer was properly sustained, it cannot be said that it unwisely exercised its discretion in denying the motion and leaving the plaintiff to its remedy by appeal. But, regardless of other considerations, the statute authorized the court to hear and decide the issue of law raised by the demurrer without notice to the appellant, and, to hold that it was an abuse of discretion to deny the appellant's motion to vacate the judgment on the sole ground that appellant had no notice of the hearing on the demurrer other than that afforded by the placing of the same on the law calendar, would be to nullify the statute, because a party without notice could always make that showing.

The order appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

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54 Cal. App. 794

HEWITT LAND CO. v. DWINNELL.
(Civ. 2331.)

(District Court of Appeal, Third District, California. Aug. 30, 1921. Hearing Denied by Supreme Court Oct. 24, 1921.)

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by the Hewitt Land Company against G. W. Dwinnell. From an order refusing to vacate judgment for defendant, plaintiff appeals. Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.
Taylor & Tebbe, of Yreka, for respondent.

PER CURIAM. The appeal in this case involves the same question as that considered in the case of Five States Timber Co. v. Dwinnell, 203 Pac. 410, this day decided by this court. On the authority of the decision in that case, the order appealed from is affirmed.

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55 Cal. App. 257

JACKSON v. ALLEN. (Civ. 3920.)

(District Court of Appeal, First District, Division 2. California. Nov. 18, 1921.)

1. Reference ⟹89—Immaterial that findings were personal opinions of referees.

A contention that report of referees, appointed to report upon facts under Code Civ. Proc. § 639, subd. 1, that 'from the testimony taken we are convinced that about half of the hay produced on this tract was no more than Bermuda grass, which would have practically no market value as hay," was the personal opinion of the referees, was without significance, since such referees were appointed to render their personal opinion, based upon the evidence produced before them.

2. Reference ⟹63—Expert opinions as to values unnecessary.

Referees appointed to report upon questions of fact under Code Civ. Proc. § 639, subd. 1, in an accounting between partners, need not seek expert opinions as to values of property, such as hay.

3. Appeal and error ⟹1033(7)—No complaint of favorable error.

A party cannot complain of findings of referee in an accounting which were favorable to him.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by W. A. Jackson against Asa W. Allen. Judgment for plaintiff, and defendant appeals. Affirmed.

W. D. Crichton, of Fresno, for appellant.
Stanley Moffatt, of Fresno, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a judgment dissolving a partnership and for an accounting of the partnership existing between plaintiff and the defendant. The plaintiff recovered a judgment for $619.48, and the defendant has appealed under section 953a. The transcript purports to be a transcript by the county clerk, setting forth copies of certain papers on file in his office, but the appellant has not brought up any transcript of the proceedings or the evidence. The trial court made an interlocutory judgment on the 3d day of January, 1921, dissolving the partnership on the stipulation of the parties, and ordered a reference to Burdick & Baker as referees to state an account between the plaintiff and defendant, and thereafter to submit the same to the court for its final decision. It does not appear whether the testimony and proceedings before the referees were taken down, nor does it appear that any exceptions were taken before the referees, nor does it appear that anything purporting to be the evidence, or purporting to be a record of proceedings had before the referees, was thereafter certified to the trial court; however, it does appear by a recital in the findings that the referees prepared a written report; that the defendant made certain objections in writing to the same; that the matter was thereupon referred back to the referees; that they made a supplemental report; that written objections were made to that report, and that thereafter, on April 26th, the report of the referees and the objections thereto were heard in open court, and thereafter the trial court ordered judgment in favor of the plaintiff in accordance with the findings and the report of the referees. At this time the appellant makes certain points which call upon us to reconsider his objections to the report of the referees. Assuming, without deciding, that this court has the power, on this kind of a record, to re-examine such questions, we will attempt to dispose of the issues presented.

The appellant cites and relies on Lambert v. Smith, 3 Cal. 408, Calderwood v. Pyser, 31 Cal. 333, and Lee Sack Sam v. Gray, 104 Cal. 243, 34 Pac. 85. The case first cited was one in which the trial court had ordered a reference to hear and determine the whole issue, pursuant to subdivision 1 of section 183 of the Practice Act (St. 1851, p. 79) which was codified as subdivision 1 of section 639 of the Code of Civil Procedure. The second case may be classified in the same manner. The third case involved a proceeding had and taken under and pursuant to sections 1507 and 1508 of the Code of Civil Procedure. As stated above, in the instant case the trial court did not order a general reference, but its order was under the last clause of subdivision 1 of section 639 of the Code of Civil Procedure, which provides: "* * * Or report upon any specific question of fact involved therein." It is patent, therefore, that the referees were not to prepare any conclusions of law, and there was therefore no occasion to state conclusions of law together with, or separately from, findings of fact, and the referees neither did nor omitted to do anything in violation of the authority conferred upon them. It is claimed that the referees called and examined witnesses, and received oral evidence not in the presence and hearing of the defendant, and that such fact appears on the face of the report. It is sufficient to state that the fact does not appear on the face of the report, nor does it appear in any other manner.

[1] As to a quantity of hay, the referees reported:

> "From the testimony taken we are convinced that about half of the hay produced on this tract was no more than Bermuda grass, which would have practically no market value as hay."

The appellant complains of this language to the effect that the same was contrary to the evidence, and the personal opinion of the referees. However, as the evidence taken by the referees is not before us, we may not consider whether the statement was in accordance with, or contrary to, the evidence. As to the statement being the personal opinion of the referees, it is sufficient to state that the referees were appointed to render their personal opinion based on the evidence produced before them, and there is nothing to show that they did otherwise.

[2] Regarding this same hay, the referees also reported:

> "From our personal knowledge of the market price of hay during the years of 1918 and 1919, and the quotations on the open market, we are convinced that the 40 tons of hay charged up to the partnership would not have been worth $10 per ton."

The appellant attacks the statement as being contrary to the evidence. That attack cannot be considered for the reasons stated above. It is also asserted that the statement of the referees is the personal opinion of the referees. If by this attack the appellant complains because the referees did not seek expert opinions as to values, it is sufficient to remark that they were not bound to do so.

[3] The referees reported, among other things, as follows:

> "There was some question as to the amount of cream checks received by Allen, inasmuch as he was to have all of the cream checks for his care of the milk cows, and it is utterly impossible to ascertain just how many milk cows of his own and how many of the partnership were producing milk at the time. We have eliminated the entire transaction as immaterial."

It will be noted that the checks in question were received by Allen; that if there was any materiality in the item, Allen should have been charged to the extent of the item. If Allen was not so charged, then Jackson had a just right to complain, but Jackson has not appealed, and Allen may not complain of errors that were in his favor.

As stated above, the referees found that there was owing from Allen to Jackson the sum of $619.48. The appellant complains that the finding is contrary to the evidence and is not supported by any evidence. This objection has already been discussed above, and needs no further attention on our part.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

55 Cal. App. 684

PHILLIPS et al. v. WHEELER et al.
(Civ. 2372.)

(District Court of Appeal, Third District, California. Dec. 16, 1921.)

1. Appeal and error ⚷933(4) — Presumed that new trial not granted for insufficiency of evidence.

Under the express provisions of Code Civ. Proc. § 657, as amended by St. 1919, pp. 141 and 142, it is presumed that an order granting a new trial was not made on the ground of insufficiency of the evidence where the order does not state that it was so made.

2. Appeal and error ⚷1161—Order granting new trial reversed when respondent concedes it cannot be sustained.

Where respondents concede that they cannot successfully argue the only grounds in support of an order granting a new trial open to them in view of the presumption under Code Civ. Proc. § 657, as amended by St. 1919, pp. 141 and 142, that the order was not granted for insufficiency of the evidence, the order will be reversed.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by J. W. Phillips and another against John H. Wheeler and another. From an order granting plaintiffs' motion for a new trial, defendants appeal. Reversed.

V. L. Hatfield, W. H. Hatfield, and P. H. Johnson, all of Sacramento, for appellants.

Otis & French, Frank L. Gafney, H. T. Hiatt, and C. B. Harris, all of Sacramento, for respondents.

HART, J. [1] On the 16th day of November, 1921, this court filed herein an opinion, 156 P.2d 468, of which the following is a portion, and which we hereby adopt as a part of this opinion:

"This is an appeal from an order granting a motion by the plaintiffs for a new trial. The motion was based upon all the statutory grounds (see section 657, Code Civ. Proc.), and the order granting it was in general language or silent as to the particular ground or grounds upon which it was predicated. There was no showing, by affidavits or otherwise, in support of any of the grounds enumerated in the first, second, third, and fourth subdivisions of section 657, such a showing being required by section 658 of the Code of Civil Procedure. The action was for damages for personal injuries, and, the verdict being for defendants, no question of excessive damages, etc. (subdivision 5, § 657), is involved herein, and it is obvious, therefore, that the order appealed from was not based upon that ground. The question as to the sufficiency of the evidence to support the verdict is eliminated from consideration here, since the order granting the new trial does not state that it was made on that ground; the presumption in such case being, under said section 657, as amended by the Legislature of 1919 (Stats. 1919, pp. 141, 142), that the order was not made upon that ground. It results that there are left but two of the several causes for which an order granting a new trial may be granted upon which the order could have been made, and they are: (1) That the verdict 'is against law' (subdivision 6); (2) 'error in law, occurring at the trial and excepted to by the party making the application' (subdivision 7). But, as to these grounds, neither counsel for respondents nor counsel for appellants have a word to say in their briefs. In fact, the brief of counsel for respondents is devoted entirely to a discussion of the question of the discretion of a trial court in the matter of granting the motion on the ground of the insufficiency of the evidence to support the verdict, while those of appellants involve merely a reply thereto and also the contention that the duty is not upon them to show that the court did not err in any of its rulings or instructions. There was no oral argument of the cause; it having been submitted upon the briefs on file. * * * It is clear that, as the cause now stands submitted, a reversal of the order would be justified. Inasmuch, however, as we conceive it our duty to assume that the trial court had some substantial legal reason for granting the motion, we feel reluctant about ordering a reversal without giving the attorneys for the respondents an opportunity to point out, if they can, any errors affecting their vital rights in the trial which occurred during the course thereof."

[2] In accordance with the conclusion thus announced, the order submitting the cause for decision was vacated and set aside, and in due time the attorneys of the respective parties notified thereof, and the respondents were allowed ample time within which to point out, if they could, any errors of law occurring at the trial, or to show, if they could, wherein the verdict was against law, and the appellants were given like time within which to make a reply to any points which respondents might advance in the particulars mentioned. On the last day of the time (December 15, 1921) allowed to respondents for filing an additional brief covering the points upon which the court desired and in its opinion invited enlightenment, the attorneys for respondents filed a document with the record herein which was signed by said attorneys, and which, among other things, states:

"Since the order made in the above-entitled action setting aside the submission on briefs on file, we have investigated the record in view of the suggestions made by the court in the order setting aside the submission. From a further examination of the transcript, we are convinced that the respondent cannot successfully argue the points referred to in the order setting aside the submission. We believe the trial court decided the points of law arising during the trial in a proper manner, but in view of the fact that we cannot consider the insufficiency of the evidence we cannot argue this point in connection with the ground that the verdict is against law. * * * We would therefore respectfully submit that the order granting the new trial be vacated and set aside, and that a remittitur issue forthwith."

Accordingly the order appealed from is reversed, and the remittitur ordered to issue forthwith.

We concur: FINCH, P. J.; BURNETT, J.

54 Cal. App. 119

SUWA v. JOHNSON. (Civ. 2322.)

(District Court of Appeal, Third District, California. Aug. 31, 1921. Hearing Denied by Supreme Court Oct. 24, 1921.)

Aliens ⚷6(2)—Issue of alienage not available to landlord in action for possession by tenant under lease.

In an action by an alien for possession of real estate under a lease for six years, in view of the Alien Land Law, Pol. Code, § 474, and Code Civ. Proc. §§ 1269–1273, the issue of alienage was not available to the landlord, but could be raised only by the Attorney General on behalf of the state.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by C. Suwa against J. W. Johnson. From judgment for plaintiff, defendant appeals. Affirmed.

W. H. Carlin, of Marysville, for appellant.
A. H. Hewitt, of Yuba City, for respondent.

FINCH, P. J. Plaintiff was given judgment for the possession of certain agricultural land, and the defendant appeals.

On January 25, 1917, the defendant executed and delivered to the plaintiff a lease of said land for a term of three years, commencing the 1st day of February, 1920, and ending the 31st day of January, 1923. On the same day the defendant executed and delivered to I. Murayama a lease of the same land for a term of three years, commencing on the 1st day of February, 1917, and ending on the 31st day of January, 1920. By separate answer and by proof offered at the trial the defendant sought to show that Suwa and Murayama are aliens, being subjects of the Emperor of Japan; that prior to the execution of the two leases Murayama desired to acquire the land for a term of six years; that the defendant then informed Murayama that a lease for six years would be invalid under the alien land law of 1913; that thereupon it was agreed between them that the two leases should be executed, one to Murayama for a term of three year, and the other to Suwa for three years after the termination of the first lease; that the two leases were executed and delivered pursuant to this understanding; and "that the two leases were made for the benefit of I. Murayama and I. Murayama alone, and for the purpose of avoiding" the restrictions of the alien land law. On motion of the plaintiff the separate answer was stricken out, and his objection to the proof offered was sustained. Murayama held possession and farmed the land for the term of the first lease, paying the stipulated rental therefor. The defendant retook possession before the commencement of the term of the second lease and refused to deliver possession of the land to the plaintiff. Thereupon this action was instituted.

The only question argued on appeal is whether a lease for six years to an alien, ineligible to citizenship, can be avoided at the suit of the lessor on the ground that the lease is invalid on account of the alienage of the lessee. Section 2 of the alien land law (Stats. 1913, p. 206) provides that aliens ineligible to citizenship—

> "may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years."

Section 6 provides:

> "Any leasehold or other interest in real property less than the fee, hereafter acquired in violation of the provisions of this act by any alien mentioned in section 2 of this act * * * shall escheat to the state of California. The Attorney General shall institute proceedings to have such escheat adjudged and enforced as provided in section five of this act."

Section 5 provides that—

> "The Attorney General shall institute proceedings to have the escheat of such real property adjudged and enforced in the manner provided by section 474 of the Political Code and title eight, part three, of the Code of Civil Procedure."

The question presented is not new, and the act of 1913 discloses no intention on the part of the Legislature to provide any new rule for its determination. It has uniformly been held under statutes forbidding ownership of land by aliens that an alien grantee takes a defeasible estate, "free from attack by any one except the government" in a direct proceeding. Ramires v. Kent, Bartel & Co., 2 Cal. 558; Norris v. Hoyt, 18 Cal. 217; Ferguson v. Neville, 61 Cal. 356; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. 168; Doe v. Robertson, 11 Wheat. 332, 6 L. Ed. 488; Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532; McKinley Creek Mining Co. v. Alaska United Mining Co., 183

U. S. 563, 32 Sup. Ct. 84, 46 L. Ed. 331; In re Palmer Window Glass Co. (D. C.) 183 Fed. 902; Johnson v. Elkins, 1 App. D. C. 430; Madden v. State, 68 Kan. 658, 75 Pac. 1023; Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 S. E. 518; Beldon v. Wilkinson, 33 Misc. Rep. 659, 68 N. Y. Supp. 205; Smith v. Smith, 70 App. Div. 286, 74 N. Y. Supp. 967; Stewart v. Gold & Copper Co., 29 Utah, 443, 82 Pac. 475, 110 Am. St. Rep. 719; Oregon Mortgage Co. v. Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841; Abrams v. State, 45 Wash. 327, 88 Pac. 327, 9 L. R. A. (N. S.) 186, 122 Am. St. Rep. 914, 13 Ann. Cas. 527; State v. World Real Estate Commercial Co., 46 Wash. 104, 89 Pac. 471; Keene v. Zindorf, 81 Wash. 152, 142 Pac. 484; Prentice v. How, 84 Wash. 136, 146 Pac. 388. The rule and the reason therefor are stated by the Supreme Court of the United States in Doe v. Robertson, supra, as follows:

> "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression."

Where an owner has conveyed his title to an alien, he becomes as much a stranger to that title as if he had never owned the property conveyed. To permit such a stranger to attack an owner's title on the ground of alienage would not promote "the peace of society" or "protect the individual from arbitrary aggression." If the alien grantee leases the land to another, he may collect the rent, and his alienage is no defense to an action therefor. Ramires v. Kent, Bartel & Co., 2 Cal. 558. If he is out of possession, he may recover the same by appropriate action. Norris v. Hoyt, 18 Cal. 217. He may defend in court against adverse claimants. Ferguson v. Neville, 61 Cal. 356; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. 168. The Constitution of the state of Washington provides that:

> "All conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void." Const. art. 2, § 33.

The courts of that state have uniformly held, as will appear from an examination of the cases cited, that an alien grantee takes a defeasible estate, void only as against the state.

There are cases holding that a court will not assist an alien to acquire title. In Ales v. Epstein, 283 Mo. 434, 222 S. W. 1012, the plaintiff, an alien, sought to enforce a constructive trust in land alleging that the defendant had purchased the land in her behalf pursuant to an oral agreement that he would convey the same to her, their relations being confidential, and the plaintiff being ready to pay, but not having paid the purchase price. The court said:

> "If the plaintiff had received a deed to the real estate in controversy, conveying to her the absolute title to same, and these defendants were seeking to divest her of said title, * * * then it might be well said that the state alone could attack the conveyance, declare a forfeiture, and take the property. If it was unlawful * * * for plaintiff, under the circumstances of this case, to take and hold the real estate aforesaid, it would be equally as unlawful for a court of equity to aid her in violating said law."

To the same effect is the holding in Case v. Kelly, 133 U. S. 28, 10 Sup. Ct. 220, 33 L. Ed. 513. No case, however, has been cited or discovered which holds that, after title has passed to an alien in violation of law, his defeasible estate can be attacked collaterally on the ground of his alienage; and all attacks are collateral except a direct proceeding by the government in the manner provided by law in the case of escheated estates.

From the foregoing authorities it seems clear that the issue of alienage, tendered by the separate answer, was not available to the defendant, but can be raised only by the Attorney General on behalf of the state, in the manner provided by the act of 1913.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

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55 Cal. App. 277

ALECHOFF v. EDWARDS. (Civ. 3585.)

(District Court of Appeal, Second District, Division 1, California. Nov. 21, 1921.)

1. Partnership 🔑331—Partner required to account to copartner to time of interlocutory decree providing for accounting.

In a partner's action against copartner who had taken exclusive possession of the partnership business for an accounting and for a dissolution, the court did not err in taking an account up to the date of filing an interlocutory decree declaring plaintiff entitled to a dissolution and to an accounting, regardless of whether dissolution took place when defendant took exclusive possession of the business under Civ. Code, § 2451, or when court rendered interlocutory decree under section 2452, subd. 2, since defendant having assumed to act in liquidation of the partnership affairs, should be required to make a complete accounting.

2. Partnership 🔑331—Equity will make complete settlement of accounts, though involving items accruing after suit.

On a suit for dissolution and accounting, a court of equity will not make an incomplete settlement of accounts, but will adjust the whole matter, even involving items accruing after commencement of the suit.

3. Appeal and error ⚷924—**Referee's report in partnership accounting presumed limited to items necessary to an accounting and settlement of the co-partnership business.**

In action by a partner for an account against copartner who had taken exclusive possession of the partnership business and profits the appellate court on appeal from judgment for plaintiff for amount found due by referee must assume that the referee's report was limited to the items necessary to an accounting and settlement of the copartnership business, and did not attempt to include business or property of the defendant exclusive of such partnership affairs.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Mike Alechoff, also known as Mike Alekian, against M. K. Edwards. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanley Visel, of Los Angeles, for appellant.

Wm. Lewis and Guy Lewis, both of Los Angeles, for respondent.

CONREY, P. J. Action for dissolution of partnership and for an accounting. Complaint filed January 6, 1919. The partnership came into existence on the 20th day of September, 1918, under an agreement whereby it was provided that the partnership should continue during the mutual agreement of the parties. After a trial of the issues presented other than the facts involved in the accounting, the court, on August 30, 1919, entered an interlocutory decree. From the facts stated in the interlocutory decree it appears that the partnership business continued until December 27, 1918, at which time the defendant, in violation of the terms and conditions of the partnership agreement, took exclusive possession, adversely to the plaintiff, of the partnership business and property, including all the proceeds and profits thereof since the beginning of the partnership, and converted the same to his own use. The interlocutory decree declared that the plaintiff is entitled to a dissolution of the partnership and to an accounting; that the assets of the business be sold, and the net proceeds, as shown by the accounting, be equally divided between plaintiff and the defendant. A referee was appointed to take the accounting and to report what upon the balance of the account should appear to be due from either party to the other.

A final judgment was entered November 15, 1920, in favor of the plaintiff and against the defendant for the sum of $1,405.73. In this final judgment it is stated that the order of reference was made by consent of the parties; that the referee took the evidence and stated an account and duly filed his report to the court. A hearing was duly had upon said report and the exceptions thereto. On motion of the plaintiff, duly presented and argued, the court approved the account "up to the entry of said interlocutory judgment and wherein and whereby it was found that the plaintiff was entitled to judgment against the defendant for the sum of $1,405.73." Judgment was entered accordingly. From the judgment so entered the defendant appeals. The appeal is presented upon the judgment roll alone.

Appellant's sole point on appeal is that the trial court was not warranted, in the face of the pleadings and evidence, in taking an account up to the date of filing the interlocutory decree and in attempting to decree a dissolution of the partnership when a dissolution had legally been had prior to the filing of the action; that the court erroneously compelled the defendant to account for the income of "his business" for the period running from the time when defendant contends that a dissolution took place to the date of the interlocutory decree. This claim is based upon the fact that, in addition to the facts hereinbefore stated, the complaint alleged and the answer admitted that "the plaintiff no longer agrees or desires to continue the said partnership, and has so informed the defendant." From this it is argued that the partnership must have been terminated prior to the commencement of this action (Civ. Code, § 2451), and therefore could not be dissolved by judgment of the court on account of misconduct of the defendant, as provided for in case of such misconduct (Civ. Code, § 2452, subd. 2).

[1-3] So far as the evidence is concerned, there is none before the court. Since the court found that the business was carried on by the parties together until December 27, 1918, it is manifest that the plaintiff's attempted withdrawal of his consent to the further continuance of the partnership did not occur earlier than that date. At all times after that date the defendant took and held exclusive possession of the partnership business and property. No facts are presented from which we can infer that it makes any difference whether the court dissolved the partnership, or determined that it was dissolved on December 27, 1918. In either event, since the defendant assumed to act in liquidation of the affairs of the partnership, he should not be permitted to escape a complete accounting.

"A court of equity will not make an incomplete settlement of accounts, but will go on and adjust the whole matter, even if it involves items accruing after the commencement of the suit." Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16.

In the absence of any evidence to the contrary, we must assume that the referee's report was limited to the subject-matter described in the order of reference, to wit, the items necessary to an accounting and settlement of the copartnership business, and did not attempt to include business or property of the defendant exclusive of such partnership affairs.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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55 Cal. App. 359

FAY IMPROVEMENT CO. v. NELSON.
(Civ. 4004.)

(District Court of Appeal, First District, Division 1, California. Nov. 25, 1921.)

Municipal corporations ⚷312—Repeal of ordinance ordering improvements held not to deprive board of public works of jurisdiction to subsequently order work done.

Where a board of public works, pursuant to a general street improvement ordinance, adopted an ordinance ordering certain improvements to be done under its supervision, after due passage, publication, and posting of a resolution of intention, that subsequently the ordinance ordering the work was repealed *held* not to deprive the board of public works of jurisdiction to later pass another ordinance ordering the work to be done; the adoption and repeal of the ordinance operating as a mere postponement, and being at most a mere informality, curable by the street improvement ordinance itself.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Fay Improvement Company against Adeline M. Nelson to foreclose a street assessment lien. Judgment for plaintiff, and defendant appeals. Affirmed.

Sawyer & Sawyer and Frank W. Sawyer, all of San Francisco, for appellant.

John R. Daniels, of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor in an action to foreclose a street assessment lien. The street improvement work in question was done upon Forty-Fourth avenue, between Anza and Fulton streets, in the city and county of San Francisco, under the provisions of the street improvement ordinance of said municipality adopted on September 2, 1913.

The appellant herein makes two main points. The first of these is that the ordinance in question is unconstitutional. No extended discussion of the argument urged in support of this contention need be made, since the question of the constitutionality of this and similar ordinances of said municipality has been set at rest by the decisions of the Supreme Court in the cases of Mardis v. McCarthy, 162 Cal. 98, 121 Pac. 389; Hayne v. San Francisco, 174 Cal. 185, 162 Pac. 625; Bienfield v. Van Ness, 176 Cal. 585, 169 Pac. 225.

The appellant's next contention is based upon the following facts as shown by the record herein: On the 14th day of June, 1916, the board of public works of the city and county of San Francisco duly and regularly passed a resolution, pursuant to the provisions of the ordinance above referred to, that it was expedient that the street improvements in question herein should be made. Thereupon plans and specifications for the doing of said work were duly prepared as in said ordinance provided. On July 12, 1916, the said board of public works duly and regularly and in accordance with the terms of said ordinance adopted and passed its resolution of intention to recommend to the board of supervisors of said city and county the doing of said work pursuant to the provisions of said street improvement ordinance, and also immediately thereafter duly caused said resolution of intention to be posted and published as required by the terms of said ordinance. On August 18, 1916, the said board of public works duly passed and adopted a resolution recommending to the board of supervisors of said city and county that they order said improvements to be made, which resolution, accompanied by a diagram certified by the city engineer and showing in detail the separate lots, pieces, and parcels of land within the limits of the district to be assessed for said work, and the location of the same with relation to the contemplated improvements, was duly transmitted to said board of supervisors. On September 18, 1916, the said board of supervisors duly and regularly passed and adopted an ordinance ordering the said work and improvement to be done under the supervision of the said board of public works. Thereafter, and on October 21, 1916, the said board of supervisors adopted an ordinance repealing the last above-mentioned ordinance ordering the said work to be done. The matter rested there until June 25, 1917, when the board of supervisors adopted another ordinance, similar in form to the ordinance of September 18, 1916, ordering the said work and improvements to be done but postponing the time for entering upon the same to a date nine months after the date of the approval of said ordinance

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

by the mayor. At the expiration of said time the work of making said improvements proceeded in accordance with the original ordinance providing the procedure for making such improvements. The appellant's contentention is that, by the repeal of the ordinance of September 18, 1916, ordering the doing of said work, the board of supervisors and the board of public works lost jurisdiction to carry on said improvements, and hence that all that was done thereafter, leading up to the assessment sought to be enforced against the appellant's property, was illegal.

We find no merit in this contention. General jurisdiction over the matter and method of making public improvements of the kind attempted in the instant case was conferred upon the board of public works and the board of supervisors of the city and county of San Francisco by the terms of the street improvement ordinance of 1913. It is in said ordinance provided that such work shall be initiated by the board of public works, through the adoption by it of a resolution of intention recommending to the board of supervisors the ordering of said work, specifying the nature and details of the same, which resolution of intention shall be published or posted as in said ordinance directed. Section 21 of said ordinance provides:

> "No assessment, warrant, diagram or affidavit of demand and non-payment after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality or other defect in the same, where the resolution of intention of the board of public works to recommend to the supervisors the ordering of the improvement has been actually published and posted and the notices of improvement posted as in this ordinance provided."

An examination of the other provisions of said ordinance discloses that nowhere is it provided therein that the board of supervisors shall within any specified or limited time act upon the recommendations of the board of public works in the way of ordering the said work to proceed; nor is it therein provided that said work shall be proceeded with or completed within any specified or limited time after the passage of the resolution of intention by the said board of public works. Jurisdiction to make said improvement and to bind the property of the appellant and of all others within the district for the expense of making the same was, we think, acquired by the due passage, publication, and posting of the resolution of intention under the express terms of the foregoing section of the Improvement Act of 1913, and was neither acquired nor lost by the passage or repeal of the ordinance of the board of supervisors of September 18, 1916. The ordinance of the board of supervisors of October 21, 1916, repealing said last-named ordinance, did not purport to be an ordinance abandoning the proceedings already taken toward making the improvements in question. Section 7 of said Street Improvement Act embraces a provision that the board of supervisors "by an affirmative vote of not less than fifteen members may determine to abandon all proceedings had and taken in the matter of the proposed improvement," but the said repealing ordinance of said board enacted on October 21, 1916, did not purport to be passed under this provision, but at most must be construed as merely expressing the resolve of the board not to proceed at present with the making of the intended improvements, but to delay its orders in that respect to some more opportune time. In the entire absence of any showing that any one, and especially this appellant, was or would be injured by the delay in ordering and proceeding with the making of these improvements we hold that the action of the board of supervisors, in first adopting and then repealing this ordinance ordering said improvements to be proceeded with, operated as a mere postponement of the time within which they should be entered upon, and was at most a mere informality which would be cured by the provisions of section 21 of the improvement ordinance above set forth. Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

No other errors being urged upon this appeal, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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55 Cal. App. 165

RICHMOND-CHASE CO. v. SCHLESSINGER. (Civ. 3944.)

(District Court of Appeal, First District, Division 1, California. Nov. 12, 1921. Rehearing Denied Dec. 12, 1921. Hearing Denied by Supreme Court Jan. 9, 1922.)

1. Executors and administrators ⚷167—Purchaser from executor may require return of sale for confirmation by court.

Where an executor sells a prune crop growing on lands of the estate, and afterwards refuses to carry out the contract with the purchaser, the sale is ineffectual without confirmation by the probate court, and the purchaser's remedy is to apply to the court to require that a return for confirmation be made.

2. Crops ⚷3—Crops growing or to be grown subject to sale or contract therefor.

Crops growing or to be grown are subject to contract for sale and to absolute sale.

3. Executors and administrators ⚷390—One assuming executor's contract for sale of growing crop held bound thereby, although original contract not confirmed.

Where an executrix contracted to sell a growing prune crop, but did not have the contract confirmed by the probate court, and thereafter sold the land and also the contract to one who agreed to carry it out, and the sale of the land and crop was confirmed to him by the probate court, he could not thereafter avoid performance on the ground that the original contract for the sale of the crop had not been confirmed.

4. Assignments 🔑5—Purchaser of growing crop may transfer his rights to assignee.

Where an executrix sold a growing prune crop, the rights arising out of the obligation were the property of the purchaser, and were capable of being transferred as such to his assignee, in view of Civ. Code, § 1458.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by the Richmond-Chase Company against Charles Schlessinger. Judgment for defendant, and plaintiff appeals. Reversed.

Fry & Jenkins, of San Jose, for appellant.
Charles S. Wheeler and Charles S. Wheeler, Jr., both of San Francisco, for respondent.

WASTE, P. J. This is an appeal by the plaintiff from a judgment rendered in the lower court, after demurrer to the first count of plaintiff's complaint sustained without leave to amend.

It appears from the facts pleaded in the first count of the complaint that Mrs. Carrie Losse, as the executrix of the last will and testament of her husband, which gave her power to sell any property of the estate without first having obtained an order of court, entered into a contract with E. N. Richmond by which she sold, and Richmond bought, the entire prune crop then growing on the real property belonging to the estate. This sale was not reported to, nor confirmed by, the probate court, for the reason that, shortly after executing the contract, the executrix received an offer in writing from the defendant to buy the real property, the sale and purchase price to include the growing crops on the land, together with the existing contract for the sale of the 1919 prune crop to Richmond, which agreement the defendant assumed and agreed to perform in the place and stead of the executrix. This sale was confirmed by the probate court. Richmond thereafter assigned his contract to the plaintiff, which made demand upon the defendant for delivery of the crop, which was refused. Thereupon the plaintiff brought this action for damages alleged to have been sustained by reason of the refusal of the defendant to deliver the crop in accordance with the agreement entered into by the defendant and the executrix of the estate.

The complaint is in two counts. The first stated the facts in detail, and the second is a common count for money had and received. The defendant interposed a demurrer, which was sustained as to the first count, on the ground of want of facts. In view of the ruling of the court, the plaintiff dismissed the second count, and upon this appeal relies upon the sufficiency of the facts alleged in the first count to constitute a cause of action.

The principal contention of the respondent in support of the ruling of the lower court, and one which no doubt greatly conduced to the action below, is that the attempted sale of the prune crop to appellant's assignor was void, for the reason that, from a reading of the contract, it is apparent that both the executrix and the purchaser intended a present sale, and not a mere agreement to sell the crop; the intention being to then and there vest Richmond with the title, contrary to section 1561 of the Code of Civil Procedure, which requires confirmation by the court in order to pass title. The sale not having been reported to the court, and confirmed, the contract was only an attempt to pass the title in a manner contrary to express law, and is a void transaction. At most, argues respondent, there was only an implied agreement to report the sale of the crop to the court for confirmation. No valuable consideration had passed. No equitable title had vested in the vendee. The transaction, so far as consummated, meant only that the purchaser was to get title to the prunes and pay the price in the event the court should confirm the sale. The confirmation, therefore, would be a condition precedent to any obligation on the part of either the buyer or the seller. In its absence, no liability for breach of the contract would attach to either the executrix or to Richmond.

[1, 2] Respondent's contention would impress us more strongly, if we were dealing with a situation presented by a refusal of the executrix to carry out the contract with the purchaser of the crop. In such a case the sale would be ineffectual without confirmation, and the appellant's procedure would have been to apply to the court to require that a return be made. Bennallack v. Richards, 125 Cal. 427, 433, 58 Pac. 65; In re Walker, 149 Cal. 214, 218, 85 Pac. 310. But we are not called upon to consider that situation. We are not now dealing with the case of an executrix, who, under such circumstances, may not bind either the estate or herself, without confirmation of her acts by the court, but with a situation presented by a party refusing to carry out a contract made for the benefit of another, the promisor being able to do so, and the contract one capable of exact performance. The sale by the executrix to Richmond was not invalid, but title to the property could not pass until confirmation

had been had. The contract in the meantime would remain executory. In all other respects the agreement was attended with the same incidents, and should receive the same construction as a similar contract between any other vendor or vendee. Bennallack v. Richards, supra. There is no merit in respondent's theory that the executrix, even with the sanction of the court sitting in probate, could not sell, or agree to sell, the crop of prunes. It is well settled that crops, growing or to be grown, as well as other personal property, are subject to contract for, and to absolute sale. Jones v. Cal. Growers & Shippers, 182 Cal. 777, 778, 190 Pac. 172; Hamilton v. Klinke, 183 Pac. 675, 677.

[3] It is alleged in the amended complaint, and on demurrer must be deemed to be true, that the agreement of the defendant to assume and perform the contract for the sale of the prunes to Richmond, in the place and stead of the executrix, was one of the considerations moving from the defendant to the executrix for the sale of the land. The written offer of the respondent to the executrix specified that—

> "Said sale and payment of the purchase price shall include also all growing crops on said land, together with the existing contract for the sale of the 1919 prune crop to E. N. Richmond, which contract I assume and agree to perform in your place and stead."

Therefore, whether or not the contract with Richmond had been reported to the probate court for confirmation was, and is, immaterial. The respondent accepted it as an existing obligation, and agreed to perform it. The sale of land and crop was confirmed to him, and he was thereby immediately placed in position to do what he stipulated with both the executrix and the court he would do, as one of the impelling inducements and as a part of the consideration for the sale to himself. He no doubt considered it, at that time, to be to his financial advantage to assume the contract. He should not now be allowed to avoid the performance of the obligation so readily assumed, upon the speculative theory that the court might or might not have approved the contract between the executrix and plaintiff's assignor.

[4] The transaction between the respondent and the executrix of the estate resulted in a contract made for the benefit of Richmond, and, not having been rescinded by the parties to it, he might maintain an action for the breach of the agreement. That right does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, has created the duty, established a privity, and implies the promise and obligation on which this action is founded. Washer v. Independent Mining, etc., Co., 142 Cal. 702, 708, 76 Pac. 654; Morgan v. Overman S. M. Co., 37 Cal. 534, 537; Lewis v. Covillaud, 21 Cal. 179, 189. The right arising out of the obligation was the property of Richmond, and was capable of being transferred as such to his assignee. Civ. Code, § 1458.

We are therefore of the opinion that the first count of the complaint states a cause of action, and that the demurrer was improperly sustained. The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

55 Cal. App. 458

PARKER v. PARKER. (Civ. 3757.)

(District Court of Appeal, Second District, Division 1, California. Nov. 30, 1921.)

1. Divorce 🔑231—When granted on husband's offense, court may make division of property and compel allowance for wife's support.

Where a divorce has been granted for an offense of the husband, by Civ. Code, § 139, the court is authorized, not only to make proper division of the community property, but also to compel the husband to make suitable allowance for the future support of the wife.

2. Divorce 🔑245(1)—Husband consenting to stipulation for lien on property for wife's support estopped from denying validity, and court could not modify decree.

In an action for divorce, where the authority of the court to impose a lien on the husband's property was derived solely from a stipulation of the parties, and not from the right of the court to impose upon the husband any duty to provide for the wife's future support, and the payments provided for in the decree were a part of and only incidental to the division of the community property, the husband having accepted the benefit of the decree so made, was estopped from denying the validity of the lien so established, and the judgment, notwithstanding the court's attempt to reserve the right to modify it, became unchangeable.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Francis M. Parker against Willie O. Parker. From an order modifying decree of divorce, defendant appeals. Reversed.

Tobias R. Archer, of Los Angeles, for appellant.

John B. Nichols, of Santa Ana, and George L. Sanders, of Los Angeles, for respondent.

CONREY, P. J. By interlocutory decree of date November 25, 1912, it was determined that the plaintiff was entitled to a divorce from the defendant. This was followed by a final decree dated August 5, 1915, whereby the parties were divorced. In the interlocutory decree, which as to these terms was followed by the final decree, it was stated that the parties stipulated in open court that, if a decree for divorce should be awarded to either party, the court, instead of dividing the property of the parties between them, might provide for the separate maintenance of the defendant by awarding to her certain property for life, and that plaintiff pay defendant such monthly allowance and secure the same by a lien upon such property of the plaintiff as in the discretion of the court should seem proper. Pursuant to that stipulation, the court awarded to the plaintiff certain parcels of real property and other property, and awarded to the defendant, for the period of her natural life, certain described real property, with remainder over to the plaintiff. It was further ordered thereby that the plaintiff pay to the defendant the sum of $50 per month during the remainder of her natural life, "and to secure the payment of said sum of $50 per month, a lien in favor of said defendant is hereby created and declared to exist upon the remainder over and interest of said plaintiff in said lot 30, Alcantara Grove tract, above described, and also upon that real property situated in the county of Orange, state of California, more particularly described as lots 5, 6, 7, and 8 of the P. A. Stanton tract, as per map recorded in book 5, at pages 23 and 24, miscellaneous records of Orange county, Cal." In October, 1920, the plaintiff made application to the court for an order modifying the provisions of the decree of divorce relating to property rights of the parties, and asked that the cash payments of $50 per month be discontinued and not further required, and that the lien in favor of the defendant on said lots in the Stanton tract be released. The matter having been regularly heard upon the application and the affidavits filed on behalf of the respective parties, the court on November 22, 1920, entered an order denying the application of plaintiff for discontinuance of the monthly payments of $50. But the court further ordered that said lien to secure the said monthly payments to the defendant on said lots in the Stanton tract be released. The defendant has appealed from all that portion of the order which orders the release of the lien on said lots.

[1, 2] If the divorce had been granted by reason of misconduct of the plaintiff, the court would have been authorized, not only to make proper division of the community property, but also to compel the husband to make suitable allowance for the future support of his wife. Civ. Code, § 139. This allowance cannot be made when the divorce is granted for the offense of the wife—only when it is for the offense of the husband. Ex parte Spencer, 83 Cal. 460, 464, 23 Pac. 395, 17 Am. St. Rep. 266. If in this case the court had authority to impose a lien in favor of the defendant upon a portion of the community property awarded to the plaintiff, as security for payments thereafter to be made by the plaintiff to the defendant, that authority was derived from the stipulation made, and not from any right of the court to impose upon the plaintiff any duty to provide for the future support of the defendant. Having accepted the benefit of the decree so made in accordance with his own consent, we think that the plaintiff should be held to be estopped to deny the validity and efficacy of the lien thus established. The parties agreed that the provision thus made was in lieu of any other division of the property. If the plaintiff at the time of the award had objected that such payments to be made and such lien securing the same were outside the scope of the stipulation as made, it may well be that the court would have decided that the defendant was entitled to a larger portion of the community property in the division then about to be made. Having accepted the benefits of the stipulation and decree as thus made, the plaintiff should not now be permitted to be relieved from the burdens imposed upon his property by the decree. In the decree of divorce and in the interlocutory decree, the court attempted to reserve to itself the right to modify the decree and the allowance to be paid to the defendant, and the liens declared to secure the payment thereof. If this had been the allowance provided for by the statute to be paid to the wife in a divorce action where she is not the party in fault, it may be conceded that such allowance might thereafter be modified. But since the payments provided for in this decree were a part of and only incidental to the division of the community property, no reason appears why the judgment, when it became final, did not also become unchangeable to the same extent as a final judgment in any other action.

That part of the order from which the defendant has appealed is reversed.

We concur: SHAW, J.; JAMES, J.

55 Cal. App. 370

LARSON v. TAYLOR et al. (Civ. 3466.)

(District Court of Appeal, Second District, Division 1, California. Nov. 25, 1921.)

1. Landlord and tenant 🔑172(1)—Failure to pay tenant part of proceeds of products and plowing of certain land held not to constitute an eviction.

Where plaintiff leased 40 acres and purchased dairy stock thereon, and agreed to turn over moneys realized by her from the sale of milk and live stock, and defendants agreed to pay her $50 a month out of such proceeds and to apply the remainder on rent and the price of the stock, landlord's failure to pay $50 per month and his plowing of 4 acres, which destroyed the alfalfa thereon, was not an eviction, in the absence of evidence tending to show that such plowing deprived plaintiff of the use of the tract.

2. Landlord and tenant 🔑34(1)—Lease contract may be rescinded by consent of parties.

A lease contract whereby tenant turned over proceeds to landlord, who applied it on rent and price of live stock purchased from the landlord, could be rescinded by consent of the parties, under Civ. Code, § 1689.

3. Landlord and tenant 🔑34(5)—Lease contract held mutually rescinded.

Where plaintiff leased land and purchased dairy herd thereupon, and proceeds were turned over to defendants to be applied on rent and price of stock, and it became apparent that the plaintiff was unable to make a living and stated that unless the contracts were modified she would abandon the possession of both the leasehold and personal property, and defendants assented to the rescission by taking possession of the land and property thereon, there was no eviction, but a mutual rescission, in view of Civ. Code, § 1689, providing for rescission by consent of the parties.

Appeal from Superior Court, Imperial County; Franklin, J. Cole, Judge.

Action by O. N. Larson against C. D. Taylor and another. Judgment for plaintiff, and defendants appeal. Reversed.

Hickcox, Crenshaw & Trude, of El Centro, for appellants.

James W. Glassford and H. L. Welch, both of El Centro, for respondent.

SHAW, J. Action to recover damages for the alleged eviction of plaintiff from the possession of premises which she held under a lease from defendants, who appeal from an adverse judgment.

It appears that on June 11, 1919, defendants executed a lease to plaintiff of 40 acres of land for a period of five years at the term rental therein specified of $6,000, to be paid in installments of $100 per month. On the same date a contract was executed between the parties whereby defendants sold to plaintiff a dairy herd of cows, together with other personal property, for the sum of $4,200 payment of which plaintiff promised to make in installments of $100 or more per month, and to secure which she executed a chattel mortgage upon the property so purchased by her. It was agreed that all moneys realized by her from the sale of products from said cows, as well as that received from the sale of live stock disposed of, should be paid monthly, which sums, less $50 per month which they were to pay plaintiff, were to be applied upon the rent due upon said lease, and any balance paid upon plaintiff's note so secured by the chattel mortgage. The dairy stock and other personal property were by defendants delivered to plaintiff, who, on the date mentioned, entered into possession of the real estate, and continued therein until September 5, 1919, a period of about four months, during which time defendants received checks for the milk products sold amounting during the period to the sum of $300, which was applied to the rental of the property under the terms of the lease, in addition to which and from other sources plaintiff paid them $600 upon the contract of sale of the personal property. Defendants, however, failed to pay plaintiff the sum of $50 per month from said creamery checks, as they had agreed to do.

The court found that on June 28, 1919, defendants entered upon the land and plowed about four acres thereof, as a result of which the alfalfa pasturage thereon was destroyed, and that on September 5, 1919, without the consent of plaintiff, they seized all of the dairy stock and personal property so purchased by plaintiff from defendants and for the payment of which she had executed the chattel mortgage, and converted the same to their own use; that by reason of the nonpayment of the $50 per month to plaintiff as stipulated in said contract, without which she had no means of subsistence, and the destruction of said four acres of pasturage on said premises on June 28, 1919, plaintiff was deprived of the beneficial use of said premises.

[1] Conceding that defendants breached their contract in the payment to plaintiff of $50 per month, and that by reason thereof she might have had a cause of action for damages, such fact, since it cannot be deemed to have interfered with her use and possession of the premises, did not constitute an act of eviction from the leasehold; and conceding also that defendants, as found by the court, destroyed 4 acres of the 40-acre tract of alfalfa, such fact, standing alone and without other evidence tending to show that it deprived plaintiff of the use of the tract, is likewise insufficient to constitute an eviction. Moreover, while plaintiff testifies that she did not consent to such act of defendants in destroying 4 acres of pasturage, she

testifies the work was done with teams which she furnished therefor and by a man jointly employed by herself and defendants.

[2] As a further defense, it was alleged in the answer that, prior to defendants taking possession of the property, plaintiff notified them that she rescinded the contract and abandoned said leased premises and the live stock and implements in said contract described, and requested defendants to take charge thereof, and that their acts in taking possession of the property were due to the acts of plaintiff in so notifying them that she rescinded the contract and abandoned said leased premises and the live stock for the reason that she could not make a living upon the land under the terms of the contract. A contract may be rescinded by consent of all the parties. Section 1689, Civ. Code. The court made no finding upon the issue tendered, and in support of which evidence was offered by appellants. Such failure so to do constituted error.

[3] It is apparent from the evidence that plaintiff, under the conditions of the lease and terms of the chattel mortgage given upon the dairy herd and personal property, was unable to make a living upon the ranch, and, unless the contracts were modified by defendants in accordance with her request, she expressed the intention of abandoning possession of both the leasehold and personal property, and so notified defendants, who, while unwilling to change the contracts, by their acts in taking possession, assented to the plaintiff's acts of rescission.

Conceding that defendants were guilty of a breach of their contract to pay plaintiff $50 per month out of the creamery checks, thus rendering it impossilbe for her to successfully operate the ranch on account of insufficient funds, it devolved upon her to secure the same elsewhere, looking to defendants for such damages as she might be legally entitled to on account of the breach. At all events, it was not an act upon which to base a claim of eviction from the leasehold.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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55 Cal. App. 251

ALEXSON v. STEWARD et al. (Civ. 2327.)

(District Court of Appeal, Third District, California. Nov. 17, 1921.)

1. Limitation of actions 🔑127(2)—Amended complaint held not to state new cause of action.

An amended complaint alleging that a contract was executed by L., doing business under the name of L. Company, in his own behalf, did not state a new or different cause of action than the original complaint, which alleged that the contract was executed by L., as president, on the behalf of the L. Company, a corporation, so as to be barred by limitations; it appearing that the corporation had at the time of the contract forfeited its charter, and that L. was the sole stockholder.

2. Shipping 🔑120—Person transporting granite held liable for all damage and work of shipper in repairing damage.

Owner of barge contracting to transport and "to secure granite well on barge, so as to avoid damage in transit, and shall be responsible for any and all damage done person or property by reason of the prosecution of his work," was just as liable as a common carrier, if not a common carrier, for injury to the granite by sinking of the barge, and there was a sufficient consideration for employment of the shipper to raise the granite, as would be the case with a common carrier, under Civ. Code, § 2194.

3. Corporations 🔑617(2)—Contract with corporation whose charter was forfeited held not void.

Contract with a corporation which had forfeited its charter for nonpayment of its license tax *held* not void, where executed by one who had been its president and owned all of the stock and was conducting the business under the old corporate name, where no prejudice resulted from the fact that the president, rather than the corporation named, was the real party in interest.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Nick Alexson against L. P. Steward and another, as individuals and as copartners doing business under the firm name and style of Steward Bros. Judgment for plaintiff, and defendants appeal. Affirmed.

W. E. Kleinsorge, of Sacramento, for appellants.

Johnson & Lemmon, of Sacramento, for respondent.

FINCH, P. J. The defendants appeal from a judgment against them in favor of plaintiff. The original complaint alleged that the defendants were copartners "engaged in the business of transporting freight as a public carrier, on the Sacramento river"; that the Leed Granite Company was a corporation; that in July, 1917, the Leed Granite Company delivered to defendants a shipment of granite, under an agreement whereby the defendants agreed to transport the same from Sacramento to Hunter's Point; that the "defendants so negligently and carelessly handled the barge upon which said granite was being transported that said barge sunk in the Sacramento River on or about July 5, 1917"; that thereafter the defendants employed the said Leed Granite Company to raise the cargo of granite and agreed to pay all "expenses incurred in raising the said granite as aforesaid and in putting the said granite in the condition the granite was in prior to the sinking of the said barge"; that the Leed Granite Company performed said work at a cost of $1,570.86; and that prior to the commencement of the action the Leed Granite Company assigned its claim for such expenses to the plaintiff.

The defendants answered, denying most of the allegations of the complaint, and alleging that on the 5th day of March, 1917, the charter of the Leed Granite Company was forfeited by failure to pay its corporation license tax.

On September 15, 1919, the plaintiff, by leave of the court, filed his amended complaint, in substance the same as the original complaint, except that the name of Werner Leed was substituted for that of Leed Granite Company. The defendants moved the court to strike the amended complaint from the files on the ground that it "wholly changes the cause of action and states an entirely new cause of action, and that said cause of action as set forth in said first amended complaint is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure" and subdivision 3 of section 340. The motion was denied and the defendants answered, denying the material allegations of the amended complaint, except the allegation that the defendants are partners, and setting up the statute of limitations as in the motion.

The evidence shows that Werner Leed owned all of the capital stock of the Leed Granite Company; that the corporation forfeited its charter March 5, 1917, by failure to pay its license tax; that thereafter Werner Leed continued the business in the corporate name and that he was the only person interested therein; that on April 30, 1917, the following contract was executed:

"Office and Quarry, Rocklin, Cal.,
"April 30, 1917.

"Articles of agreement made and entered into by and between Leed Granite Company of Rocklin, party of the first part, and Steward Bros. of Sacramento, party of the second part.

"Witnesseth: That the party of the second part agrees to handle all granite in three shipments for Union Iron Works dry dock from cars on barge and deliver said granite from Sacramento to Hunter's Point, San Francisco Bridge Co. to unload barge as soon as possible.

"Party of the first part will furnish hooks for handling said granite.

"Party of the second part agrees to secure granite well on barge so as to avoid damage in transit, and shall be responsible for any and all damage done person or property by reason of the prosecution of his work.

"Party of the first part agrees to pay sum of two dollars ($2) per ton payment to be made on delivery of granite at Hunter's Point. In witness whereof, the parties have hereunto set their hands this 30th day of April, 1917.

"Leed Granite Co.,
"Werner Leed, President.
"Steward Bros.,
"By J. L. Steward."

The evidence further shows that the defendant's barge, loaded with granite, was sunk as alleged, but the court found that the defendants were not negligent in the matter. Thereafter Werner Leed asked the defendants to raise the granite, and one of the partners, J. L. Steward, according to Leed's testimony, said, "I want to find what it was going to cost, and which was the easiest way to get it up;" that he would let Leed know "as soon as he got information." After various conversations between them, Steward said to Leed, about July 17 or 18 or 19: "Yes; you can go ahead; you people may do better than I can; I never heard anything about my man; maybe you can be able to do better than I can; if you can get things going on, go ahead." Leed asked for "some kind of writing," and Steward executed and delivered to Leed the following:

"Sacramento, Cal., July 18, 1917.

"Leed Granite Company, Rocklin, Cal.—Gentlemen: In response to your inquiry, will state that it is perfectly agreeable with us for you to make arrangements for raising your granite from the river at Vorden. Respectfully yours, Steward Bros., by J. L. Steward."

Leed proceeded thereafter to raise the granite and put it in its former condition, at an expense of the amount sued for, and assigned his claim therefor to the plaintiff. The defendants believed at all times that their transactions were with the Leed Granite Company rather than with Werner Leed as an individual.

[1] The plea of the statute of limitations is based upon the assumption that the amended complaint states an entirely new cause of action. The original and amended complaints, however, are founded upon the same contract. The cause of action in each arose out of the same state of facts. The original complaint was drawn on the theory that the contract sued on was executed by Werner Leed as president on behalf of the Leed Granite Company. The amended complaint was drafted on the theory that the same contract was executed by Leed, doing business under the name of the Leed Granite Company, in his own behalf. The cause of action was the same in both. Walsh v. Decoto, 194 Pac. 298; Thompson v. Southern Pacific Co., 180 Cal. 730, 183 Pac. 153.

[2] The court found that the defendant partnership was a "public carrier." The appellant assails this finding as unsupported by the evidence. Leed testified:

"I asked him (J. L. Steward) if it was a fact he was in the business, transportation, * * * and he says: 'Yes; I handle that kind of business.' * * * He says: 'We have regular transportation; have lots of barges; we can handle all granite.'

"Q. Transportation where? A. All over.

"Q. You mean on the river? A. On the river."

J. L. Steward testified:

> "My brother and I operated gasoline towboats, barges on the Sacramento and San Joaquin rivers. * * * We made contracts and agreements for miscellaneous hauling from different points, towed barges and towboats, turning steamers, and did miscellaneous work."

The witness further testified that they did not operate between fixed points or make fixed trips, or have fixed charges, or "undertake to do any and all business that might be submitted." Under the provisions of the Civil Code, §§ 2168 to 2194, relative to common carriers, it may be doubtful whether the foregoing evidence is sufficient to uphold the finding that the defendant partnership was a common carrier. The finding, however, is not necessary to the conclusion reached by the court and is material only upon the question of consideration for the contract authorizing Leed to raise the cargo. If the defendants were common carriers they were absolutely liable, under the circumstances disclosed, for the injury to the granite. Civ. Code, § 2194. Such liability would afford sufficient consideration for the agreement with Leed last referred to. But if the defendants were not common carriers, the contract under which they undertook to carry the granite imposed upon them the same measure of liability as that provided by section 2194. There was no conflict in the evidence as to the execution of that contract or its terms. It provided:

> "Party of the second part agrees to secure granite well on barge so as to avoid damage in transit, and shall be responsible for any and all damage done person or property by reason of the prosecution of his work."

The liability thus assumed furnishes sufficient consideration for defendants' employment of Leed to raise the granite.

[3] Appellants urge that the contracts with the Leed Granite Company are void because executed after the corporation had forfeited its charter for nonpayment of its license tax. The evidence shows that Leed was the owner of all the capital stock of the corporation, and that after the forfeiture of its charter he continued the business as an individual, but under the corporation name. In the case of Ginaca v. Peterson (C. C. A.) 262 Fed. 904, after the corporation had forfeited its charter by failure to pay its license tax in this state, the president and owner of all the capital stock of the corporation executed a deed conveying property of the corporation. The court said:

> "It is said that a stockholder of a corporation which has forfeited its charter cannot as a corporation convey real property of the corporation, and that one not shown to be a director in office at the time of the forfeiture of the charter of the corporation cannot properly execute a deed as president and trustee. The evidence, however, shows that at the time of the execution of the deed of March 10, 1915, S. W. Parker was the president of the Hornitos Gold Mining Company and owner of all of the capital stock of the corporation. We believe that he had ample power to do with the property of the corporation and to make conveyance of property, and that it is not in the power of any one to complain of any disposition made by Parker of the property, except, of course, creditors existing at the time of the disposition. Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Civ. Code Cal. § 400; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719; Relley v. Campbell, 134 Cal. 175, 66 Pac. 220; Deming v. Maas, 18 Cal. App. 330, 123 Pac. 204."

In Willey v. Crocker-Woolworth National Bank, 141 Cal. 513, 75 Pac. 108, it is said:

> "There is no law of this state which prevents the use of a trade name by an individual, and, in the absence of any such prohibition, an individual may conduct business under any designation he sees fit."

While the appellants believed that they were contracting with the Leed Granite Company, and not with Werner Leed individually, their rights were in no manner prejudiced by the fact that Leed, rather than the corporation named, was the real party in interest.

Under their agreement to carry the granite, the appellants made themselves liable for the damages suffered by the shippers, and their various conversations with Leed relative to raising the cargo, together with their letter of July 18, 1917, constituted a contract obligating them to pay the reasonable value of such work. In the absence of such contract, they would have been liable in damages, under the original agreement, for the reasonable cost of raising the granite and putting it in the condition in which it was when received by them. The judgment imposes no greater obligation.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

55 Cal. App. 507

ASHLEY et al. v. SUTTER BUTTE CANAL CO. (Civ. 2376.)

(District Court of Appeal, Third District, California. Dec. 3, 1921.)

1. Appeal and error ⚷930(1)—Court accepts successful party's version of contract in case of conflict.

On appeal from a judgment for plaintiff, where there was a conflict in the evidence as to the terms of an oral contract, plaintiff's version thereof must be accepted.

2. Waters and water courses ⚷254—Waiver of damages for noncompletion of irrigation ditch held not to apply to failure to furnish water under modified contract.

Where a contract by defendant to furnish water to plaintiff for irrigation provided that plaintiff would not claim any damages on account of the noncompletion of the ditches, etc., and the contract was superseded by an oral contract providing for the furnishing of water by means of pumps to be constructed and ditches already constructed, the waiver of damages for noncompletion of the ditches was not a part of the new contract, as it comtemplated a contingency that would not possibly arise, and, even if a part of the new contract, did not exonerate defendant from liability for its failure to deliver sufficient water by the substituted method.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by P. N. Ashley and others against the Sutter Butte Canal Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Henry Ingram, of Gridley, W. H. Carlin, of Marysville, and Guy R. Kennedy, of Chico, for appellant.

George F. Jones, of Oroville, for respondent.

BURNETT, J. The action was for damages for the failure of defendant to furnish sufficient water for the irrigation of a rice crop on 450 acres of land belonging to plaintiff, Ashley. The claim was for $30,000, and a jury awarded to plaintiffs the sum of $1,800. Only one point is made by appellant, namely, that the evidence is insufficient to support the verdict. The contention is based upon the claim of the insufficiency of the evidence to establish a contract between the parties, but more particularly, as we understand the contention, that in the asserted contract which is the basis of this action respondents waived any claim for damages. As appellant states:

"In the spring of 1918 P. N. Ashley owned some land, and was about to purchase, and afterwards did purchase, for cropping to rice during that season other lands which he and certain tenants and associates afterwards during that year sought to crop to rice. Of course water was necessary for the enterprise. No irrigation ditches had as yet been constructed to any of these lands, and Mr. Ashley, along about April, 1918, took up with appellant a proposition whereby it was to construct ditches and canals to these lands in order that they might receive water for irrigation."

It is not disputed that a contract in writing was formulated and signed by Mr. Ashley, but afterward it was abandoned by mutual consent because it was found impracticable to irrigate by the method therein provided, and it was superseded by an oral contract.

[1, 2] As to the terms of this oral contract there is a conflict, but, obviously, we must accept the version of the respondents. The following substantially covers Mr. Ashley's testimony in reference to it:

"Q. Now, when you did ascertain between yourself and Mr. Tulloch that the water could not get on the 606 acre tract of land by gravity, and then what was agreed to or done by you and him? A. I met Mr. Tulloch and I said to Mr. Tulloch, 'I understand that we cannot flow the water from the west part of the Crocker tract from that ditch,' and he said that was true, but he would put pumps in there and pump that water for me over that tract from Dry creek.

"Q. Did you have any different contract or agreement for the pumping of the water on there than you had for the furnishing of water to the rest of your land? A. The conversation was brief. I told him all right, that that was all right, and it ended there.

"Q. Did you understand that you would be served with water for that tract of land in all respects practically on the same terms that you were being served on your other tracts, excepting that it was to be pumped on there for you? A. Yes, sir.

"Q. And in all other respects the contracts were practically the same. A. I repeated the conversation—I told you just the conversation.

"Q. Your understanding? A. I understood that the contract was to be carried out excepting as to the pumping.

"Q. That it would be in effect just the same as if Exhibit B had been signed, or number 1, rather—except that you were to get the water by being pumped instead of coming by gravity? A. Yes, sir."

He further testified:

That Mr. Tulloch told him that he would turn the water into said Dry slough from the ditch above, and would install two pumps; that after these pumps were in operation he "notified Mr. Tulloch that the pumps were not carrying their rated capacity; that they should carry a great deal more than they were carrying; that there was something the matter with the pump; and Mr. Tulloch came out and viewed the situation, and he said that he would get a different pulley and put it on the pump to see if it would not do better."

It is not controverted that respondents relied upon this agreement in incurring the expense of preparing the land for a rice crop, but appellant seems to think the case is rendered difficult by reason of the following provision in said Exhibit B:

> "It is further mutually understood, stipulated and agreed by and between the parties hereto that, owing to the lateness of the season, said party of the second part will not claim any damages for or on account of the noncompletion of the ditch or ditches hereinabove referred to, and will not claim that the failure to complete said ditch or ditches was caused by lack of due diligence or reasonable efforts on the part of the party of the first part to complete said ditch or ditches to the lands and premises hereinabove described; and in this connection it is further stipulated and agreed, and hereby admitted by the party of the second part, that this contract would not be entered into by said Sutter Butte Canal Company, in view of the lateness of the season, without the waiver in this paragraph contained being made by the party of the second part."

This language is entirely plain, and it cannot be doubted that it provided for a waiver of damages in the event of only one contingency, and that is the failure to complete the ditch which it was supposed originally to build in order to carry water by gravity to said land. It could not possibly apply to the oral agreement, which was substituted, for the reason that, under the executed agreement, there was no ditch to construct. Dry creek was a natural waterway, and the ditches and flumes crossing it, which appellant used in conveying water, had been constructed for years. Respondents understood —and rightly so—that appellant was to supply the pumps by opening the gates in the flumes where they crossed said Dry creek and allowing sufficient water to pass down to satisfy the needs of the land.

The only reasonable construction of the agreement between the parties, as we view it, is that all the terms embodied in said written instrument, which were applicable to the substituted method of irrigation, were to control the parties, but said covenant, being entirely extraneous, and contemplating a contingency that would not possibly arise, could not have been in the minds of said parties. The conditions which were obviously included in the agreement are found in the following portion of said writing:

> "The first party agrees to furnish sufficient water to the second party during said period and for such additional number of years thereafter during the term of the corporate existence of the first party, its successors and assigns, as the second party may desire, for the irrigation of said land for rice, not exceeding the ratio of three cubic feet of water per second for each 160 acres of land, and the second party agrees to pay therefor to the first party annually during said period, and annually in said additional years, at its office, in gold coin of the United States, at the rate of $7 per acre, and if more than said ratio of three cubic feet of water per second for 160 acres is used by the second party in any year, the second party shall pay the first party for said excess such additional proportion of the foregoing rate per acre as the excess of water used bears to three cubic feet of water per second for 160 acres."

Of course the result is the same if we regard said covenant of waiver as a part of the new agreement. The situation would then be that appellant agreed to furnish the water by means of pumps that were to be thereafter constructed and by means of ditches that had already been constructed, provided that appellant should not be liable for damages by reason of its failure to construct a ditch for conveying said water. There was and could be no such failure, and therefore the condition did not exist that relieved appellant from its obligation to supply what water was needed by respondents. There is no pretense, it may be said of a provision exonerating appellant from liability for its failure to deliver sufficient water by the substituted method, and this failure is the basis for respondents' action.

It is true, as before stated, that appellant also claims that there was no contract between the parties; or, as declared in the closing brief:

> "This isn't a case where appellant is seeking an excuse for nonperformance of contract because of any difficulty in performance. It is a case where there was no contract at all; simply an offer of a makeshift accepted by respondents for what it might be worth to them."

This statement, however, is based upon the testimony that was favorable to appellant, while we, of course, are required to regard the evidence for respondents as controlling. That such evidence justifies the conclusion that a contract was entered into similar to the written proposal, with the modification already noted, we think is quite apparent.

There can be no escape from the conclusion that the judgment is supported, and it is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

55 Cal. App. 4

CRAWFORD v. MEADOWS.

(Civ. 3476; L. A. 6818.)

(District Court of Appeal, Second District, Division 1, California. Nov. 1, 1921. Opinion of Supreme Court in Bank Denying Hearing Dec. 30, 1921.)

1. Appeal and error 🔑649—No abuse of discretion shown in refusal to relieve party from default in presenting record on appeal.

There was no abuse of discretion on the part of the court in denying motions to be relieved from default due to failure, within the time allowed by law, to prepare and present for authentication a record to be used on appeal on the ground of excusable neglect or mistake, where the affidavit was barren of any facts to show neglect or mistake other than that counsel filed with the clerk a notice that defendant intended to appeal, and requested preparation of a transcript as provided in Code Civ. Proc. § 953a.

2. Appeal and error 🔑672—Matters to be considered in absence of instructions and evidence.

In the absence of the instructions and the evidence adduced at the trial, appeal must be considered on the judgment roll alone.

3. Pleading 🔑193(1)—Defects not reached by general demurrer.

Defects of form, in a complaint, sufficient in substance, cannot be reached by general demurrer.

4. Abatement and revival 🔑75(2)—Supplemental complaint on substitution of administratrix properly alleged presentation for allowance.

Where judgment was had against defendant and was reversed on appeal, pending which defendant died, a supplemental complaint, substituting his administratrix and alleging a presentation to the administratrix for allowance or rejection of the claim as provided by Code Civ. Proc. § 1502, was properly allowed.

5. Replevin 🔑97—Verdict held not indefinite and uncertain as to damages for detention.

A verdict in a claim and delivery case, "We, the jury in the above-entitled action, find for the plaintiff, and find he is entitled to the return of the automobile described in the complaint, and find the value thereof to be the sum of $2,200, together with interest thereon from February 5, 1915, at 7 per cent. per annum," was not indefinite and uncertain under Code Civ. Proc. § 627, and as against a contention that there was an absence of a finding as to damages for the detention of the property, since the court was justified in construing the interest stated as the damages sustained by reason of the detention.

6. Replevin 🔑76—Damages for detention.

In claim and delivery the ordinary measure of damages for wrongful detention is interest; but, where the property has a usable value which exceeds the lawful rate of interest, the usable value is the measure of damages.

On Hearing in Supreme Court.

7. Appeal and error 🔑440—District court may correct records nunc pro tunc pending appeal.

While the district court has no power or jurisdiction to make an order vacating a judgment or materially altering it pending an appeal, it has power to correct its own records nunc pro tunc so as to make its records state what actually occurred.

8. Appeal and error 🔑440—Alteration of judgment held mere correction authorized pending appeal.

Where verdict of jury in claim and delivery was that plaintiff was entitled to the return of the property, and that its value was a certain amount with interest as damages in accordance with Code Civ. Proc. § 627, and the judgment actually rendered was in accordance with this verdict, but in attempting to enter it the clerk entered a simple judgment for the recovery of the property and the accrued interest, and failed to enter the judgment as actually rendered for possession of the property, or for its value, in case a delivery could not be had, and for the interest as damages, a subsequent alteration of the judgment to conform to the verdict and the judgment actually rendered was not the entry of a new judgment, but was simply a correction nunc pro tunc, which the court had jurisdiction to make pending appeal.

Appeal from Superior Court, Imperial County; Phil D. Swing, Judge.

Action by Harry J. Crawford against Rebecca J. Meadows, as administratrix of the estate of Mobley Meadows, deceased. From a judgment for plaintiff and orders denying her motion for relief from default in preparing her record for use on appeal, defendant appeals. Affirmed in District Court of Appeal and hearing denied in Supreme Court.

See, also, 41 Cal. App. 13, 181 Pac. 845.

Thomas A. Sanson, of Los Angeles, and James L. Allen, of Brawley, for appellant.

Samuel J. Crawford, of Ocean Park, and Alfred F. MacDonald, of Los Angeles, for respondent.

SHAW, J. This is an appeal from a judgment entered in favor of plaintiff, and from orders denying defendant's motions for relief from default in preparing her record for use on appeal.

It appears that this action in claim and delivery was originally brought against Mobley Meadows as sheriff of Imperial county. An answer was filed, and upon the issues so joined a trial was had, which resulted in a judgment for defendant, from which plaintiff appealed, as a result of which the judgment was reversed. Meanwhile Meadows had died and Rebecca J. Meadows was appointed administratrix of his estate. Thereupon in due time plaintiff, in accordance with the statute, duly presented to her as such administratrix a demand for the delivery to him of an automobile made the subject of the claim and action then pending. Thereupon she as such administratrix was substituted as defendant, and a supplemental complaint was filed, setting forth the facts upon which plaintiff based his claim to the property, together with other matters which under the circumstances were proper in a supplemental complaint. To this complaint defendant filed a general demurrer, which was overruled. Thereupon defendant answered the same, wherein, in addition to denials, she alleged a number of separate defenses to plaintiff's cause of action. The case was tried by a jury, which rendered a verdict in favor of the plaintiff, fixing the value of the automobile, constituting the subject of the action, at the sum of $2,200, together with interest thereon from February 5, 1915, the date of the taking. Following this verdict, judgment was entered by the clerk on May 13, 1920. A motion for a new trial, made by defendant, was denied by operation of law on August 13, 1920.

On September 10th following, defendant filed a notice of appeal from the judgment and order denying her motion for new trial, followed on November 10, 1920, by the filing of a transcript of the record in support of the appeal, after which, to wit, on February 7, 1921, the Supreme Court, in which court the appeal was pending, made an order dismissing the same.

In entering the original judgment on May 13, 1920, the clerk failed to comply with the directions contained in section 667, Code of Civil Procedure, wherein provision is made for the entry of judgment in such cases in the alternative form. Nor did it provide that payment should be made by defendant as administratrix in due course of administration of the estate of Mobley Meadows, deceased, in accordance with the provisions of section 1504, Code of Civil Procedure.

Thereafter, to wit, on November 12, 1920, upon motion of plaintiff, the court made an order pursuant to which the judgment was amended nunc pro tunc as of date May 13, 1920, when originally entered. The amendments consisted of a compliance with the provisions of the statute requiring the judgment in such cases to be in the alternative form, so that as amended it provided for the recovery by plaintiff of the automobile and damages, and in case a delivery could not be had of the property that plaintiff should recover the value thereof, with interest, payment of which should be made by said administratrix out of the estate of Mobley Meadows, deceased, in due course of administration.

Thereafter, to wit, on November 23, 1920, the defendant filed with the clerk of said court a notice that she intended to appeal from the judgment as amended, and requested that a transcript of the proceedings be prepared in accordance with the provisions of section 953a, Code of Civil Procedure. Whether or not such transcript was ever prepared and presented for authentication is not disclosed by the record. It does appear, however, that on December 17, 1920, defendant, correctly or erroneously assuming that her time for so doing had expired, and upon notice supported by the affidavit of her counsel, moved the court for an order relieving her from default in filing with the clerk notice of defendant's intention to appeal from the judgment entered against defendant on May 13, 1920, and requesting the reporter's transcript to be prepared in accordance with section 953a of the Code of Civil Procedure, and that the court reporter be ordered and directed to transcribe the phonographic notes of the report of the trial, and also made a motion that she be relieved from default in failing to prepare and present to the judge of said court a bill of exceptions of the proceedings had at the trial of the cause within 10 days after the defendant's motion for a new trial had been denied, which motions were made upon the ground of the alleged mistake, inadvertence, and excusable neglect of defendant's counsel, both of which motions, upon consideration of appellant's affidavit in support thereof and the counter affidavit filed by plaintiff, were, on December 17, 1920, denied by the court, which proceedings in regard to the making and denial of said motions are embodied in a bill of exceptions presented by the record.

Thereafter, on December 31, 1920, defendant filed two notices of appeal, one of which was directed "to the plaintiff and to the clerk of said court," and the other "to the plaintiff and to his attorneys," in both of which she gave notice of an appeal to the Supreme Court from the judgment as amended by order of court on November 12, 1920, and also from the orders of the court denying her motions for relief from default made on December 17, 1920.

[1] There was no abuse of discretion on the part of the court in denying motions that defendant be relieved from her default due to her failure within the time allowed by law therefor to prepare and present for authentication a record to be used on appeal, without which the orders should not be disturbed by this court. The affidavit, dated December 6, 1920, of defendant's attorney in support of the motions is barren of any facts which even tend to show excusable neglect or mistake on the part of defendant. Other than the statement that on November 23, 1920, her counsel filed with the clerk of the court a notice that defendant intended to appeal, and requesting the preparation of a transcript of the proceedings at the trial, as provided in section 953a, Code of Civil Procedure, all of the statements therein relate to the motion theretofore made for a new trial and to matters occurring prior to the entry of the amended judgment made on

November 12, 1920, and from which this appeal is prosecuted. While it appears that within 10 days from the entry of the amended judgment he filed with the clerk notice and request for a transcript of the record, including the reporter's notes to be used on the appeal, it does not appear that the transcript was ever prepared. On the contrary, affiant states that—

> "He has not been able to obtain the transcript from the said court reporter, and has not received it at this time (December 6, 1920), and is unable to assign any reason for the failure of the said court reporter to furnish it."

Upon the showing so made by affidavit, we cannot say there was any abuse of discretion on the part of the court in denying the motions; indeed, it is difficult to see how it could properly have done otherwise. Moreover, while not necessary to a decision of the case, we are unable to perceive how a reversal of the orders could in any wise avail appellant on this appeal. She has appealed from the judgment on the judgment roll, and that appeal must be determined on its merits, regardless of the fact that the trial court may have wrongfully refused to settle a bill of exceptions or have a proper record authenticated. The proper remedy in such case is to apply to this court for a writ of mandate to compel the trial court, or officers charged therewith, to authenticate a proper record which can be brought up with the record on appeal from the judgment.

[2] We are thus brought to the appeal from the judgment, which in the absence of instructions given by the court to the jury and the evidence adduced at the trial must be considered on the judgment roll alone. Contrary to respondent's contention, we shall, without so deciding, assume the time for taking the appeal commenced from the entry of the judgment as amended on November 12, 1920, rather than, as he claims, from the time of the entry of the original judgment on May 13, 1920, from which last judgment it appears that an appeal was taken and thereafter dismissed by the Supreme Court.

[3, 4] Appellant suggests, without making any argument thereon, that the court erred in overruling her general demurrer to the supplemental complaint. There was no error in so doing. While in form the complaint may have been objectionable, it is sufficient in substance, and defects, if any, therein could not be reached by a general demurrer. Neither was it objectionable in that, as claimed, it added a cause of action against defendant individually and not in her representative capacity. The cause of action as stated was against her solely and alone in her capacity as administratrix of the estate of Mobley Meadows, deceased, out of whose estate it was ordered the judgment be paid in course of administration. Neither was there any error on the part of the court in permitting the supplemental complaint substituting the administratrix of deceased, to be filed, and alleging therein, as provided by section 1502, Code of Civil Procedure, the presentation for allowance or rejection of plaintiff's claim. "In such cases, a supplemental complaint should be filed, alleging the death and due presentation of the claim." Falkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386. In Thomas v. Fursman, 39 Cal. App. 278, 286, 178 Pac. 870, 874, it is said:

> "The proper practice undoubtedly is to serve and file such a complaint, alleging compliance with the statute. Proof of presentation of the claim as required is made by the statute essential to recovery, and this implies an allegation of the fact upon which issue may be joined if desired, and a finding where issue is joined."

[5, 6] The verdict of the jury was:

> "We, the jury in the above-entitled action, find for the plaintiff, and find he is entitled to the return of the automobile described in the complaint, and find the value thereof to be the sum of $2,200.00, together with interest thereon from February 5, 1915, at 7 per cent. per annum."

Appellant insists that such verdict is not in accordance with section 627, Code of Civil Procedure, in that it is indefinite and uncertain, and hence constituted no basis for the judgment, as amended, entered thereon. That the verdict was sufficient in finding that plaintiff was entitled to the return of the automobile and as to the value thereof admits of no doubt, and hence is not uncertain either as to plaintiff's right or the value of the property in the event that delivery could not be had. Nor is there merit in the contention that there is an absence of any finding as to damages for the detention of the property. In Tucker v. Hagerty, 37 Cal. App. 789, 174 Pac. 908, it is said:

> "In an action for the wrongful detention of property, the ordinary measure of damages is interest, but where the property has a usable value which exceeds the lawful rate of interest, such rule has no application."

In other words, the usable value may, as in the case cited, exceed the value of the property itself. Since the property at the time of the wrongful taking was of the value of $2,200, plaintiff, in case of nondelivery, was entitled to such sum, together with interest, which interest might be, as taken by the court, the amount of damages sustained for its detention. Kelly v. McKibben, 54 Cal. 192; Webb v. Phillips, 80 Fed. 954, 26 C. C. A. 272. See, also, 23 Ruling Case Law, § 77, p. 914, where it is said:

> "The amount of damage which the owner of goods wrongfully taken and detained is entitled to recover in ordinary cases is the value of the property, with damages, which is ordinarily the interest on the value."

No damages were found by the jury on account of the usable value of the automobile due to its detention, and upon the authorities cited the trial court was justified in construing the interest stated in the verdict as the damages sustained by plaintiff for detention of the property, if delivery thereof was made.

A number of separate defenses were set up in the answer of defendant, which the jury by its implied finding decided adversely to her. In the absence of instructions given or any evidence offered, we must assume there was no error in the trial which affected the verdict.

The judgment and orders appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [7] The petition for a rehearing of this cause in the Supreme Court after decision by the District Court of Appeal of the Second Appellate District, Division 1, is denied.

The defendant insists that the district court failed to consider at all her objection that the court had no power or jurisdiction to make an order amending the judgment as entered on May 13, 1920, nunc pro tunc, while the appeal therefrom was pending, so as to make it conform to the judgment as rendered on that day, and that the corrected judgment so entered is void for that reason.

In support of this point she cites Kinard v. Jordan, 175 Cal. 13, 164 Pac. 894, and other cases to the effect that when an appeal is taken the entire cause is removed to the appellate court, so that the lower court has no jurisdiction thereafter until after the appeal has terminated, to take any proceeding in the cause. These decisions are correct so far as they refer to orders which in some respect alter the judgment appealed from as actually rendered. The superior court, pending the appeal, has no power to vacate the judgment or materially alter it so as to make it different from the judgment as actually rendered. But this rule does not affect the power of the court to correct its own records nunc pro tunc so as to make its record state what actually occurred.

[8] The action in this case was in claim and delivery under the Code. The verdict of the jury was that the plaintiff was entitled to the return of the property, and that its value was $2,200, with interest, as damages, in accordance with section 627, Code of Civil Procedure. The judgment actually rendered was in accordance with this verdict, and it should have been entered in that form. In attempting to enter it, however, the clerk, by a mistake that is perfectly apparent from the previous proceedings shown in the record, entered a simple judgment for the recovery of the property and the accrued interest, and failed to enter the judgment as actually rendered, that is, a judgment for the possession of the property, or for its value in case a delivery of the possession could not be had, and for the interest as damages. The subsequent entry nunc pro tunc was not the entry of a new judgment different from that already rendered, or the vacation of the previous judgment, as was the order entered in Kinard v. Jordan, supra. It was the entry of the judgment as actually rendered on May 13, 1920, and a correction of the clerical error of the clerk in the original entry. The pendency of an appeal does not destroy the power of a court to make such correction of its record when the mistake is obvious from the other parts of the record and the proper correction can be made therefrom. In Fay v. Stubenrauch, 141 Cal. 575, 75 Pac. 174, the court said:

> "Nor is the right of the lower court to amend suspended or impeded by an appeal where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record."

For other cases of similar effect see San Francisco v. Brown, 153 Cal. 651, 96 Pac. 281; Boust v. Superior Court, 162 Cal. 345, 122 Pac. 956; Holland v. Superior Court, 169 Cal. 364, 146 Pac. 878. There is no attempt to show that the corrections made in the entry in any wise prejudiced the appellant. If the District Court had accepted her theory that the corrected judgment was void because an appeal was then pending, it would merely have reversed the judgment, with directions to the lower court to re-enter it in the same form. It reached the same result by affirming the judgment as corrected.

SHAW, C. J., LENNON, J., WILBUR, J., SHURTLEFF, J., SLOANE, J., WASTE, J., and RICHARDS, Justice pro tem., concur.

55 Cal. App. 412

PRICHARD v. PRICHARD et al. (Civ. 3762.)

(District Court of Appeal, Second District, Division 1, California. Nov. 29, 1921.)

Husband and wife ⚿264—Evidence held to show property was not community.

In action by former wife of decedent, who had procured divorce from him, against decedent's brothers, to quiet title to real property devised by decedent to defendants, plaintiff claiming it was community property, evidence *held* to show that the property was not community; a settlement between plaintiff and decedent having been had prior to divorce.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Suit by Minnie Shields Prichard against Mrs. M. H. Prichard and others. From judgment for defendants, plaintiff appeals. Affirmed.

Alpheus G. Reily, of Los Angeles, for appellant.

George A. Prichard and M. M. Meyers, both of Los Angeles, for respondents.

JAMES, J. Appeal by the plaintiff from a judgment denying to her the relief prayed for in her amended complaint. That complaint, in so far as its contents are material to questions here presented, sets forth causes of action to quiet title to a parcel of real property located in the county of San Bernardino, and also to declare a trust against the same property as against the defendants, who were heirs of and distributees under a will made by Joseph G. Prichard, deceased. The evidence offered was in support of the alleged cause of action asserting the right to have a trust declared. The contention here made is that the trial court's findings are not supported and that the evidence presented entitled the plaintiff to a judgment.

The plaintiff in the year 1911 was the wife of Joseph G. Prichard. The couple resided, during the most of their married life at Omaha, where they acquired a small tract of land. This land was the property of the marital community. The husband in October, 1910, came to the city of Los Angeles to visit his brothers, who are named as defendants herein. The wife remained at Omaha to dispose of the land. After having found a purchaser for the same and having collected the proceeds, she came to Los Angeles in April, 1911. The amount of money which remained in her hands, resulting from the sale of the property in Omaha, after paying debts owing by herself and husband there, was about the sum of $3,200. It appeared that she resided with her husband in Los Angeles for a few months and then left him and went to reside with a sister, who also lived in the city named. In October, 1913, she brought an action for divorce against her husband, which was not contested, and an interlocutory decree was entered on the 2d day of December, 1913. The complaint in the action for divorce contained this allegation: "That there are no children the issue of said marriage and no community property to be settled or disposed of by this action." On the 8th of September, 1914, Joseph G. Prichard died, leaving a will which devised to these defendants the real property mentioned in the complaint in this action. Probate proceedings were duly had and decree of distribution was entered on the 10th day of April, 1917. This action was commenced on March 23, 1920, almost three years after the property and estate of Joseph G. Prichard had been so distributed. Plaintiff in her testimony admitted that she was informed about a month after the death of her husband that that event had occurred, but claimed that she had had no information of the pendency of the probate proceedings until August, 1919. She based her right to have the trust declared as to the property referred to upon the claim that such property was the community property of herself and husband, and that one-half of it should have been awarded to her. The court found that there had been a settlement of all property interests between the husband and wife prior to the divorce proceedings being had.

There is abundant evidence in the record to sustain this finding, and the case need be given no further consideration than to call attention to some of the facts and circumstances which that evidence presents. It was admitted by both parties that the husband used such money as he received from the sale of the Omaha property in purchasing the land described in plaintiff's complaint. While the plaintiff testified that after coming to Los Angeles she handed over to her husband the net proceeds of that sale, it appears in contradiction of such testimony that she in her own handwriting rendered a statement, which was found among the effects of her husband, showing a calculation of various matters, including the amount received from the Omaha property and a dividing of that amount into two equal parts. It was also shown by the testimony of several witnesses that after leaving her husband she stated that they had settled their property matters; that she had given him one-half of the proceeds from the sale of the Omaha property and had invested money of her half, received from the same source, by loaning the same in Omaha. She stated further to some of these witnesses that she had given "Joe" his half and kept her own, and that they were through "for good and always." Very significant also is the allegation in her divorce complaint that there was no community property requiring an order of court affecting the same. When plaintiff was asked the question, during the taking of her deposition, why community property had not been adjusted in the divorce action, the only reply she had to make thereto was that she did not know.

It was shown clearly that plaintiff was a woman of mature years, of considerable mental keenness, and of long business experience. That she did not overlook any matter which would result in benefit to her we can very safely assume from all the evidence as the record expresses it. The bringing of this action may be considered as added evidence of her industry in that direction. Respondents point to the fact that probate proceedings were allowed to progress to distribution of the estate without protest made by this plaintiff, and that in consequence she would be debarred from asserting any claim to property distributed. So well satisfied are we with the court's determination of the case upon the evidence that we feel it unnecessary to extend this opinion to the discussion of any further propositions. That evidence supported fully the determination of the trial judge that there had been a settlement of all property interests and that none of the property brought into the estate was of a community character.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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55 Cal. App. 344

SHOUDY v. SHOUDY. (Civ. 4055.)

(District Court of Appeal, First District, Division 1, California. Nov. 25, 1921.)

1. Divorce 🔑254—Judgment in divorce held not bar to rights of wife in insurance policy.

A judgment, awarding alimony and directing payment of certain sums "in full payment for alimony, maintenance, and support of the minor child, made or to be made and in full settlement of their property rights," and providing that defendant shall pay all claims by reason of the community heretofore existing or from any contract to which said defendant may be a party, did not determine the interest of the wife as to a prior agreement made between her and the husband in settling their property rights, to the effect that the husband should keep life policies in effect for her benefit so as to bar an action to enforce such agreement after his death; he having attempted to change the beneficiary.

2. Insurance 🔑586—Divorced wife held to have equitable interest in life policies under agreement.

Where husband, pending a divorce action agreed with his wife, who was a mere volunteer beneficiary in life policies to keep the policies in effect "for her as long as she remained single," her interest as beneficiary became changed from that of a mere expectancy, and she acquired an equitable interest which could not be divested by the mere act of the insured in changing the name of the beneficiary, and her equities were superior to those of one who subsequently loaned money to the insured and thereafter married him, after having ceased to press him further for the payment of the money upon his assuring her that she was protected by his insurance policies; the latter never seeing the policies nor knowing anything about the change in the name of the beneficiary.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Emma Eldred Mae Shoudy against Julia Shoudy. Judgment for defendant, and plaintiff appeals. Reversed.

J. R. Gilbert and E. B. Mering, both of San Francisco, for appellant.

Andrew F. Burke and John R. Tyrrell, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the defendant's favor. As to the facts of the case there is no material dispute: The plaintiff and appellant, Emma Eldred Shoudy, intermarried with one Dexter Shoudy on March 1, 1906. There was issue of this marriage one child, Kenneth Shoudy, born October 10, 1907. The parties to said marriage were divorced on April 10, 1916. On February 6, 1919, Dexter Shoudy married Julia Cochran, the defendant and respondent herein. On the 22d day of September, 1908, Dexter Shoudy had caused two life insurance policies, each for $2,000, to be issued by the Illinois Bankers' Life Association upon his life, with his then wife Emma Shoudy as the beneficiary named therein. On the 29th day of March, 1916, while a divorce action instituted by his said wife against Dexter Shoudy was pending and about to be brought to trial, the latter wrote a letter to his sister, Mrs. Laura Armstrong—who, it seems, had interested herself in bringing about a property settlement between the parties—which letter as far as is material reads as follows:

"Dear Sister: Referring to our conversation settlement between Mrs. Shoudy and myself you are at liberty to say to her as follows:

"First. She can have the divorce.

"She can have the custody of the child.

"Second. She will have an alimony as long as Ruth is with her of $125.00 per month. * * * If at any time during this year I am able to pay her in cash $3,500, I am to be released from paying alimony entirely.

"Third. * * * As soon as the divorce is granted I will give her $250.00. I will give her $250.00 on June 1st, 1916, * * * $500.00 on September 1, 1916. * * *

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"Fourth. * * * Dishes. * * *

"Fifth. * * * For Ruth * * * a piano.

"Sixth. In consideration of this, and when payments have been met, i. e., $250.00, $250.00, $500.00 and the furniture purchased, I want it understood and considered that I am released and have settled in full for everything of every kind and nature whatever.

"Seventh. Insurance: I have a policy in the Bankers' Life Association, $4,000.00, which I will keep in effect for her as long as she remains single, and also for Ruth until she marries—$3,000 for Mrs. Shoudy and $1,000.00 for Ruth. I feel that I will be able to carry this out. * * *

"If this letter is acceptable to her, have her so instruct her attorney, Mr. Wilman Tucker, and we will close the matter up as speedily as possible.

"All this, if you like, can be incorporated in the decree if the judge will so permit."

Upon the same day on which this letter was written Dexter Shoudy and his then wife, the plaintiff herein, entered into the following written agreement respecting a settlement of their property rights and interest, namely:

"Memorandum of agreement made and entered into this 29th day of March, 1916, by and between Dexter Shoudy, the party of the first part, and Emma May Shoudy, the party of the second part, witnesseth: That whereas the parties hereto are now husband and wife; and whereas, there is now an action pending for divorce; * * * and whereas, the parties hereto have arrived at an adjustment of their business affairs, which is evidenced by a letter dated March 29, 1916, addressed to Mrs. Laura Armstrong which is hereto attached marked 'Exhibit A,' and which the parties hereto hereby confirm and adopt.

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written."

On April 10, 1916, an interlocutory judgment was made and entered in said divorce action granting the plaintiff therein a divorce and awarding to her the custody of said minor child which, in so far as the same refers to alimony or to any division or settlement of the property rights and interests of the parties, reads as follows:

"That the plaintiff be and she is hereby awarded alimony as follows: $250 to be paid upon the entry of this decree; $250 to be paid on June 1, 1916; $500 to be paid on September 1, 1916, and in addition thereto that the defendant pay to the plaintiff the sum of $125 per month, the first of said payments to commence on the 1st day of April, 1916, and the said sum to be paid on the 1st of each and every succeeding month until such time as the plaintiff may remarry, at which time said alimony shall cease. That in the event the daughter of the plaintiff, Ruth Genevieve Osborne, should marry or cease to reside with plaintiff, then and in that event the said alimony shall be reduced to the sum of $100 per month. The foregoing in full payment of and for alimony, maintenance, and support of minor child made or to be made, and in full settlement of their property rights.

"That in the event the defendant shall pay to the plaintiff within one year following the entry of this decree the sum of $3,500 then and in that event the said alimony shall cease.

"Said defendant shall hereby assume and pay all claims and demands arising and to arise by reason of the community heretofore existing, or by reason of any contract or note to which said defendant may be a party."

The letter which he had sent to the insurance company was dated April 19, 1916. It inclosed and referred to the original policies which had been issued to him, and then proceeded to say:

"This is to advise that we have just been divorced a few days ago, and I agreed to keep these in force for her until she may remarry. Therefore, I think there is another indorsement needed. I wish you would kindly fix them up as they should be and return them to me. She will go by the name of Mrs. Emma Mae Shoudy, and of course is a widow. I desire her to receive the money in case of my death."

The letter in reply from the insurance company, a copy of which he sent to his former wife and also to his said sister, returned the policies to him with the statement that—

"In reply will say that these policies do not need any change as the face of the policy provides, should they become a claim, would be paid to Emma Eldred Shoudy, and the wife part of it would not cut any figure. This is simply placed in the policy at the time of issue to show that there was a relationship when the policy was issued. Unless there is a legal change in the changing of the beneficiary altogether, at your request, the face of the policy would be paid to Emma Eldred Shoudy as stated in the policy."

To this letter Dexter Shoudy sent the following reply:

"I am in receipt of yours of the 25th and note that with reference to policies 9452 and 9453 for $2,000.00 each, it makes no difference about the divorce.

"You say the policies will be paid to Emma Eldred Shoudy just the same in case of my death.

"My address for assessment notices is 421 Railway Exchange Building, Seattle, Washington."

Copies of all of these letters were sent, as we have seen, to the plaintiff herein. The policies themselves, both before and after the divorce between the parties, appear to have been kept in a vault to which Dexter Shoudy and his former wife had each a key.

Notwithstanding these various letters and agreements Dexter Shoudy on April 21, 1916, undertook to change the name of the beneficiary in his said two policies from "Emma Eldred Shoudy, wife," to "Mrs. Laura Armstrong, sister." On October 15, 1917, he again undertook to change the name of such beneficiary from "Mrs. Laura Armstrong, sister," to "Julia Cochran, fiancée"; and still again on April 21, 1919, he undertook to change said beneficiary from "Julia Cochran, fiancée," to "Julia Shoudy, wife," to whom he had been married on February 5, 1919.

The record herein further discloses without substantial conflict the following facts: In the month of April, 1916, after Dexter Shoudy had been divorced from the plaintiff herein, Julia Cochran, the defendant herein, delivered to him the sum of $5,000. There seems to have been no note evidencing this transaction nor any postponed time of repayment, but Dexter Shoudy credited that amount to Julia Cochran about that date in his books of account, stating therein that it was cash for investment, and also later on entered items showing payments on account of said transaction to the amount of several hundred dollars. In her testimony herein Julia Cochran states that the transaction was in the nature of a loan, and she further testifies that during the year 1918 and prior to her marriage to Dexter Shoudy she began pressing him for the payment of this loan, whereupon, as she testifies and as the trial court found, he said to her—

> "I have protected you. I have life insurance in the Illinois Bankers' for $4,000, and I am protecting you. If anything happens to me, why, you will have my insurance for the money I owe you."

She further testifies that upon this statement she ceased pressing him further for the repayment of the money. The fact was that Dexter Shoudy had in the year 1917, a year or so after receiving said money and some time before the defendant began to press him for its repayment, changed the name of the beneficiary in said policies on the face thereof to "Julia Cochran, fiancée." It does not appear that Julia Cochran ever saw or had possession of these policies or ever knew that any change had been made in the name of the beneficiary therein until after Dexter Shoudy's death, which occurred on October 28, 1919. Thereafter the plaintiff herein demanded of said defendant that she turn over to her the said policies, which demand being refused, the plaintiff commenced this action to recover said policies or the proceeds thereof.

Upon the trial of the cause the court found in the defendant's favor, holding that Dexter Shoudy had made no binding contract with the plaintiff which would have the effect of taking away the right reserved in said policies to change the beneficiary thereof at any time, and that by the change to "Julia Cochran" under the circumstances above set forth she became invested with the right to the same and the proceeds thereof at the time of Dexter Shoudy's death. The court further found that the plaintiff was estopped to claim or assert any right to be or remain the beneficiary of said policies, and that the judgment of divorce between herself and said Dexter Shoudy was a bar to the making of said claim. Judgment was entered accordingly in the defendant's favor, and from such judgment the plaintiff prosecutes this appeal.

The first question which presents itself upon this appeal is that arising upon the respondent's contention that the judgment of divorce between Dexter Shoudy and the plaintiff herein constituted a determination of the rights of the plaintiff in respect of these policies, and is a bar to the maintenance by her of the present action.

[1] We find ourselves unable to agree with this contention as to the effect of said judgment. It is true that in said judgment the trial court, after making the award of alimony and directing the payment of certain sums of money according to the terms of the prior agreement between the parties, does say:

> "The foregoing in full payment for alimony, maintenance, and support of the minor child made or to be made and in full settlement of their property rights."

But the said decree also contains another clause evidently inserted in the decree with the agreement of the parties in the peculiar form and order in which the same is phrased before the court, which reads as follows:

> "Said defendant shall hereby assume and pay all claims and demands arising and to arise by reason of the community heretofore existing or by reason of any contract or note to which said defendant may be a party."

There is no reference in the record to any other outstanding contract to which said Dexter Shoudy was at said time a party than the written agreement predicated upon the letter or note to his sister, Mrs. Armstrong, and which was apparently before the court at the time it made and entered said judgment. Moreover, the parties to said divorce action did not at any time so interpret said judgment, but, on the contrary, evidently regarded the agreement between them as to the status of the rights of the plaintiff in regard to said policies as still in force and effect, since Dexter Shoudy immediately after the entry of said judgment took steps to have the said status and rights of the plaintiff therein and herein fixed and determined upon the face of said insurance policies, and at the time, supposing that he had done so, duly notified said plaintiff thereof. We therefore conclude that the said judgment of divorce did not determine the rights and interests of the plaintiff in respect to said insurance policies adversely to whatever fixed and vested rights or equities she had acquired therein by virtue of said agreement, and that the said judgment is not a bar to her present action.

[2] The next contention which arises upon the face of this record is as to the right or interest that the plaintiff herein acquired in these two policies and in the proceeds thereof by virtue of her contract with Dexter Shoudy. The Bankers' Life Association is, as the record shows, a mutual benefit association, the members of which are, by the terms of its policies, permitted to change the beneficiaries named therein by obtaining the written consent of the insurer so to do. Up to the time when Dexter Shoudy and the plaintiff entered into their said agreement the plaintiff was a mere voluntary beneficiary therein, having an expectancy but no vested or equitable rights or interests therein which the insured could not have terminated at will by changing the beneficiary named therein; but when Dexter Shoudy, in anticipation of the divorce between himself and his wife, offered as one of the terms of settlement of their property rights "to keep in effect for her as long as she remained single" said policies, and when this offer was accepted by her the quality of her interest as a beneficiary in said policies became changed from that of a mere expectancy to a more fixed and permanent relation. She had thenceforth an equitable interest in said policies of which she could not be divested by the mere act of the insured in changing the name of the beneficiary. In the case of Jory v. Supreme Council, etc., 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17, this interest or equity is thus described:

> "The principle here under consideration is the most recent growth of mutual benefit association law, a branch of law which in itself is young in years; and we know of nothing in the law which deprives a person contemplating membership in a mutual benefit association from so contracting with the proposed beneficiary as that when such certificate is issued, equities in favor of the beneficiary are born of such merit that the insured member has no power to defeat them. The few authorities shedding light upon this question declare the rights of the beneficiary are such as to create a vested interest in the proceeds of the certificate. Smith v. National Ben. Soc., 123 N. Y. 85; Maynard v. Vanderwerker, 24 N. Y. Supp. 932. Possibly this is not a correct declaration of the principle of law applicable to the conditions; for a second beneficiary might be substituted, wholly innocent of the contractual relations existing between the insured and the first beneficiary, and his substitution give rise to the creation of equities in his behalf, all controlling upon a judicial disposition of the rights of the parties concerned. If the original beneficiary's interest was vested no subsequent conditions could possibly arise which would defeat his right, and for this reason we think it can hardly be termed a vested interest. The whole matter seems to be rather a question of equities, and the stronger and better equity must prevail."

In this view of the instant case it would seem to follow that the equitable right which the plaintiff herein acquired by virtue of her agreement with Dexter Shoudy was one of which she could not be deprived by any act of the insured in the way of an attempted substitution of the name of a merely voluntary beneficiary in the place and stead of her name in said policies; and that in so far as Mrs. Laura Armstrong or Julia Cochran or Julia Shoudy were such voluntary beneficiaries neither they nor either of them could have gained any right or interest in said policies which would be superior to that of the plaintiff herein.

The respondent, however, contends that the defendant herein, Julia Shoudy, upon the facts of this case as testified to by her and as found by the court to be true, became, by virtue of the change in the name of the beneficiary in said policies to her own name, something more than a mere voluntary beneficiary therein; and that upon said facts it must be held that she acquired an equitable interest therein which was superior to the equitable interest of the plaintiff therein, and hence that for that reason the judgment must be affirmed.

The facts upon which the defendant herein relied in the trial court successfully to sustain this claim are undisputed and are these: On April 23, 1916, Dexter Shoudy credited Julia Cochran on his books with $4,000, charging himself with the same under the item "Gave me cash to invest." On April 27, 1916, he credited the account of Julia Cochran with the sum of $1,000 debiting himself with that sum under the item "Cash." Julia Cochran, testifying regarding these matters, states that the $5,000 was a loan. There was no security then given or any note or other memorandum than said book entries evidencing the transaction. On October 15, 1917, Dexter Shoudy changed the name of the beneficiary upon the face of said policies to "Julia Cochran, fiancée." This was done apparently of his own motion, without either agreement, demand, or knowledge on the defendant's part. At some time during the year 1918 she began pressing Dexter Shoudy for the repayment of this money, and he then said to her:

> "I have protected you. I have life insurance in the Illinois Bankers' for $4,000, and I am protecting you. If anything happens to me, why, you will have my insurance for the money I owe you."

She further testifies that upon hearing this she ceased to press him further for the payment of the money. Dexter Shoudy married Julia Cochran on February 6, 1919. Thereafter, and also without her knowledge or agreement, he caused the name of the beneficiary on the face of said policies to be change from "Julia Cochran, fiancée," to "Julia Shoudy, wife." The defendant never saw these policies nor knew anything about the changes in name of the beneficiary in said policies until after Dexter Shoudy's death.

We are of the opinion that these facts fall far short of being sufficient to create equities in the defendant herein superior to those already created by Dexter Shoudy in favor of his former wife. His act in changing the name of the latter as the beneficiary of said policies was at the time such change was made a wrongful act on his part, in express violation of what we have found to be the agreement with the plaintiff. It was also an entirely voluntary act on his part, for which there was no consideration moving from any one, and regarding which there was neither agreement, compulsion nor knowledge on the part of this defendant. The mere fact that he owed the defendant some money at that time would not suffice to render her other than a mere voluntary beneficiary, created by himself and changeable at his will. The defendant herein upon such a state of facts could not have asserted any equities in said policy against Dexter Shoudy himself had he undertaken to again change the beneficiary in said policies; and she certainly cannot be heard to assert equities against the prior rights of this plaintiff which she could not have asserted against Dexter Shoudy himself.

Nor do we think that the subsequent conversation between Dexter Shoudy and this defendant strengthens the position of the defendant in this regard, since it amounted to nothing more than the vague, general statement that he had protected her, and that she should have his insurance upon his death. No details were given or asked as to how the defendant had been protected, nor was any agreement made or further understanding had between the parties. The defendant merely states that upon being given this vague assurance of protection she ceased to press him further for the money. We are cited to no authorities, and are satisfied that there are none which would serve to uphold the claim of an equitable assignment of an insurance policy as between a debtor and his creditor based upon the oral generalities of such a conversation as this. If the defendant understood from this conversation that she was thereby being invested with equitable rights in these policies which Dexter Shoudy could not thereafter take away, and with superior equities therein to those which might exist in favor of former beneficiaries, she should certainly have taken some steps to inform herself as to the facts out of which they arose. She did not do this; she made no effort to inform herself further, and remained in ignorance of the fact that she had ever been made the beneficiary of these policies until after Dexter Shoudy's death. Out of such an inchoate condition and in the absence of any definite agreement or understanding between Dexter Shoudy and this defendant amounting in effect to an equitable assignment of these policies to her, we cannot conceive how equities could have arisen in her favor which can be made superior to the definite equities which the plaintiff acquired by virtue of her agreement with Dexter Shoudy at the time of her divorce from him. We are therefore of the opinion that the trial court was in error in its finding and conclusion that the equities of the defendant were superior to those of the plaintiff herein, and in rendering judgment in the defendant's favor predicated upon such erroneous finding of fact.

Judgment reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

55 Cal. App. 447

SHOUDY v. SHOUDY. (Civ. 4056.)

(District Court of Appeal, First District, Division 1, California. Nov. 30, 1921.)

1. Insurance ⟹586—Wife held not to have vested interest in policy.

Where husband took out policy of life insurance and handed it to his wife with the statement that he thought it would be a protection for the children and the family in case anything went wrong, he did not give the wife such a vested interest as would prevent the exercise by him of the right reserved to him in the policy to change the beneficiary thereof.

2. Insurance ⟹586—Payment of premiums on policy of husband from community gives no vested interest in wife.

Where husband took out life insurance and made wife beneficiary, the fact that the premiums were paid out of the community property did not give the wife a vested interest such as would prevent the exercise by the husband of the right reserved to him to change the beneficiary.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Emma Eldred Mae Shoudy against Julia Shoudy. Judgment for defendant, and plaintiff appeals. Affirmed.

E. B. Mering and J. R. Gilbert, both of San Francisco, for appellant.

John R. Tyrrell and Andrew F. Burke, both of San Francisco, for respondent.

PER CURIAM. This case and that of the same title numbered 1 Civil No. 4055 (203

Pac. 433), decided in this court November 25, 1921, were tried together, and the appeals are before us upon the same transcript. In the opinion filed in said last-mentioned case the circumstances preceding and giving rise to the litigation are set out in some detail, but are not necessary to be gone into upon the present appeal.

The plaintiff is the divorced wife of Dexter Shoudy, deceased, who in his lifetime took out a policy of life insurance with the Northern Life Insurance Company of Seattle for the sum of $5,000, and made said plaintiff the beneficiary thereof, delivering said policy to her. It contained a provision giving to the assured the right to change the beneficiary named therein by indorsement made by the company on the face thereof. Marital difficulties having arisen between himself and his wife, Dexter Shoudy substituted his sister as the beneficiary in said policy and later made a second change, this time in favor of the defendant, whom he subsequently married. At the time of Shoudy's death he had borrowed from the insurance company upon the security of the policy the sum of $2,400, so that only the balance of $2,600 was payable thereon, which sum was in due course paid to the defendant, his widow, and was used by her in liquidating various debts incurred by the assured during the last year or two of his life.

The plaintiff brings this action against the defendant, basing it upon the claim that she had acquired a vested interest by contract in said policy of insurance by virtue of the facts that she had been made the beneficiary thereof, that Shoudy had delivered it to her, that he had promised that he would continue to pay the premiums thereon, and that a large proportion of the money used to pay the annual premiums on said policy was community property—or at least, such payments having been made during coverture, their source must be presumed to be community funds.

The trial court found against the existence of any vested right by contract in said policy in the plaintiff, and also found to be true certain facts pleaded by defendant as an estoppel in her favor, but which we do not deem necessary to refer to in detail, being satisfied of the correctness of the court's finding against the plaintiff's claim of a vested interest in said policy. It accordingly rendered judgment in the defendant's favor, from which the plaintiff has appealed, and urges here the same contentions as were made by her in the trial court.

The testimony introduced by plaintiff in support of her claim to a vested interest in the policy by contract is as follows: She was sick in a hospital, and in the first stages of pregnancy. She there had a conversation with her husband, the substance of which she related in the following terms:

"Q. The question, Mrs. Shoudy, is what did you say and what did Mr. Shoudy say at the time the policy was delivered, or on or about that time, in reference to that policy? A. Well, he just said that he had taken out the insurance policy for me; he said that in case there were any children coming along he thought it would be a protection for the children and the family in case anything went wrong, and he didn't have any money at that time—just an ordinary conversation. That is all that I can remember."

[1] This testimony falls far short of establishing in the plaintiff such a vested interest as would prevent the exercise by the assured of the right reserved to him in the policy of insurance to change the beneficiary thereof. Jory v. Supreme Council, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Hoeft v. Supreme Lodge, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174.

[2] Nor would the fact that a large proportion of the premiums were paid from community funds improve the plaintiff's position (and it may be remarked that there was no proof that such was the fact). Cade v. Head Camp, 27 Wash. 218, 67 Pac. 603. It has even been held that the payment of premiums from the separate funds of the beneficiary would not suffice to create a vested interest in his behalf. Supreme Council v. Behrend, 247 U. S. 394, 38 Sup. Ct. 522, 62 L. Ed. 1182, 1 A. L. R. 966.

The sections of the Civil Code and authorities cited by appellant to the effect that a husband and wife are under the obligation of mutual support, and that they may contract with each other as to community and other property, have no determinative bearing upon the facts of this case.

Judgment affirmed.

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55 Cal. App. 408

PLOTNIK et ux. v. ROSENBERG.
(Civ. 3971.)

(District Court of Appeal, First District, Division 2. California. Nov. 28, 1921.)

1. New trial 🔑77(1)—Court can set aside verdict for exemplary damages showing passion and prejudice.

Though the power of the jury in the award of exemplary damages under Civ. Code, § 3294, is broad, the courts have the same power to set aside a verdict for such damages, and exercise it upon the same principle as in any case of excessive verdict if the amount awarded was such as to suggest passion and prejudice of the jury.

2. Damages 🔑94—Exemplary damages must bear reasonable proportion to actual damages.

While there is no fixed rule as to the proportion between actual and exemplary damages, the exemplary damages should bear some reasonable proportion to the actual damages suffered.

3. Landlord and tenant ⚷132(3)—Judgment for $1,500, including exemplary damages for trespass by landlord, reduced to $300.

In an action by tenants against their landlord for an unjustified trespass in entering the premises and removing the doors therefrom, where the actual damages claimed amounted to only $15.60, a judgment awarding as compensatory and exemplary damages $1,500 allowed a sum as exemplary damages out of all proportion to the actual damages, and should be reduced to $300.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Trespass by Nathan Plotnik and wife against R. C. Rosenberg. Judgment for plaintiffs for $1.500 reduced by the court from $2,000 awarded by the verdict, and defendant appeals. Reversed and remanded for a new trial, unless the respondents shall remit all damages in excess of $300 in which case judgment affirmed.

Goodfellow, Eells, Moore & Orrick, of San Francisco. for appellant.

Albert Jacoby, of San Francisco, for respondents.

LANGDON, P. J. This is an action in trespass. Plaintiffs were tenants of the defendant and occupied a certain flat or apartment on Natoma street, in San Francisco. The husband, an invalid, was away part of the time, and the wife and three minor children occupied the flat. During the tenancy, while the rent was seldom paid on the due date, no month passed without payment of the rent in full. For some reason, defendant decided to force the plaintiffs to move, whether it was because of higher rents then obtainable or because he considered the plaintiff Rose Plotnik a trouble maker, is wholly immaterial. Defendant had served notice on plaintiffs that on October 17, 1919, the rent would be advanced to more than double the amount of the previous rent, but at no time was a notice terminating the tenancy served upon the plaintiffs. It is admitted that on the evening of October 2, 1919, defendant, without any legal justification, in the temporary absence of the plaintiffs, entered plaintiffs' home with his pass-key and removed therefrom six doors, including the front and rear door. It was only when the police intervened, at the request of the neighbors of plaintiffs, that defendant restored two of the doors, but never restored the interior doors during the remaining period of plaintiffs' tenancy. The keys of the two doors which were replaced by the defendant were taken by him, and their return was refused. The jury awarded actual and exemplary damages in the sum of $2,000, which amount was reduced to $1,500 by the trial court and judgment given therefor.

[1] The contention is made upon appeal that the damages are excessive. Judgment was prayed "for the sum of $15, the amount of the damage actually suffered by reason of the removal of the said tenant and boarder as aforesaid, and for the further sum of 60 cents, expended for said keys, as aforesaid, and for the further sum of $5,000 as exemplary damages," and for costs. Assuming that the full amount of actual damages alleged were allowed by the jury. the verdict represents an award of $1,484.40 punitive damages—about 100 times the amount of the actual damage alleged. It is true that the common-law rule with relation to the assessment of punitive damages allowed to the jury an exceedingly broad discretion (Hanna v. Sweeney, 78 Conn. 492, 62 Atl. 785, 4 L. R. A. [N. S.] 907); but even under that rule, the courts granted new trials in cases where the amount of punitive damages awarded was such as at first blush to suggest passion and prejudice of the jury (Hanna v. Sweeney, supra; Flannery v. Wood, 32 Tex. Civ. App. 250, 73 S. W. 1072; Saunders v. Mullen, 66 Iowa, 728, 24 N. W. 529; International, etc., Co. v. Telephone Co., 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45).

[2] It is true that there is no fixed rule as to the proportion between actual and exemplary damages in cases where exemplary damages are recoverable. St. Louis Southwestern Ry. Co. v. Thompson, 108 S. W. at page 457; Tynberg v. Cohen, 76 Tex. 409, 13 S. W 315 at pages 316, 317. But it has been held that the exemplary damages should bear a reasonable proportion to the actual damages sustained (Flannary v. Wood, supra), and that the discretion of the jury is not unlimited in this matter. The decisions of the various states present conflicting theories upon which exemplary damages are allowable. In California it is not a question of theory, but of express statutory provision. Civ. Code, § 3294. The power of the court to set aside a verdict for exemplary damages is the same power, and is exercised upon the same principle as in any case of excessive verdict. Sedgwick on Damages (9th Ed.) vol. 1, p. 756. The cases in which courts have set aside such verdicts furnish some guide to the exercise of this power in the present case. A study of these cases reveals the fact that even in cases presenting evidence of extreme malice and aggravation, the verdicts permitted to stand do not represent an award of punitive damages so greatly in excess of the actual damages as in the present case. See Sedgwick on Damages, vol. 4 (9th Ed.) p. 2699.

In this state we have a case presenting facts strikingly similar to the facts of the case at bar. Waters v. Dumas, 75 Cal.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

563, 17 Pac. 685. In that case, the plaintiff was occupying a house in San Francisco, and the defendants "wrongfully and maliciously took down, removed, and carried away the front door of said house; took out and carried away the windows therefrom; stopped and stuffed the flues of the chimney so as to prevent the escape of smoke through the same." It also appeared that at the time of the occurrence, the weather was cold, wet, and stormy, and when the plaintiff tacked cloth on the windows to keep out the cold, the defendants tore down the same, and threatened her and struck her with a board or piece of stick. The jury rendered a verdict of $301. It was contended that the damages should have been limited by the trial court in its instructions to the value of the use and occupation of the premises. The Supreme Court stated that punitive damages were properly allowed, and further stated that the appeal was frivolous, and were it not for the fact that the court "deemed the verdict quite large enough," a penalty for frivolous appeal would have been added thereto.

[3] Guided by the above intimation of the Supreme Court in a case presenting facts strikingly similar to those in the instant case, we have concluded that the judgment in the instant case should be reversed, and the cause remanded for a new trial, unless the respondent shall, within 20 days from the date of the filing of this opinion, file in this court a remittitur of all damages in excess of $300, plus costs. If such remittitur be filed, the judgment then to be modified in accordance therewith, and, as so modified, affirmed. It is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

55 Cal. App. 280

PEOPLE v. CALDWELL. (Cr. 817.)

(District Court of Appeal, Second District, Division Two. California. Nov. 22, 1921.)

1. Criminal law 🔑1023(8) — Order denying motion for arrest of judgment is not appealable.

An order denying motion for arrest of judgment in a criminal case is not appealable.

2. Criminal law 🔑656(9)—Court's statement as to weight of evidence held error.

In a prosecution for rape, trial judge's complaint that counsel for the defendant were not establishing anything and not asking a material question, and only corroborating the state's witnesses, and that they certainly knew they were "not getting anywhere with their evidence," and if they had any witness to contradict any witness brought by the state they should call such witness, made in the presence of the jury, *held* erroneous where such evidence as to the condition of the prosecutrix shortly after the alleged crime contradicted that of a state's witness in a material way.

3. Criminal law 🔑1053—Misconduct of court need not be excepted to, where admonition to jury would have been futile.

In a prosecution for statutory rape, where the judge added one harmful remark to another, calculated to prejudice defendant, *held* that the judge's action could be reviewed, although not excepted to by the defendant's attorneys, since admonition to the jury would have been useless.

4. Criminal law 🔑1166½(12) — Court's admonition to jury to disregard his own remarks bearing upon weight of defendant's evidence held not to cure error.

In a prosecution for rape, where the court was guilty of misconduct in commenting upon the defendant's evidence, stating that the defendant's counsel were getting nowhere with their evidence, the court's admonition to the jury that "the remarks of the court are not for your consideration," but "only addressed to counsel," and to disregard it, *held* insufficient to cure the error.

5. Witnesses 🔑311 — Exclusion of evidence that prosecutrix was testifying under coercion and duress held error.

In a prosecution for rape, the exclusion of defendant's evidence tending to show that the prosecutrix was testifying against the defendant through fear of her adoptive father and mother *held* error.

6. Indictment and information 🔑125(37)—Information may charge prosecutrix was under 18 years of age, and also charge rape with force and violence.

A single count in an information for rape, alleging that the prosecutrix was of the age of less than 18 years, and that the crime was committed by force and violence, *held* not to show an improper joinder.

7. Criminal law 🔑1144(12) — Exclusion of testimony assumed harmless in view of the record.

On appeal from conviction of statutory rape, where defendant did not show what prosecutrix testified to in the preliminary examination as to her age, and such is not shown by the record, it cannot be determined whether her statements were different from those made on trial, so that the appellate court is bound to assume that the exclusion of such testimony, if error, was harmless.

8. Criminal law 🔑1137(5)—Defendant cannot complain of admission of evidence as to age of prosecutrix, when he introduced similar proof.

On appeal in a prosecution for statutory rape, the defendant may not complain of the testimony of prosecutrix's adoptive father and mother as to her age, where he has introduced an application for admission of prosecutrix to a children's home society, which shows her to have been under the age of consent.

9. Criminal law 🔑454—Adoptive parents of prosecutrix could give opinion as to her age.

In a prosecution for statutory rape, the opinions of her adoptive parents as to the age of the prosecutrix were admissible, they having adopted her 9 years before the alleged offense, and her presence in court did not render such testimony incompetent.

10. Criminal law 🔑400(3)—In prosecution for statutory rape prosecutrix's adoptive parents' testimony as to her age held admissible as evidence secondary to public records, where she was born out of state.

In a prosecution for rape testimony of prosecutrix's adoptive parents as to her age *held* admissible as evidence secondary to the public records of the date of her birth, where she was born outside of the state.

11. Witnesses 🔑330(3)—Answer to question held properly excluded as not tending to show duress of prosecutrix.

In a prosecution for rape, where defendant claimed that prosecutrix testified under duress and coercion of her adoptive father and mother, a question asked the adoptive mother on cross-examination, "You have even caused her to be put in the Juvenile Hall after the preliminary hearing?" *held* properly excluded, as not tending to show duress.

12. Rape 🔑59(3)—Refusal of instruction to view prosecutrix's testimony with caution not error, where corroborated, and prosecutrix was not of tender years.

In a prosecution for rape, where the prosecutrix was not a child of tender years, and where her testimony was corroborated, it was not error to refuse an instruction that prosecutrix's testimony "ought to be viewed with great care and caution by you, and you must weigh the evidence in this case with the utmost care, without bias or prejudice."

13. Rape 🔑59(3)—Refusal of instruction that the jury should consider evidence as fairly as if crime were of another nature held not error.

On appeal by one convicted of rape where the prosecutrix was not a child of tender years and was corroborated, refusal of an instruction that the jury should not allow their minds to be prejudiced against the defendant merely because he was charged with crime, nor on account of the nature of the crime, but were to consider "fairly and without prejudice" the evidence both of the prosecutrix and the defendant "as you would if the crime charged were of another nature," *held* not error.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Clarence Caldwell was convicted of rape, and from an order denying his motion for new trial and from an order denying his motion for an arrest of judgment, he appeals. Judgment and order denying motion for new trial reversed, and cause remanded for new trial. Appeal from order denying motion in arrest of judgment dismissed.

O. V. Willson, of Los Angeles, and E. R. Utley, of Calexico, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

WORKS, J. [1] This is an appeal from a judgment of conviction of rape, from an order denying appellant's motion for a new trial, and from an order denying his motion for an arrest of judgment. The latter order is not appealable.

The information charged that the rape was committed with force and violence, and also that the prosecutrix was under the age of 18 years, that being the age of consent to sexual intercourse. Appellant was of the age of 20 years. The facts show that a party of six, including the prosecutrix, the appellant, two other boys and two other girls, drove in an automobile to a park in the country in the latter part of the afternoon. The prosecutrix and appellant separated themselves from the other four. As evening approached, the four, desiring to return home, made search for the missing couple, but did not find them, and finally started home without them. They went to the home of Mr. and Mrs. Smith, father and mother of one of the two girls, where they told the girl's parents that they had been unable to find appellant and the prosecutrix, and had left them in the park. Smith then asked the two boys to accompany him on a search for the missing pair, and they did so, going in the car in which the young people had just returned, one of the boys driving it. The car, at some distance short of the park, met appellant and the prosecutrix walking beside each other along the road. They were taken into the vehicle, and the entire party returned to the Smith home. Mrs. Smith questioned the prosecutrix soon afterward, and elicited from her a statement that appellant had violated her while they were in the park. The prosecutrix is an adopted child, and her adoptive father was called to take her to the family home, some blocks away. Appellant was put under arrest for the alleged crime that evening.

[2] Appellant contends for a reversal of the judgment on the ground of the conduct of the trial judge in making the following statement while a witness for the defense, one of the boys who drove back to the park with the other boy and with Mr. Smith, was on the stand:

> "Well, I do not usually desire to interpose the court's own objection, but you are not establishing a thing, you are not asking a material question, and all you are doing with these three last witnesses is to corroborate what was said by the plaintiff's witnesses. Now, you must have some purpose in that, because you certainly know you are not getting anywhere with your evidence; if you have got any witnesses that know anything that will contradict

any witness brought or any one that knows anything material, call the witness."

These remarks met with no protest from appellant's counsel, but the district attorney at once attracted additional attention to the attitude of the court by saying:

> "I don't know whether the court thinks that the prosecuting officer is negligent, but I can't object when it is favorable to the prosecution; for that reason I did not object."

Notwithstanding the failure of appellant to take exception to the judge's statement, by that means giving him the opportunity to withdraw it and to admonish the jury to disregard it, we feel called upon to consider minutely the point presented. In doing so it will be necessary to take a view of portions of the evidence. If such a view shall disclose that counsel for appellant were "not establishing a thing," that they were "not asking a material question," that all they were doing with their "three last witnesses" was "to corroborate what was said by the plaintiff's witnesses" that they must have had "some purpose in that because" they certainly knew they were not "getting anywhere" with their evidence, and that the judge was justified in saying, "If you have got any witnesses that know anything that will contradict any witness brought or any one that knows anything material, call the witness"—if, we say, these things shall appear, then appellant's contention is at an end, except for some considerations which we shall mention below, for the language employed by the court wil have been shown to be harmless upon that score. On the other hand, if the things mentioned, or some of them, shall not appear from a review of the evidence, then we can discern a great injury resulting to the defense and therefore to the rights of appellant.

There were but five witnesses for the defense, called in the following order: A physician, who testified as an expert; the prosecutrix; the two boys who were of the party which went to the park and who returned there with Smith on the search for the missing pair; and the defendant himself. The three witnesses referred to in the statement of the judge to which exception is taken were the prosecutrix and the two boys, and his remarks were made toward the close of the direct examination of the boy who testified last of the two. It is to be noted, therefore, as a preliminary to the examination of the testimony of the three, that if their statements contained anything that was worthy the attention of the jury, the remarks of the judge were such as completely to nullify the effect of those statements and to leave appellant's defense on the facts to rest upon his own unsupported testimony, for we have already observed that the sole remaining witness testified as an expert.

Not much is to be said concerning the testimony of the prosecutrix when on the stand for appellant. Her examination was very brief. In fact, objection was made and sustained to the principal questions addressed to her, and she was at once called from the stand. We must say, however, that there is nothing in the record to indicate that she was not called in good faith, and the questions put to her were consistent with the general line of defense adopted by appellant. They were objectionable only because they had been addressed to her before, on her cross-examination while on the stand as a witness for the people.

Upon the score of the materiality of the testimony of the two boys and the extent to which it contradicted the evidence brought forth by the prosecution, we are first pointed to the testimony of Smith. Speaking concerning the trip to the park in search of the prosecutrix and appellant, and testifying for the prosecution, that witness said:

> "When we met the two coming in the machine Lillian [the prosecutrix] jumped in the machine and threw her arms around my neck and just simply collapsed."

A little later the witness said:

> "I held Lillian all the way into Santa Ana."

Smith's testimony, and that of others, shows that on the ride to the park he and Cecil Park, one of the boys, occupied the rear seat, and Dewey Callahan, the other boy, sat in the front seat alone and drove the car. When appellant and the prosecutrix were taken up the latter got into the rear seat between Smith and Parks and appellant sat in front with Callahan. With this observation we turn to a part of the cross-examination of Smith:

> "Q. Now, what do you call 'collapse'? A. Well, she was in a nervous condition and she wasn't able hardly to walk, she was just simply prostrated. * * * Q. And as soon as she got in the car she did what? A. She fell into my arms. * * * Q. Inside of the car? A. Yes. * * * Q. Did you have your arms out? A. Yes. Q. Ready for her to fall into your arms? A. I did. Q. And she didn't sit down in the seat, did she? A. Yes. Q. After falling into your arms or before? A. Both. * * * Q. What did you say to her there? A. 'Lillian' was about the only thing I said. Q. You kept saying 'Lillian,' is that it? A. Yes. * * * Q. And all you said was 'Lillian' all the way in? A. Yes, sir. * * * Q. What was the first thing said by either you or the defendant or [the prosecutrix] when you met them? * * * A. 'Lillian.' Q. You said 'Lillian'? A. Yes. Q. And what did she say? A. 'Mr. Smith.' * * * Q. What else was said? A. That was all then said. Q. Park say anything to either of them in your presence then? * * * A. Not that I remember. Q. Didn't you hear Park say at that time, ask [the prosecutrix] and the defendant if they were lost? A. I don't remember. Q. You didn't? A. No, sir. Q. So

there was nothing said from that time you met them at the park gate by any of you until you got home except 'Lillian' and 'Mr. Smith,' is that right? A. I wouldn't swear nothing was said, I couldn't say that; I was looking at Lillian, the main thing I thought of. Q. You weren't thinking of anything except of Lillian's welfare, you can't remember a thing said except 'Lillian' and 'Mr. Smith,' and you addressed her as 'Lillian' and she you as 'Mr. Smith'? A. Yes. Q. Nothing else said? A. Nothing that I recall. * * * Q. When was the next you saw the defendant? A. Well, it was a few minutes after we got home, I don't know how many minutes. I took the girl in the house, and she was in such a condition when we went in I took care of her first. Q. Did you carry her in your arms? A. No, sir; I very nearly carried her in; she walked, however. Q. * * * And she never even laid down when she got in the house? A. She set down very forcibly. * * * Q. And she got up and talked with her young friends in your house? A. No, sir. Q. She didn't talk to you at all, while in the house before her stepfather came for her? A. She talked, but she didn't get up to talk. Q. They were all sitting down when they were talking? A. Yes. * * * Q. What did you say to her? A. That I don't remember; it was only as a father would do to a daughter, just quietly; her nerves were in such a condition. Q. What did you do to quiet her? A. Stroked her head and talked to her."

We now take up the testimony of the two boys in order to determine the extent to which Smith was contradicted by them. Dewey Callahan, having the prosecutrix in mind, testified in part as follows:

"Q. Did you see that girl at the house before her father came for her? * * * A. I did. Q. Was she sitting down all the time or not? A. She wasn't. Q. What was she doing in the house? A. Walking about the rooms. Q. Was she talking with anybody? A. No. Q. Was she weeping copiously, weeping? A. Just walking around the room, with her head down. Q. And Smith was there, was he? A. He was."

Cecil Park, speaking first of the occurrences at the time when he, Smith, and Callahan met the prosecutrix and appellant coming from the park, testified in part thus:

"Q. Do you remember what the first thing said was when you met them there? A. The first thing said, Mr. Smith hollowed 'Lillian.' Q. What was the next thing said? A. Well, I asked the defendant and the girl both if they had been lost. Q. What did they say, if anything? A. The defendant said 'Yes,' and the girl said something. Q. Did you see the girl walking along the road that night? A. I didn't see them until we got to them. Q. Did she need any assistance to get into the car? A. She got in by herself. Q. Did she collapse after she got in the car? A. Well, I don't know what a collapse is, she sat down in the machine, and Mr. Smith put his arm around her. Q. She sat down in the machine, and Mr. Smith put his arm around her? A. After she sat down in the machine, Mr. Smith put his arm around her."

These extracts from the evidence show plainly that Callahan and Park contradicted Smith in several respects, the contradictions, taken together, tending in a considerable degree to impeach his story in two of its particulars: First, that the prosecutrix collapsed when she and appellant were met outside the park; second, that at Smith's home she was so nearly prostrated that she was unable to be on her feet and needed the attentions by means of which he says he ministered unto her. In addition to these contradictions of Smith, Callahan and Park testified at some length upon the general occurrences in which they figured, having to do with the case. More specifically, they both testified that the prosecutrix sat on appellant's lap during the ride of the three couples to the park, and that shortly after they arrived at their destination the prosecutrix and appellant separated themselves from the other four, who remained in company. One of the boys testified that the prosecutrix did not cry on the return trip to the Smith home.

As is usual in such cases the events surrounding the actual commission of the alleged offense are to be gathered only from the testimony of the prosecutrix and of appellant. The girl's recital was to the effect that appellant and she had sexual intercourse in the park as a result of physical force employed by him upon her. Appellant testified that he resorted to no force in accomplishing what was done by the two; that there was no resistance upon the girl's part; that, in truth, she was in full accord with him in what was done; that, with that accord on her part they indulged in a certain course of conduct toward each other which did not include penetration, and that he never did penetrate her person; that the reason there was no penetration was because the girl said she was not well, and therefore would not permit him to indulge in sexual intercourse with her. It will thus be seen that there were two issues arising from the testimony of these two witnesses: First, was the crime of rape consummated upon the prosecutrix by the performance of the final act without which the crime cannot be committed, that is, a penetration of the person of the woman? Second, if the crime was committed, did it result from the employment of force, or is appellant guilty solely because the prosecutrix was under the age of consent? Upon one of these questions the jury found with the prosecutrix; upon the other they declined to believe her testimony, and found with appellant. They adjudged him guilty as charged, but found that the crime was committed "without force and violence," and recommended him to the leniency of the court. Their verdict, then, shows that a decided doubt was present in their minds on the score of the credence to be given respectively to the testimony of the two. If the conduct of the trial and the shaping of the evidence had been modified in but a slight degree in favor of appellant, the jury might have found against the testimony of the prosecutrix upon the issue as to which, the record being as it is, they found with her. Granting the presence of but a slight added circumstance favorable to appellant, they might well have utterly disbelieved the prosecutrix; they might well have given credence to the entire story of appellant. Is it not plain that the trial could have resulted so if the judge had not taken, and expressed, his determined attitude against all of appellant's evidence on the facts except the testimony of appellant himself? The jury, assuredly, after the judge made his statement, must have laid the entire testimony of Callahan and Park out of consideration except as favorable to the prosecution. They were not told merely that the answers of the two boys amounted to nothing by way of defense, but the judge said directly and positively that those answers strengthened the case made by the prosecution. As we have already observed, the attitude of the judge put the appellant in such a position that his story must have stood alone before the jury. But for his own word, he faced the jury undefended by any evidence on the facts. All corroboration of his testimony was swept away at a blow. Perhaps it may be well to state, at the risk of repetition, the extent to which appellant was corroborated by Callahan and Park. Smith's testimony tended to prove that when the prosecutrix came from the park, while she was on the way to his home, and after she had arrived there, she was in a condition which might naturally have followed upon a forceful violation of her person. This testimony was disputed by the two boys. In addition, appellant's statement that the prosecutrix was a willing participant in their conduct in the park is somewhat borne out by the testimony of the two boys that she sat on appellant's lap on the way to the park, and that, soon after the party reached its destination, prosecutrix and appellant separated themselves from the other four, who remained together. Nor does it matter that the corroboration of appellant's story in these respects related to the issue upon which the jury found with his story as against that of the prosecutrix. The heartier the corroboration of that branch of his testimony, the more inclined, naturally, would the jury have been to disbelieve what the prosecutrix said upon the other issue between them, that is, upon the question as to whether her person was penetrated.

There is another feature of the case in which Callahan's and Park's contradiction of Smith was most material. It is contended by appellant, inasmuch as the prosecutrix made no complaint concerning his conduct, except in response to questions, that she testified falsely through fear of Smith and her adoptive father and mother; that, in effect, she testified under their coercion. Many questions were put by counsel in support of this theory at the trial on cross-examination of witnesses for the prosecution, and it was shown that the next morning after the alleged commission of appellant's offense the adoptive mother shook the prosecutrix in an endeavor to make her talk concerning the events of the evening before. We have already observed that the statements out of which the prosecution grew were made by the prosecutrix in response to questions put to her by Mrs. Smith. Under this state of the record and under the contention of appellant concerning it, he was entitled to the benefit of the testimony which contradicted Smith, for, if he could have convinced the jury that Smith testified falsely concerning the girl's condition after she came from the park, that circumstance might have aided the jury in some degree, though perhaps slight, to a conclusion favorable to his contention that the entire case, including the incriminating testimony of the prosecutrix, was inspired not only by Smith, but by the others whom appellant endeavored to hold responsible for a coercion of the prosecutrix. The remarks of the trial court effectually swept this right away.

Laying aside these questions, all arising from the nature of the subject-matter of the testimony of the two boys, other considerations lead us to the conclusion that the statement of the judge did irreparable damage to appellant's defense. Whatever the nature of the examination of the two witnesses, whether counsel were "getting anywhere" with it or not, we cannot avoid the conclusion that the judge's remarks showed a decided hostility toward appellant and toward his defense. In this connection we must mention a circumstance to which we have not yet adverted. We have observed that the statement of the judge occurred toward the close of the testimony of Park. A few pages further along in the record, and at the end of the testimony of that witness, the reporter's transcript shows the following, the italics being ours:

> "The Court: Now, gentlemen, the noon hour has arrived, and we will take an adjournment, if you have another witness that you can call or want to call, call him.
>
> "Mr. Utley [of counsel for defendant]: We have no other.
>
> "Mr. Willson [also for defendant]: Excepting the defendant; that will take some time.
>
> "The Court: Then you have no other witnesses *of this kind?*
>
> "Mr. Willson: You mean—
>
> "The Court: *I mean to establish all the facts testified to by the plaintiff.*
>
> "Mr. Willson: We do not, your honor—of course, we respect the court, but we do not so consider."

This return of the trial judge to the attack, after what he had said a few pages back in the record, will serve to accentuate all that we have said above upon the point presented as to his conduct. We mention the occurrence in this place particularly, however, for the reason that, but for the announcement of a noon recess of an hour and a quarter which immediately followed it, the quoted colloquy was the last event of the trial preceding the appellant's being sworn in his own behalf, for he took the stand, the last witness in the case, upon the reconvening of court after the recess. In such a position was his defense left when he alone and unsupported was to face the jury in testimony upon the serious charge pending against him. The jury could not have heard the judge say, as he had said but a short time previously, that appellant's counsel were "not establishing a thing," that all they were doing by all their witnesses on the facts was "to corroborate what was said by the plaintiff's witnesses," that they "must have some purpose" in their course, because they certainly knew they were not getting anywhere with their evidence, that if they had any witnesses that knew anything "that will contradict any witness brought or any one that knows anything material," they should "call the witness"; they could not have heard the district attorney say, under the inspiration of the judge's statement, that he did not object because appellant's evidence was "favorable to the prosecution"; they could not have heard the judge say, finally, that appellant's witnesses were of a kind "to establish all the facts testified to by the plaintiff"; the jury could not have heard all these things without feeling that all the evidence offered to them up to the moment that appellant took the stand in his own behalf tended to prove his guilt. Undoubtedly he opened his testimony with the jury feeling as they had felt at the close of the case for the prosecution; nay, he was in even a worse position, for the jury had heard the judge say that the testimony of his witnesses had corroborated the testimony of the prosecution, which was to say, in effect, that when he took the stand he had a stronger case to meet by his testimony than if he had foregone the aid of other witnesses and had himself testified immediately after the people had rested. We cannot feel that, so handicapped, appellant had the fair trial to which he was entitled under the law.

[3] The Attorney General insists that appellant's contention can avail him nothing, for the reason that no exception was taken to the statement of the judge at the time it was made. It is the general rule, of course, that misconduct of a district attorney or of a trial judge must be called to the attention of the court by a defendant whose rights are prejudiced by it, upon the theory that through timely objection or exception the court is given the opportunity duly to admonish the jury to disregard the fault, thus making harmless a course of conduct which but for the admonition would be harmful. It is not always true, however, that admonition will eradicate the evil done by an improper statement made by district attorney or judge. When it will not, the necessity for objection to the misconduct vanishes, and in such a case the error is not cured, even if the court, in the absence of objection, hastens in an attempt to correct the impression improperly conveyed to the jury. People v. Derwae, 155 Cal. 592, 102 Pac. 266; People v. McDonald, 167 Cal. 545, 140 Pac. 256. It is impossible for us to imagine what the judge could have said, by way of admonition or instruction, of sufficient potency to remove from the minds of the jury the effect of his statements made in their presence in this case. His utterance was not a short, sharp expression, the effect of which might have been removed by a statement that it came forth through inadvertence or undue haste. He spoke at some length, and added one harmful remark to another, until the total was enough to do substantial and lasting injury to the defense. Moreover, he evidently spoke with deliberation, for his remarks were prefaced by a statement that he disliked interposing the court's own objection; and, when he had concluded, he had impressed the jury with the idea that he spoke after due reflection, for his condemnation of the evidence of the defense reached back through the testimony of three witnesses; and, not content with what he then said, he took up the same theme a short time later, as we have already shown, thus settling his views firmly in the minds of the jury. Disregarding the rule that the jury are the sole judges of the facts, he placed before them what amounted to an expression of a deliberately formed opinion on his part, as appellant was about to take the stand as the last witness in his behalf, that the case of the prosecution was stronger than when the prosecution rested. Considering the nature of the evidence the people had offered, the jury could not well have escaped the conviction that the judge believed appellant guilty as charged. No admonition could have purged their minds of that conviction.

[4] The Attorney General takes the ground that the judge did admonish the jury to disregard his statements. After what we have said in the paragraph immediately preceding this, it is not worth while to spend any great time upon a consideration of this claim. Therefore we shall notice it but briefly. At the conclusion of the colloquy between court and counsel which we have last quoted above, and immediately following the statement of Mr. Willson that "we respect the court, but we do not so consider," the judge said:

"Ladies and gentlemen of the jury, the remarks of the court are not for your consideration, it is only addressed to counsel; diregard it."

This is the "admonition" upon which the Attorney General makes his point. The judge's statement was ineffective for two reasons: First, it necessarily impressed the jury as referring only to the remark made just preceding the retort of Mr. Willson, and as not at all touching the longer statement of the judge made some time before; second, it was totally inadequate to the occasion, forgetting for the moment what we have said in the last preceding paragraph. The judge did not say that he had no right to speak as he had spoken, that all questions of fact were within the peculiar province of the jury, or that his opinions were incorrectly formed. On the contrary, he left with the jury the impression that he had the right so to disburden himself, albeit by way of remark to counsel, the duty of the jury being not to leave their ears unstopped when he found it necessary thus to speak. Such an "admonition" could have borne no fruit whatever.

[5] Appellant's counsel, in an endeavor to substantiate their claim that the prosecutrix testified under the coercion of her adoptive father and mother and Mr. Smith, and that certain physical disabilities under which the prosecutrix claimed she labored were due to her fear of them, especially of her adoptive father and mother, asked her several questions on cross-examination. These were objected to on the ground that they were incompetent, irrelevant, and immaterial, and in each instance the objection was sustained. The various rulings are assigned as error. One of these questions was,

"You were afraid of your father when he came there to that Smith house that night, were you not?"

Another was:

"Now, what did your father say to you when you saw him at the Smith house?"

Yet another:

"You would never have said a word to anybody about this affair, had it not been for your fear of your father and mother; isn't that true?"

And still another:

"Your mother abused you when you arrived home?"

In order that their purpose in asking these questions might be clearly before the court, counsel made the following statement after the objection to the second question had been sustained:

"We offer to prove that this girl is testifying under the influence of her father and mother and has all the way through the proceedings, that she is under the duress of her adopted father and mother, and we make the offer to prove it by cross-examination as well as other witnesses."

To this offer the court responded, after an objection by the district attorney:

"The court ruled on the objection that it was immaterial; now the counsel offers to prove by this witness certain things which would run counter to the ruling of the court. Therefore the offer to prove by this witness is disallowed."

The Attorney General contends that none of these questions was proper cross-examination, but that position is not tenable, even if it be admitted that, strictly speaking, the questions were not legitimate cross-examination. None of the objections made by the district attorney included that ground. Moreover, the court, in his remarks in response to the offer of proof, distinctly stated that he considered the evidence as immaterial, and he specifically rejected the offer on that ground. Counsel were justified in taking the statement as final. They doubtless did so, and they doubtless refrained from calling witnesses by whom to prove the offered matter on that account. It would have been a futility for them to call witnesses for the purpose of making the proof, merely to have objection made to the testimony and to have it sustained on the ground that the evidence was immaterial. After all that had transpired they were amply justified in assuming finally that any evidence offered by them on the subject would meet that fate. We are convinced that the evidence proffered both by the questions and the offer of proof was not immaterial. People v. Knight, 5 Cal. Unrep. 231, 43 Pac. 6. It is certainly most important in a rape case that proof be made, if such be the fact, that the prosecutrix is influenced by her fear of others to testify against the defendant. The credibility of a witness in any judicial proceeding will be affected by the fact that the witness gives testimony through coercion or duress of others; and it is a most important function of the law of evidence to ascertain the credibility of witnesses. We are satisfied that the court erred in sustaining objection to the questions we have set out above.

A reversal of the case must follow from the commission of the errors we have noted, and we are therefore called upon to consider such other points discussed in the briefs as may arise upon a retrial.

[6] The information under which appellant was tried consisted of but one count, containing the two allegations that the prosecutrix was of the age of less than 18 years, and that the crime with which appellant was charged was committed by force and violence. The pleading was demurred to on the ground of an improper joinder in the respect mentioned and the demurrer was overruled.

It is contended that the ruling was error. The point is not well taken, as there was no improper joinder. People v. Jailles, 146 Cal. 301, 79 Pac. 965; People v. Maruyama, 19 Cal. App. 290, 125 Pac. 924.

[7] Counsel for appellant made several attempts at the trial to impeach testimony of the prosecutrix as to her age by asking her whether she had made statements on the same subject as a witness at the preliminary examination of appellant. In each instance they were halted by the court's sustaining an objection on the ground that no proper foundation for the inquiry had been laid. There is nothing in the record to show what the statements of the witness at the preliminary examination were. We are therefore unable to say that they were different from her statements made at the trial. Under such circumstances we are bound to assume that the rulings of the court in sustaining the objections, even if erroneous, which we do not decide, were harmless. An appellant must always make an affirmative showing that errors of the trial court have resulted prejudicially to him.

[8] Appellant contends that the trial court erred in receiving, over his objection, testimony of the adoptive father and mother of the prosecutrix as to her age. Their testimony on the subject was based upon their recollection of the appearance of the girl as indicating her age at the time of her adoption by them, the answers evidently having been given through a process of adding the number of elapsed years after the adoption to the number representing the age the girl appeared to have attained when the adoption occurred. Whatever intrinsic merit this question possesses is robbed of interest on the present appeal because of the fact that appellant himself introduced evidence showing prosecutrix to have been less than 18 years of age at the time of the commission of the alleged offense. This evidence is in documentary form, and is entitled "Application for Admission of a Child to the Michigan Children's Home Society." The child mentioned in the application was the prosecutrix, and, among various items of statistical matter concerning her set forth in the paper, the date of her birth is stated. Under well-established rules of evidence appellant is bound on this appeal by the showing made by this document, introduced by himself. Nor does it matter that the paper was not a public record, and that it might have been excluded upon objection by the district attorney as "inadmissible evidence, if admitted without objection, is sufficient proof of the fact to which it relates." Prentice v. Miller, 82 Cal. 570, 23 Pac. 189. It becomes necessary, however, to consider the point made by appellant, as it may arise on the retrial of the cause, when appellant may not see fit again to offer the application.

[9] It appears to be settled by an overwhelming weight of authority that a witness may give his opinion as to the age of one whose age is the subject of judicial inquiry. Where the point presented is merely as to whether the individual in question has passed from minority to majority, some cases are to the effect that the opinion of any witness who has seen him may be taken. Where the ascertainment of exact age is necessary, a sterner test is generally applied. In such a case the witness must have had an intimacy, or at least an acquaintance of some duration, with the person whose age is under inquiry before the opinion may be received. In both kinds of cases, however, that is, in those in which the question is merely as to the passage from minority to majority, as well as in those in which age is to be ascertained, many of the authorities decide that the opinion cannot be given until after the witness has described the individual who is the subject of the inquiry. A copious list of cases in support of all these rules may be found in a note to State v. Pruett, L. R. A. 1918A, 662, 685. In a number of decisions it has been held that opinion evidence as to age, generally, may be received only when the subject of the inquiry is not in attendance in court or is deceased (State v. Robinson, 32 Or. 43, 48 Pac. 357), and the cases deciding that a description of the subject must accompany the opinion would seem to be based upon the same theory, for if he were present in court no description would be necessary. The reason for this rule is that if age is to be determined from appearance and the subject is in court the jury may themselves resolve the question without the aid of opinion evidence. It has been determined in this state that the age at a particular time of one who was deceased at the date of the inquiry was provable by the opinion of one who had known him for 25 years. People v. Bond, 13 Cal. App. 175, 109 Pac. 150.

[10] We state these various rules of law in but a general way, for the reason that it appears to us to be unnecessary to review or to distinguish separately the cases which announce them. No case like the one now before us has come to our attention, and any of the rules which are above stated, and which would appear at first glance to operate against the reception of the opinions of the adoptive parents as to the age of the prosecutrix, may be shown not to apply here. They testified at a time when she had been under their especial care and observation as a dependent member of their household, as their child, although by adoption, for a period of 9 years. She had come to them as a little girl, and they had observed, practically as minutely and narrowly as would natural parents, her transition from childhood to budding womanhood. It is next to impossible that they did not know her actual age at the time of the adoption, although the knowledge might be hearsay when tested

by the rules of evidence. It is next to impossible, granting for the moment that her age at the period of the adoption was unknown to them, that they did not know her approximate age at the time they testified. They fixed her age as more than 2 years under 18, and, reasoning from the standpoint that only an approximation was possible as coming from them, it is impossible that under all the circumstances of their intimate association with her they could have been 2 years from the truth in stating the approximation. They need not have described her, for she was present in court. On the other hand, her presence in court did not render their opinions inadmissible under a rule we have stated above, for it would be futile to assert that the jury could judge her age from seeing her a few hours as well as could they after having, during 9 years, reared her to young womanhood. If it be said that the testimony of the adoptive parents might in some sense be designated as secondary to books of public record which might disclose the date of the birth of the prosecutrix, although the assertion would not apply in the case of natural parents, it may be retorted that the record before us discloses that she was born outside of the state. Therefore, evidence secondary to the public records of the date of birth would be admissible. On the whole, to conclude, we are convinced that the opinions of the adoptive parents were properly received.

[11] Appellant contends that the trial court erred in sustaining an objection to the question, which referred to the prosecutrix and which was addressed to her adoptive mother on cross-examination:

> "You have even caused her to be put in the Juvenile Hall after the preliminary hearing?"

This question was asked in support of the defense that the prosecutrix was under duress in giving her testimony in the cause. It appears to us, however, that it did not tend to prove that defense, and that the objection that it was incompetent, irrelevant, and immaterial was for that reason good.

[12] It is insisted that the court erred in refusing an instruction to the effect that the testimony of the prosecutrix "ought to be viewed with great care and caution by you, and you must weigh the evidence in this case with utmost care, without bias or prejudice." Cautionary instructions of this character are proper in rape cases, under many decisions, either when the prosecutrix is a child of tender years, or when her testimony is uncorroborated. Neither of these conditions was present in this case. Therefore the instruction was uncalled for. People v. Rangod, 112 Cal. 669, 44 Pac. 1071; People v. Corey, 8 Cal. App. 720, 97 Pac. 907. Nor do we mean to determine whether the refusal to give such an instruction, in a case where it were proper to give it, would amount to reversible error.

[13] Appellant requested the trial court to instruct the jury as follows:

> "You are instructed that you shall not allow your minds to be prejudiced against this defendant merely because he has been charged here with this crime, nor on account of the nature of the crime here charged, but you are to consider just as fairly and without prejudice the evidence in this case, both for the prosecution and the defendant, as you would if the crime charged were of another nature."

Perhaps it would not have been improper for the court to have given this instruction; but, on the other hand, it was not error to refuse to give it. People v. Barney, 114 Cal. 554, 47 Pac. 41.

The judgment and the order denying the motion for a new trial are reversed, and the cause remanded for a new trial. The appeal from the order denying the motion in arrest of judgment is dismissed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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YOUDALL v. KAUFMAN. (Civ. 2346.)

(District Court of Appeal, Third District, California. Nov. 25, 1921.)

1. Appeal and error 🔑854(3) — Demurrer sustained is deemed sustained on any ground on which it is well taken.

Where a demurrer is sustained and no particular ground for sustaining specified, it is deemed to have been sustained on any ground as to which it is well taken.

2. Pleading 🔑224—After sustaining demurrer to three of five paragraphs of an answer entering judgment for plaintiff on demurrer was error.

In ejectment, where the answer set up five defenses, and, under Code Civ. Proc. § 443, providing that demurrer may be made to one or more defenses, a demurrer was entered to three of these, leaving two good and sufficient defenses unassailed, upon sustaining the demurrer, entering judgment for plaintiff was error.

3. Ejectment 🔑23—Mistake as to boundary not a defense.

In ejectment, answer setting up that defendant committed the trespass under mistake as to boundary line did not relieve him from the duty of surrendering the property and making reparation in damages for the trespass.

4. Ejectment 🔑69—Admission in answer of a lease not alleged in complaint not averment of any fact.

In an action of ejectment, where the complaint did not allege a lease of the land in question to defendant, a statement in the answer that defendant admitted a lease of premises from plaintiff to him does not amount to an issuable allegation of a lease, not being an averment of fact.

5. Perjury 🔑1—Perjury is not committed by verified answer conceding a lease which the complaint did not allege.

In an action of ejectment, where the complaint did not allege a lease of the land in question to defendant, a verified answer, admitting a lease from plaintiff to defendant, is not perjury.

6. Pleading 🔑8(7)—Allegation in ejectment that defendant leased from plaintiff land in question, which lease had never been canceled held conclusions and insufficient.

In an action of ejectment, a statement that defendant leased from plaintiff the land in question, and that the lease had never been canceled or terminated, were conclusions, and further reference by the words "by reason of said lease," and another reference, "That defendant agreed to pay plaintiff a nominal sum as rental thereof until the entire matter could be adjusted," were too vague and indefinite.

7. Pleading 🔑214(4)—A demurrer does not admit the correctness of conclusions.

A demurrer does not admit correctness of conclusions.

8. Ejectment 🔑69—Denial that defendant is or ever was in possession is in effect the denial of an ouster.

In an action of ejectment, a denial by defendant in his answer that he "is or ever was in possession" is, in effect, a denial of an ouster, and is sufficient in the absence of objection thereto.

9. Appeal and error 🔑1073(1)—Judgment erroneous in part not reversed, where no prejudice results.

In an action of ejectment for two adjoining tracts of land, where judgment was properly given against defendant as to one tract, which would carry with it the costs, where he was never in possession of the second tract a judgment against him as to this tract is not injurious, and there should be no reversal as to it.

10. Pleading 🔑224 — Denial of hearing on question of damages on sustaining demurrer to other parts of answer held error.

In ejectment asking damages for retention of possession, where defendant alleged a defense as to damages, denying him a hearing on the question of damages on sustaining a demurrer which was good as to other matters alleged in defense, but not good as to the matter alleged in defense of the claim for damages, was erroneous.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Leonard F. Youdall against Isadore Kaufman. From judgment for plaintiff, defendant appeals. Modified and affirmed.

A. H. Carpenter, of Stockton, for appellant.

Carleton C. Case and Elmer W. Forslund, both of Stockton, for respondent.

PREWETT, Justice pro tem. Action in ejectment to recover the possession of two certain lots in the city of Stockton, described as the north half of lot 10 and the north half of lot 12 in a certain block in that city.

The complaint is in the ordinary form, averring ownership in the respondent and ouster by the appellant, and that the rents, issues, and profits are $150. The appellant answered, denying certain allegations and furnishing insufficient defenses as to others. The court sustained a demurrer to the answer, with leave to the appellant to amend. He declined to amend, and in due course judgment was rendered against him for the recovery of both tracts and $150 as rents, issues, and profits. No costs were awarded to the respondent.

As the action of the court in sustaining the demurrer to the answer is the only point involved in this appeal, it will be found profitable to quote at length all the material parts of both answer and demurrer. The material parts of the answer are as follows (the numbers of the paragraphs are ours):

1. "Admits that plaintiff is the owner of the real property described in the complaint, and that he leased from plaintiff the north half of lot 12 * * * at a nominal rent for the ground thereof; and in that behalf alleges that such lease is still in full force and effect, and has never been terminated, canceled or revoked by notice as required by section 789, Civil Code, or in any other manner or way whatsoever."

2. "Denies that he is or ever was in possession of any part of the north half of lot 10 or that he ever leased the same from plaintiff."

3. "Denies * * * that he is wrongfully occupying or withholding the possession of the north half of said lot 12 of said tract; and in that behalf alleges that his occupation of the said last-named piece of land is rightful and lawful by reason of his said lease from plaintiff, which has never been canceled, revoked or terminated in any manner or way whatsoever."

4. "Denies that the value of the rents, issues and profits of said real property is the sum of $150, or any other or greater sum that $1 per month during the defendant's occupancy thereof, or the sum of $11. * * *"

5. "That the said Morrell erected said dwelling mainly on the south half of lot 12, but by mistake, extended the rear thereof upon the north half of the same lot * * * and when so informed by the plaintiff, defendant agreed to pay plaintiff a nominal sum as rental thereof until the entire matter could be adjusted."

The answer further shows that said Morrell was acting as an agent of the respondent in the erection of a dwelling on the south half of lot 12. There are a number of other allegations in the pleading, but they are unimportant.

The demurrer is directed to the allegations and denials contained in those paragraphs which we have designated as numbers 1, 3, and 5, and it is wholly silent as to paragraphs 2 and 4. Its grounds are stated as follows:

> "1. That said answer does not state facts sufficient to constitute a defense, for the reason that said answer shows upon its face that the defendant unlawfully and wrongfully entered upon the real property, the possession of which is sought to be recovered by plaintiff.
>
> "2. That the alleged lease mentioned by the defendant in said answer is not sufficiently identified or set up; that there is no allegation as to whether said alleged lease was or was not in writing, or the date thereof, or the amount of rental to be paid, or the length of the term of said lease; and said answer does not allege that the said plaintiff ever agreed to or accepted the terms of the alleged lease mentioned by defendant.
>
> "3. For the reasons given above the said answer is ambiguous.
>
> "4. For the reasons given above the said answer is unintelligible.
>
> "5. For the reasons given above the said answer is uncertain."

[1] The court, in sustaining the demurrer, did not specify any particular ground; hence it is deemed to have been sustained upon any ground as to which it is well taken. Sechrist v. Rialto, 129 Cal. 640, 62 Pac. 261.

[2] It is, of course, at once conceded that the denials contained in paragraphs 2 and 4 of the answer are good in form as to the particular matters which they attempt to deny, and that they raise material issues in the case. The appellant had a right to deny the allegation in the complaint that he withheld the north half of lot 10, and a like right to deny that the rents, issues, and profits exceeded the sum of $11. These two defenses were not demurred to, and the issues met by them were never tried. This was clearly error, unless the action of the court in sustaining the demurrer to other portions of the answer operated to carry these defenses with it. In this last event, the demurrer having been sustained in general terms, the effect of the order was to leave no answer on file, and the default of the appellant for not filing an amended answer was properly entered. While this is the rule where a demurrer is sustained to a pleading, all of whose parts are interdependent and constitute one complete and connected statement of a cause of action or ground of defense, it is not the rule as to a demurrer directed only to certain specified defenses, leaving other and sufficient ones unassailed. It will be shown further along that the demurrer was properly sustained as to defenses numbered 1, 3, and 5. The effect of the demurrer was to leave intact and unassailed the defense or denial that appellant withheld lot 10 and the denial that the damages exceeded $11. In support of this point, we will quote from but one case, as it appears to be conclusive:

> "Where a pleading contains sufficient to make a good cause of action or a good defense, the effect of sustaining a special demurrer thereto is no different than * * * results where a motion to strike out has been granted. Where such a demurrer has been sustained, and the party affected fails to amend, then the portions of the pleading so specially demurred to will be taken out of view for the purposes of the trial, and be deemed to have been stricken out." Pitzel v. Maier Brewing Co., 20 Cal. App. 737, 130 Pac. 705, 706.

The words "special demurrer," as used in the opinion from which we have just quoted, were construed by the Supreme Court, on petition for a hearing in that court, to mean a "demurrer to same particular detached portion" of the pleading. Section 443 of the Code of Civil Procedure expressly provides that a plaintiff may demur to one or more of several defenses set up in an answer. In the present case, one of the defenses set up in the answer is the denial by appellant of possession of lot 10, and another is the denial as to the rents, issues, and profits. The respondent, doubtless realizing that a demurrer would not lie to them, made no attempt to assail them by that means. They stand to-day as unimpeached denials and defenses in the case. Several other cases, from which, however, we will not quote, throw much light on the point discussed in the Pitzel Case. They are: Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497; Locke v. Peters, 65 Cal. 161, 3 Pac. 657, and Hagely v. Hagely, 68 Cal. 348, 9 Pac. 305. The conclusion that the matters set out in paragraphs two and four of the answer constitute subsisting defenses is so clearly sustained by the authorities above cited, that further attention to the point would be superfluous.

[3] Turning to the chief controversy in the case, which appears to involve the north half of lot 12, we will inquire whether the matters set up in paragraphs numbered 1, 3, and 5, and relating to said lot, constitute a defense. In these allegations, the appellant admits the commission of a trespass upon said lot, and he pleads no legal justification therefor. He shows, perhaps, that he committed the trespass under a mistake as to the location of the boundary line, but this does not relieve him from the duty of surrendering back the property and making full reparation in damages for the trespass.

[4, 5] The complaint in no manner or form alleges or hints at a lease. Nevertheless the appellant purports to admit that he leased the tract in question from the respondent, but this admission, in the absence of an allegation to be admitted, does not amount to an issuable allegation that he so leased it. At most, he merely concedes it. The answer

is verified, and upon such a concession, where there is nothing to concede, he could not be held for a perjury in making it. Moreover such a vacuous admission, when directly challenged by demurrer, is wholly insufficient to amount to an averment of the fact.

[6, 7] Even if we could read the word "admits" as meaning "alleges," the allegation would still fall far short of a proper pleading. The sole allegation, as thus construed, is that he "leased from the plaintiff the north half of lot 12 * * * at a nominal rent for the ground thereof." The respondent is entitled, as against his demurrer, to a distinct allegation of such an array of facts as will enable the court to say, as a mere matter of law, that the respondent leased the premises to the appellant, and that the lease still subsists. It is quiet apparent that the appellant has failed to meet this test. His several statements in his answer that the lease has never been "canceled or terminated" amount only to conclusions of the pleader. A demurrer does not admit the correctness of conclusions.

The second reference in the answer to the alleged lease consists of the use of the words "by reason of said lease." The third and remaining reference is found in paragraph 5, and is in the following words:

> "That defendant agreed to pay plaintiff a nominal sum as rental thereof until the entire matter could be adjusted."

But there is here no allegation that the respondent parted with the leasehold estate to the appellant, nor that he ever assented to or accepted appellant's agreement. Other infirmities in the allegation are plainly apparent. Only by conjecture could the court ascertain that the lease still subsists. In all respects it is too vague and indefinite to stand as a pleading.

Taken as a whole, paragraphs 1, 3, and 5 do not state a defense, and, in addition, they are uncertain and unintelligible. They are the only paragraphs toward which the demurrer was directed, and as to them it was properly sustained. The court appears to have treated the demurrer as going to the entire answer, and its order was entered accordingly. While this action as to lot 10 and the claim for damages was clearly erroneous, it does not follow that the appellant was injured thereby, at least not beyond the power of this court to furnish a provisional remedy without ordering a new trial. It is manifest that the substantial controversy concerns only lot 12, and as to that tract the judgment of the court is right. The appellant concedes that he does not own, and that the respondent does own, the north half of this lot. He concedes the ouster and the continued trespass and furnishes no justification for them. Thus far, the judgment is sustained by the pleadings and the proofs.

[8] The appellant concedes that the respondent owns the north half of lot 10. He does not complain of an adjudication based upon this fact, for he admits it. He does, however, deny that he "is or ever was in possession" of any part of it. While this does not in express terms deny an ouster, it does in effect do so. In the absence of objection this denial is sufficient.

[9] Conceding, as we must, that this denial is true, the proper form of judgment should be that the respondent take nothing by the action, and that he pay the appellant's costs. Although appellant does not concede that he withholds this tract, he does concede that he has no right to withhold it, and therefore he is only technically injured by a judgment based upon the assumption that he still withholds it. He is not injured, even as to his costs, since he loses them in any event as an incident to the judgment as to lot 12. Moreover, his costs amount to but $2 or $3. If the judgment were reversed, and the case sent back for trial as to lot 10, the final judgment would leave the appellant where, for all practical purposes, he is at present. This would follow from the concession made in the brief of respondent, which is, in legal effect, that paragraph 2 of the answer is true. If there has been no miscarriage of justice, if, in other words, the appellant is uninjured by the judgment, there should be no reversal as to lot 10. There is no occasion to reverse it as to lot 12, for as to that tract the judgment is technically correct.

[10] However, the appellant denied that the damages suffered by the respondent exceeded $11. The judgment assesses them at $150. He was entitled to a hearing on this point, and it was error to deny him a hearing. He cannot complain of damages up to the sum of $11, for he concedes them. We cannot determine whether these damages were assessed upon the one lot or the other, nor the amount apportioned to each.

The judgment as to both tracts is affirmed. The judgment as to damages is reversed, unless the respondent shall, within 30 days after the judgment of this court is entered, remit all damages in excess of $11. If within said period said damages are thus remitted, the entire judgment will stand affirmed. The appellant will recover his costs on this appeal.

We concur: FINCH, P. J.; BURNETT, J.

(55 Cal. App. 433)

CUMMINGS v. CUMMINGS et al. (HAMMONDS et al., Interveners). (Civ. 2369.)

(District Court of Appeals, Third District, California. Nov. 29, 1921.)

1. Quieting title 🔑30(1)—In suit to quiet title allegation that plaintiff owned all the land did not prevent intervention of those beneficially interested.

In a suit to quiet title to land owned by plaintiff partly for himself and partly in trust for others, an allegation in the complaint that plaintiff owned all the land, even if seriously claimed by the subsequent pleadings of plaintiff, would not preclude other persons not made parties defendant to his complaint from intervening and setting forth their claims to the property, since Code Civ. Proc. § 387, provides that at any time before trial any person having an interest in the matter in litigation or in the success of the parties, or an interest against both, may intervene.

2. Trial 🔑396(3)—Findings of court held not inconsistent with pleadings.

In a suit to quiet title, in which plaintiff alleged that he owned all the land, but two interveners alleged that plaintiff held two-thirds of the land in trust for them, and plaintiff filed an answer to defendant's cross-complaint, alleging that one-third of the land belonged to him and that he held two-thirds in trust for the interveners and had conveyed to defendant relying upon defendant's promise to reconvey when requested, the finding of the court that defendant was owner of one-third, and that the interveners were each the owner of a one-third interest, and that defendant took the land with an agreement to reconvey it to them, was not inconsistent with the pleadings.

3. Trusts 🔑96—Breach of oral agreement to reconvey held to create a constructive trust.

Where a conveyance was made by plaintiff to defendant, his brother, upon an oral promise of defendant to reconvey when requested, although under Civ. Code, § 852, for a trust in relation to real property to be valid it must be created or declared by written instrument or by operation of law, and although void under section 857, in force at that time, providing that a trust for the conveyance of real property could not be formed, the transaction grew out of and was founded upon a fiduciary relation, and was a constructive trust arising by operation of law, which is valid under section 852, subd. 3.

4. Trusts 🔑62—"Resulting trust" defined.

A "resulting trust" arises by operation of law where the legal estate is disposed of or acquired, not fraudulently or in violation of any fiduciary duty, but the intent and theory of equity appears or is inferred or assumed from the terms or disposition, or from the accompanying facts and circumstances, and that the beneficial interest is not to go with the legal title (Civ. Code, § 853).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Resulting Trust.]

5. Appeal and error 🔑907(3)—On appeal on judgment roll, presumed that evidence was received to support findings of court.

In a suit to quiet title to land conveyed by one brother to another on a promise to reconvey when requested, where there was a finding of the court that a fiduciary relation existed, on appeal from the judgment on the judgment roll alone, a presumption arises that there was evidence received without objection, in addition to the fact that they were brothers, showing the existence of confidential or fiduciary relation prior to and at the time of the conveyance.

6. Trusts 🔑103(2)—Fiduciary relation between grantee and grantor held to extend to those for whom grantor held title, so as to make them beneficiaries of a constructive trust.

Where a grantor held title partly for himself and partly as a trustee for others, and conveyed the land to his brother on a promise to reconvey when requested, a fiduciary and confidential relation existing between the brothers extended to those for whom the grantor held title, so as to make them beneficiaries of the constructive trust in favor of the grantor.

7. Limitation of actions 🔑103(2)—Statute held not to begin to run until trust was repudiated.

Where a grantor held title partly for himself and partly in trust for others, and conveyed to a grantee, his brother, on a promise to reconvey when requested, the constructive trust created was a continuing one, and the statute of limitations did not begin to run against those for whom the grantor held title until there was a repudiation of the trust.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Suit by James J. Cummings against Frank M. Cummings, in which W. J. Hammonds and Thomas H. Wolfe and Annie E. Cummings intervened. From a judgment that defendant was entitled to one-third of certain lands and that interveners Richards and Wolfe were entitled to two-thirds of the land and that intervener Annie E. Cummings had no interest in the land, defendant appeals. Affirmed.

Joseph Edward Connolly, of San Francisco (Charles Heggerty and Knight & Heggerty, all of San Francisco, of counsel), for appellant.

A. H. Ricketts, of San Francisco, for respondent.

J. M. Walthall, of Modesto (Leon A. Clark, of Oakland, and F. O. Hoover, of Modesto, of counsel), for interveners and respondents.

HART, J. The plaintiff brought this action to quiet his title as against the defendant Frank M. Cummings to 320 acres of land situated in Stanislaus county. The appeal is by the defendant from the judgment, on the judgment roll alone, and therefore the findings, so far as this record discloses (and, indeed, as must be presumed), contain a full and complete history of the controversy between the parties. From the findings, consequently, the facts herein presented will be extracted, although it is deemed proper first to refer briefly to the several pleadings filed.

The complaint is in the usual form of a pleading designed to secure such relief. The defendant answered, denying the material allegations of the complaint and also filed a cross-complaint, alleging, among other things, that the plaintiff, on the 31st day of May, 1911, executed and delivered to the defendant a grant, bargain, and sale deed of conveyance, whereby he sold and transferred to the said defendant the property described in the complaint; said deed having been duly recorded in the office of the county recorder of Stanislaus county on the 3d day of June, 1911.

The plaintiff replied to the cross-complaint, traversing its material averments and alleging, in substance: That the property in dispute, at the time of the execution and delivery of the deed by plaintiff to the defendant, was owned in common by and in possession of the plaintiff, Thomas H. Wolfe, and W. J. Hammonds; that upon the acquisition of the ownership of the property by plaintiff, Hammonds, and Wolfe from one H. C. Morris, the title thereto was conveyed to plaintiff upon the agreement and understanding that he would, when requested by Hammonds and Wolfe, reconvey to them a two-thirds interest in the property; that plaintiff, reposing great faith and confidence in the defendant, his brother, and believing that he would faithfully execute the trust created in him, and relying upon defendant's promises to reconvey said premises when requested so to do, made conveyance to defendant of the land in question, upon the express understanding and agreement that the defendant would hold the same in trust for said Hammonds, Wolfe, and plaintiff in equal proportions and reconvey the same to them upon their request.

The prayer of the cross-complaint is that the plaintiff and interveners be declared the equal owners of the land in question and that defendant be required to convey the same to them.

Hammonds and Wolfe, having first obtained the consent of the court so to do, filed a joint complaint in intervention. We need not reproduce here the averments of said complaint in intervention, inasmuch as the facts found by the court are substantially in accord with the facts pleaded in said complaint. The prayer of the complaint in intervention filed by Hammonds and Wolfe is for a decree adjudging that each of said interveners has and owns an undivided one-third interest in and to the said real property, and that the said defendant be required to execute and deliver a deed conveying to the said interveners respectively their said undivided interests. The defendant answered the complaint in intervention, specifically denying each and all of the material averments thereof, and also set up as in bar of the action the provisions of sections 337 and 343 of the Code of Civil Procedure.

Annie E. Cummings, wife of the plaintiff, having first obtained permission from the court to intervene, filed a complaint in intervention, alleging that the property in controversy was acquired during the coverture of herself and the plaintiff; that it was community property; that it was transferred to the defendant by the plaintiff without any consideration; that she did not sign the instrument conveying said property to the defendant and had no knowledge of the purported conveyance by her husband to the defendant until the month of August, 1917. To the complaint in intervention by Mrs. Cummings the defendant replied, denying the material allegations thereof and pleading laches as a bar to her right to the relief prayed for in her complaint in intervention.

The history of the controversy, as it is to be gleaned from the findings of fact, may be summarily given as follows: That some time prior to the 10th day of June, 1907, the plaintiff and the interveners Hammonds and Wolfe jointly entered into negotiations for the purchase of the real property described in the complaint. These negotiations culminated on the 3d day of August, 1907, by the purchase of said property by the plaintiff and the said interveners. Pending the negotiations for the purchase of the property, an agreement or understanding was had between the plaintiff and Wolfe and Hammonds that said Cummings and Wolfe were to pay for said land and that Hammonds was to conduct and complete said negotiations for the purchase thereof from H. C. Morris, who was then the owner thereof. It was further agreed that upon the purchase of the land, the plaintiff, Hammonds, and Wolfe should become the owners of the land in common, each to own an undivided one-third interest therein, but that the land, for the sake of convenience, should stand in the name of James J. Cummings, who was to hold the same in trust, one-third belonging to the plaintiff, one-third to W. J. Hammonds and one-third to Thomas H. Wolfe. This latter agreement was reduced to writing and signed by Hammonds, Wolfe, and plaintiff. It further appears that, upon the purchase of said land by the parties just named, Hammonds took up his residence upon the land and continued in the possession thereof, although there had never been a conveyance by the plaintiff either to Hammonds or to Wolfe of the one-third interest to which each was entitled. For some reason, not explained by the findings, except that which is to be found in the general statement that it was "for convenience," the intervener Wolfe requested the plaintiff to transfer said property to some one to be held in trust for himself (plaintiff) and Hammonds and Wolfe, and that thereupon the plaintiff selected his brother, the defendant, Frank M. Cummings, as the person to whom he would transfer the property in trust for the purposes stated. The plaintiff having revealed to Hammonds and Wolfe the fact that he had selected his (plaintiff's) brother as the person to whom the title to the land would be transferred in trust for the owners thereof, Hammonds and Wolfe consented thereto after the purposes of the trust had been fully explained to the defendant and upon the latter's promise that he would reconvey the property to the plaintiff and said interveners at any time that they would make a demand therefor. Accordingly, on the 31st day of May, 1911, the plaintiff executed a conveyance of the premises in question to the defendant; the instrument having been prepared by the intervener Wolfe, and said conveyance was, on the 3d day of June, 1911, recorded in the office of the recorder of Stanislaus county.

The court found:

> "That said conveyance was made to said defendant without consideration, in trust for said interveners W. J. Hammonds and Thomas H. Wolfe, and that said defendant accepted said conveyance to be held by him in trust as aforesaid; that the plaintiff and defendant are brothers, and at the time of the conveyance of said property by the plaintiff to the defendant occupied the relation of great confidence to each other; that they had other dealings in properties of a similar nature calling for and exhibiting great confidence between them; and that the plaintiff relied on these relations in conveying said property to the defendant in trust for the said interveners W. J. Hammonds and Thomas H. Wolfe."

It was further found that—

> The defendant, Frank M. Cummings, "paid no taxes of any kind or nature levied or assessed against said property until after the institution of this action, and that said Frank M. Cummings never resided on said property and never received any rent, issues, or profits therefrom, and never demanded or accepted or received any accounting for rent or use of said property, and never claimed to either said W. J. Hammonds or Thomas H. Wolfe that he owned any interest in said property; that the said conveyance by the said plaintiff to the defendant, Frank M. Cummings, was made without any consideration passing from said Frank M. Cummings to the interveners W. J. Hammonds and Thomas H. Wolfe, or either of them, and that the said conveyance was made to said Frank M. Cummings in trust for the said interveners W. J. Hammonds and Thomas H. Wolfe as to their said two-thirds' interest therein, and that said Frank M. Cummings never denied or repudiated said trust until after the 1st day of August, 1917; that it was intended by the plaintiff and defendant and the said interveners Hammonds and Wolfe that said deed should grant, and said deed did grant, to the said defendant, Frank M. Cummings, an undivided two-thirds interest in said real property in trust for said interveners W. J. Hammonds and Thomas H. Wolfe, to be reconveyed to said interveners on demand, and an undivided one-third interest in said real property in fee to the said defendant, Frank M. Cummings."

As to the claim set forth by Mrs. Annie E. Cummings in her complaint in intervention, the court found that, while she did not sign or execute the conveyance of said property by James J. Cummings to Frank M. Cummings, she nevertheless had knowledge or the means of acquiring knowledge of said conveyance, "and is now estopped from claiming any interest in said property."

It further appears that all taxes levied against the property down to the date of the filing of the complaint in this action were paid by the plaintiff, James J. Cummings, and the intervener Annie E. Cummings; that since the institution of this action the defendant has paid taxes assessed against the property for the year 1918 aggregating $270.80; that the plaintiff and interveners Hammonds and Wolfe have offered in court to repay the same with interest thereon at the rate of 7 per cent. per annum from the date of each payment to the date of trial, amounting in all to the sum of $283.32; that it was the understanding or the agreement that during the said trust the said Hammonds was to pay no taxes levied upon or assessed against said real property; that after the said conveyance by plaintiff to his brother the intervener Annie E. Cummings paid taxes assessed against said property amounting to the sum of $81.15.

The conclusions of law and the judgment harmonize with the findings. The plaintiff and the intervener Annie E. Cummings have not appealed.

The appellant, in supporting his appeal, finds what he conceives to be not only fatal inconsistencies between the pleadings of his adversaries, but like inconsistencies between said pleadings and the findings. As to the pleadings, he emphasizes the fact that, while the complaint alleges that the plaintiff is the owner of all the real property therein described, both the answer of plaintiff to the cross-complaint of defendant and the complaint in intervention of Hammonds and Wolfe allege that plaintiff and interveners were the owners in common of said property. As to the proposition that the findings are not supported by the pleadings just referred to, the appellant in his brief declares:

> "The findings declare both that defendant holds in trust one-third for plaintiff and two-thirds for Hammonds and Wolfe and that defendant holds in trust two-thirds for Hammonds and Wolfe and one-third in fee for defendant, and also find that the only agreement between plaintiff and Hammonds and Wolfe was that Hammonds would convey two-thirds to plaintiff and Wolfe, and also that it was intended that the deed by plaintiff to defendant should grant, and said deed did grant, to defendant two-thirds

in trust for Hammonds and Wolfe and one-third in fee for defendant."

It is further contended by appellant that the trust alleged in the pleadings of the plaintiff and interveners Hammonds and Wolfe is not the trust found by the court, and "the judgment establishes a trust not alleged, and only one of the trusts found." This contention is founded on the theory that, since the plaintiff in his answer to the cross-complaint of defendant, and Hammonds and Wolfe in their complaint in intervention, allege that defendant received and accepted the deed from plaintiff in trust for plaintiff and Hammonds and Wolfe, the court found that the defendant was the owner of an undivided one-third interest in the property, and that as to the other undivided two-thirds interest therein he held the land in trust for Hammonds and Wolfe.

[1] The criticisms thus directed against both the pleadings of the adversaries of the defendant and the findings are devoid of legal force. It is obviously wholly immaterial that the plaintiff in his complaint, which, as we have seen, was for the quieting of his title to the land in dispute, therein claimed that he was the owner of all the land in controversy; and this would be true even if he had seriously claimed, by answer or otherwise, throughout the progress of the pleadings subsequent to his complaint, that he was the sole owner of all said land. That fact could not have the effect legally of precluding other persons, not made parties defendant to his complaint, from intervening and setting forth any claim or claims they might have to the property. Code Civ. Proc. § 387. But it is reasonably inferable from all the pleadings that the plaintiff, in instituting the action to quiet title to the land as against the defendant, was not only acting for himself, but also for his co-owners of the land, Hammonds and Wolfe. He might have assumed that, having been authorized as an agent of Hammonds and Wolfe to convey the property to some third party as a matter of convenience, and having in the exercise of the authority thus conferred upon him conveyed it to his brother, the defendant herein, he was still authorized to secure a reconveyance of the land from his brother to him through his action to quiet title, not only for his own benefit, but also for the benefit of Hammonds and Wolfe. But, be that as it may, it is true that the real issues which were finally submitted to the court for decision were made by the plaintiff's answer to the defendant's cross-complaint, the two complaints in intervention filed by Hammonds and Wolfe and Mrs. Cummings, and the answers thereto by the defendant, and the real issues thus presented were whether the land was owned in common by Wolfe, Hammonds, and the plaintiff and conveyed to the defendant by the plaintiff in trust for the said three parties claiming such ownership of the land, as alleged in the complaint in intervention as well as in the answer of the plaintiff to the defendant's cross-complaint.

[2] Nor are we able to discern a fatal inconsistency between the findings and the averments of the complaint of the said interveners and the answer of the plaintiff to the defendant's cross-complaint. It is true that the court found that the one-third interest which was claimed by the plaintiff was owned by the defendant, and it is true that so far the findings do not correspond with the pleadings of the said interveners and the plaintiff; but the court did find, as we have seen, that Hammonds and Wolfe were each the owner of a one-third interest in said land and that defendant took the same in his name with an agreement to reconvey it to them, and in so finding it found that the trust as alleged arose at least in part. There cannot be said to be any more of a variance between the pleadings and the findings here than there would be if A. should sue B. to recover upon a promissory note, the face value of which was $1,000, and had alleged that no part of the principal of said note or the interest had been paid by the maker, and the proofs and findings showed that, as a matter of fact, the maker had paid a considerable sum upon the principal and interest, thus reducing the judgment to an amount much less than that for which the plaintiff had prayed and to which he would have been entitled if the allegations of his complaint had been established. The whole issue as to the ownership of the land in dispute was before the court upon pleadings properly framed, and it was within the power of the court—indeed, its duty—to adjudicate the whole question of ownership according as the evidence might in its judgment justify and award to each of the litigants establishing his claim of part ownership a judgment for such interest as the proofs showed he had in the property.

[3, 4] But the more serious question is as to the legal nature of the transaction between these parties litigant. Concededly, the conveyance of the property by the plaintiff to the defendant upon the conditions stated involved an express oral trust to convey, and as to this, in the absence of other conceivable equitable considerations which would operate to remove the transaction from the ban of the statute of frauds, it is obvious that the trust cannot be enforced. Section 852, Civ. Code. That section provides, inter alia, that no trust in relation to real property is valid unless the same is created or declared by a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing, or by the instrument under which the trustee claims the estate affected. But, further than this, since the alleged trust was created prior to the amendment of section 857 of the Civil Code by the Legislature of 1913 (Stats. 1913, p. 438), it is void, because it was a trust for

the conveyance of real property, which was not allowed under said section prior to the amendment referred to. Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. Nor clearly is it strictly a resulting trust, which arises by operation of law and "where the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent in theory of equity appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title." 1 Pom. Eq. Juris. p. 155. See, also, section 853, Civ. Code. But that the transaction resulting in the creation of the trust grew out of and was founded upon a fiduciary relation, and is therefore a constructive trust, arising by operation of law (Civ. Code, § 852, subd. 3), we think the findings, educed from presumptively sufficient evidence, clearly enough show.

It is contended by the appellant, however, that, assuming that the findings sufficiently show that a fiduciary or confidental relation existed between the plaintiff and the defendant, still it is not alleged in any of the pleadings of the plaintiff and the interveners that any such a relation existed. It may be conceded that there appears to be some force in this contention. The answer of the plaintiff to the defendant's cross-complaint does not state facts clearly disclosing that a fiduciary or confidential relation existed prior to and at the time of the conveyance of the property to the defendant between the latter and the plaintiff. The complaint declares, as we have seen, that—

> "The plaintiff reposed great faith and confidence in the defendant, his brother, and believing that he would faithfully execute the trust created in him, and relying on defendant's promise to reconvey said premises when requested so to do, plaintiff made conveyance to defendant upon the trust aforesaid."

[5] This might be said to be an attempt to aver a confidental relation between the plaintiff and the defendant, and doubtless such was the intention of the pleader in inserting that averment in the complaint. There was no demurrer to the answer of the plaintiff to the cross-complaint—indeed, there was none interposed to any of the pleadings filed in the case. We will not, however, nor is it necessary to do so, express an opinion herein upon the question whether the averments referred to, in the absence of a demurrer to that pleading of plaintiff, were sufficient to show a confidential relation between the plaintiff and the defendant; for, as we have before declared, we are of opinion that the findings do sufficiently show such a relation, and the presumption is, upon this appeal from the judgment upon the judgment roll alone, that there was evidence received without objection, in addition to the fact that they are brothers, which is itself some evidence of such a relation, showing that prior to and at the time of the conveyance of the property by the plaintiff to the defendant a confidential or fiduciary relation existed between them, and that thus the defect in the plaintiff's pleading in that particular was cured at the trial. Myers v. Canepa, 37 Cal. App. 556, 174 Pac. 903, 906.

[6] But it might be contended that, conceding that it is made to appear that such a relation existed between the plaintiff and the defendant, there is no showing of any such relation between the defendant and Hammonds and Wolfe. The answer to this contention, though, would be that the plaintiff, in investing the defendant with the trust, was, under express authority conferred by Hammonds and Wolfe, acting as the latter's agent, and that the very essence of the terms of the trust agreement was that the defendant would, upon demand made by the beneficiaries of the trust, reconvey the property, not alone to plaintiff, but also to Hammonds and Wolfe. In other words, the trust was vested in and accepted by the defendant upon the express promise upon his part that he would execute it according to its terms, namely, that he would convey an undivided one-third interest in the land each to Hammonds and Wolfe and plaintiff. Thus it is clear that the confidential relation between the plaintiff and defendant extended and inured to the benefit of Hammonds and Wolfe. Indeed, inasmuch as the evidence, as we must presume, disclosed that the trust as described in the pleadings of the plaintiff and the interveners was created, and that the conveyance to the defendant of the corpus of the trust was without consideration, we think the case here comes clearly within the doctrine invoked in the case of Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428.

In that case one Elizabeth L. Cook, being seriously ill and in great fear and peril of death and believing that she was about to die, conveyed to Tripp, the appellant in said case, certain of her real property, with oral instructions that, in the event of her death, he dispose of said property in certain designated ways and to certain designated individuals. The death of the grantor occurred shortly after the execution of the conveyance, and thereafter action was brought by one of the heirs of the deceased to set aside said conveyance and assignments of certain personal property and to have it declared that the defendant held the lands which were the subject of the conveyance and the personal property assigned in trust for the plaintiff and her coheirs or for the estate of the deceased. The complaint in said action did not proceed upon the theory that fraud characterized the transaction, culminating in the execution of the conveyance and the assignments by the deceased. It was contended in that case, as here, that since the trust was created orally the same could not be enforced, under the terms of section 852 of the Civil Code, supra. But the Supreme Court held with the plaintiff; and, as what is said therein has cogent application to the facts of this case, we quote from the opinion therein in extenso as follows:

> "The position of the appellant on this point is that, as there was no fraud in the procurement of the conveyances, the plaintiff can have no relief. But, assuming the absence of fraud (though, in view of the defendant's relation to the grantor as her agent, this can hardly be assumed), it does not follow that equity cannot afford relief. The deeds, it is found, were made to the defendant simply as her agent, and were therefore taken by him in trust for her; and though the trust was not expressed in writing, equity will not permit the defendant to convert the property to his own use, contrary to the intention of the parties and to the confidence reposed in him. 'The doctrine is both novel and startling which restricts, in matters of fraud, its jurisdiction over the operation of written instruments to those cases where the fraud has been committed in their creation. If maintained, it will sweep away its heretofore admitted jurisdiction in an infinite variety of cases, of almost daily occurrence, *where the fraud alleged consists in the use of instruments entered into upon a mutual confidence between the parties. Fraud in their use is as much a ground for the interposition of equity as fraud in their creation.* [Italics ours.] There is no distinction in the principle upon which the jurisdiction is asserted in the two cases. In both there is the same abuse of confidence, and from both the same injury results.' Pierce v. Robinson, 13 Cal. 127. In the case cited the instrument involved was a deed absolute in its terms, shown by parol evidence to have been intended as a mortgage. But the principle applies equally to other cases; as, for example, to the cases involved in Hultz v. Wright, 16 Serg. & R. 345, and Oliver v. Oliver, 4 Rawle, 144 (cited in the principal case), and in Thompson v. White, 1 Dall. 424. In the last—which is a very instructive case—the subject is fully discussed. Another example is that of the purchase of an outstanding title by a tenant in common, considered in Mandeville v. Solomon, 33 Cal. 43, where it is said: 'Where the circumstances of a transaction are such that the person who takes the title to property cannot be permitted to enjoy it, in whole or in part, without necessarily violating some principle of equity, a constructive trust will be raised for the party entitled in equity to its beneficial enjoyment'—which is the same principle that, at law, governs the action for money had and received. This principle has not always been consistently applied by the courts; but in this state it has been held applicable to cases where there were fiduciary relations between the parties, as in this case (Alaniz v. Casenave, 91 Cal. 46; Brison v. Brison, 75 Cal. 525; Feeney v. Howard, 79 Cal. 525); and the defendant comes directly within this restricted application of the doctrine. There is also another principle upon which the rule may be sustained, which is, that in such cases generally, *and in this case especially, there is an entire failure of consideration.* [Italics ours.] Civ. Code, § 1689, subd. 2 et seq.; Knight v. Tripp, 121 Cal. 681."

In Oliver v. Oliver, 4 Rawle (Pa.) 144, 26 Am. Dec. 123, cited in the above case, it is said, referring generally to such transactions as are involved in this litigation:

> "When the fairness of the transaction is impeached, it is immaterial whether the party intended a fraud, at the time of the contract, or whether the fraud consists in the fraudulent use of the instrument."

Again, in the same case, referring to Thompson v. White, 1 Dall. (Pa.) 447, 1 L. Ed. 206, 1 Am. Dec. 252, the court said:

> "The fraud consisted in Lawrence Saltar obtaining a conveyance of his wife's estate under a solemn promise to make a settlement, which he afterwards neglected to do. It has never been doubted that he entered into the contract with good faith. In his last sickness, he expressed uneasiness at leaving no will, because, as had always been supposed, he thereby intended to comply with his promise. The fraud consisted in the fraudulent use which was attempted to be made of the deed, in the exclusion under the general rule of law, of Mary Thomson, the sister of Mr. Saltar, and to whom Lawrence Saltar promised to assure the property."

See, also, Lyon v. Huntingdon Bank, 14 Serg. & Rawle, 283.

As stated above, it is conceived that, upon the principles enunciated by the foregoing authorities, the proposition submitted here may justly be solved and determined. In truth, the decree in the case at bar is amply supported by findings disclosing a case which should receive the positive sanction of a court of equity. Indeed, if it were true that there was no principle in equity upon which the decree here could be sustained under the findings supporting it, a handle would thus be furnished for a most regretable commentary upon that branch of our jurisprudence which, out of consideration for the impotency of the stubborn or inelastic rules of law so to extend their remedial power, has justly given wider range than otherwise it would have to the application of the salutary maxim that "for every wrong there is a remedy."

[7] Another point made by the defendant is that the action by the interveners was barred by the statute of limitations. We think that the point is clearly untenable. The trust found by the court to have been created was a continuing one, and the statute in such a case would not begin to run until there was a repudiation of the trust. The action here was brought, and Hammonds and Wolfe intervened therein, within due legal time after the defendant had declared his repudiation of the trust.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

187 Cal. 587

SEID PAK SING et al. v. BARKER et al.
(S. F. 9935.)

(Supreme Court of California. Dec. 19, 1921. Rehearing Denied Jan. 16, 1922.)

1. Mortgages 🔑575—Bond necessary on supersedeas to stay sale in foreclosure.

Code Civ. Proc. § 945, providing that upon an appeal from a judgment directing a sale of real property a bond must be given to stay proceedings, applies to a judgment in foreclosure, and hence supersedeas to stay sale under execution will not be granted in the absence of a bond; the fact that the judgment itself gave a stay of 70 days not justifying a stay on appeal without a bond, regardless of whether the judgment be considered interlocutory or final.

2. Appeal and error 🔑479(1)—Stay held not required by inconsistency between appeal and right to enforce judgment.

An appeal by plaintiff from a portion of a judgment denying recovery for loss of profits on failure to deliver land under an agreement is not so inconsistent with the right to enforce the judgment as would justify a stay of execution, where on the appeal the amount of the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

judgment could not be reduced below the sum already allowed.

3. Mortgages 🔑411—Sale under execution in foreclosure may be had before entire amount due is ascertained on appeal.

A sale under execution in foreclosure before the entire amount due is ascertained on appeal is not in violation of Code Civ. Proc. § 726, prohibiting more than one action for the foreclosure of a mortgage.

In Bank.

Action by Seid Pak Sing and others against Harry B. Barker and others. Judgment for plaintiffs, and defendants apply for a writ of supersedeas to stay sale under execution in foreclosure. Writ denied.

Elston, Clark & Nichols, of Berkeley, and Miller, Thornton & Miller, and Platt Kent, all of San Francisco, for appellants.

A. H. Ashley, of Stockton, and Sterling Carr, of San Francisco, for respondents.

WILBUR, J. The defendants apply to this court for a writ of supersedeas on two grounds: First, that their appeal is taken from an interlocutory judgment upon which they are not required to give a stay bond; and, second, that the plaintiffs, having appealed from a portion of the judgment, cannot take advantage of the portion in their favor not appealed from, because plaintiffs have by their appeal selected a remedy which is inconsistent with the enforcement of the balance of the judgment, because the portions of the judgment appealed from are inextricably interwoven with the portion from which no appeal is taken.

The plaintiffs' mortgage upon 970.93 acres of land was subject to a prior trust deed thereof given to secure an indebtedness of $35,000 and certain advances. Plaintiffs brought this action to enjoin the sale of the land by the trustees for nonpayment of the indebtedness secured by the trust deed, and to have the amount of the indebtedness so secured fixed so that plaintiffs could redeem the property from said trust deed. The trustees claimed the amount of the indebtedness so secured to be $186,000.

[1] By cross-complaint the defendant Grossman, who owned the mortgaged property, sought similar relief against the plaintiffs' mortgage, as the amount admittedly due thereunder was less than $25,000, and plaintiffs were claiming that more than $400,000 was due thereunder, as alleged in plaintiffs' answer to this defendant's cross-complaint. The trial court fixed the amount due upon the trust deed entitled to priority over plaintiffs' claim at $37,091.70, plus $305 taxes, and the amount due upon plaintiffs' mortgage at $133,452.27, and provided that the plaintiffs could redeem from the trust deed by paying the clerk of the court the amount due within 60 days, and upon deposit of said trust deed and note thereby secured, properly indorsed and assigned to plaintiffs. The decree further declared that the amount due on the mortgage was $133,452.27, and provided for the payment thereof by the owner within 70 days, and that if the amount of plaintiffs' mortgage was not paid within 70 days the property should be sold in satisfaction of the indebtedness found to be due to the plaintiffs, and that a judgment be entered for the deficiency, if any. The time for redemption has expired, and it is not contended that the mortgage has been paid or the amount due tendered. The Code provides that, upon an appeal from a judgment directing a sale of real property, a bond must be given to stay the proceedings, the amount thereof which must be fixed by the court. Code Civ. Proc., § 945. No such bond was given. This is such a judgment. The sale could be stayed or prevented by payment of the amount due within 70 days, or by giving a stay bond on appeal. The fact that the judgment itself in effect gave a stay of 70 days does not justify a stay on appeal without a stay bond. It matters not whether the judgment be considered as interlocutory or final. The defendants are not entitled to a supersedeas on their own appeal.

Notwithstanding defendants' failure to give a bond, they seek to have a writ of supersedeas issued by this court because of the plaintiffs' appeal from portions of the decree denying its claim for judgment for $260,000 more than was given. In order to more clearly present the defendants' position, it will be necessary to state other facts. The defendant Grossman's predecessor rented 970.93 acres of land to plaintiffs at the rental of $25.50 per acre for the year 1918 and $26 per acre for the year 1919. The plaintiffs were to pay the rentals in advance and have paid $35,000 in rentals. The land at the time of the agreement was swamp and overflowed land, incapable of cultivation without reclamation. Grossman's predecessor agreed to have a portion of the land ready for cultivation on February 1, 1918, and the balance March 1, 1918. Only 152.20 acres were ready for cultivation by the plaintiffs in 1918, and 382.90 acres in 1919. The mortgage was given to them to secure the performance by the landlord of the terms of the lease. Plaintiffs claim the return of $22,140.55 on the rental of land not delivered to them, expressly agreed to be refunded by the terms of the lease, and the sum of $7,565.43 for levee work, $410.06 for a siphon, $6,855.03 for expense of pumping, and $96,418.20 for damages to the plaintiffs' growing crop in 1918, due to flooding. These items were allowed by the trial court, aggregating $133,457.27. The court denied the plaintiffs' prayer for loss of profits due to the failure to deliver the land as agreed, amounting to over

$250,000, and it is from this portion of the judgment only that plaintiffs appeal.

[2] It is claimed that to enforce the judgment for the amount found due by the court would be inconsistent with the prosecution of the appeal, for the reason that the allowance of damages for lost profits on the undelivered acreage is inconsistent with the allowance of a rebate of rents as provided in the lease for the same land. However that may be, on plaintiffs' appeal the amount of judgment cannot be reduced below the sum already allowed to them, and the only question is whether or not the amount of the judgment can be increased. If, as the plaintiffs claim, there is an inconsistency between the recovery by the plaintiffs of the amount provided in the lease for a failure to deliver to them the land leased, and the right to also recover damages because of loss of profits for such nondelivery, such question goes to the merits of plaintiffs' appeal, and, however determined, could not result in the decrease of the amount of the judgment in favor of the plaintiffs. There is therefore no such inconsistency between the appeal and the rights of the plaintiffs to enforce the judgment as would either justify or require a stay of execution.

It is unnecessary, we think, to review the many cases cited by the petitioners, as both parties agree that no writ can be issued unless there is such inconsistency between the right of appeal and the right of execution to enforce the judgment as require the plaintiffs to elect between the two remedies, and no such inconsistency exists.

[3] The petitioners contend that a sale under execution in foreclosure before the entire amount due is ascertained on appeal would in some manner violate section 726, Code of Civil Procedure, which prohibits more than one action for the foreclosure of a mortgage. There is nothing in this point, as this action will be the same single action after the sale as before, the sale being only one step in the foreclosure proceeding; the ascertainment of the deficiency, if any, being another. It should be said in this connection that it is not contended that the property is worth the amount of the liens thereon, as declared by the court.

If authority is needed for such obvious conclusions stated by us, the cases cited below will be sufficient, and, for the reason stated, we deem it unnecessary to enter into a detailed discussion thereof. Stetson v. Sheehan (App.) 200 Pac. 387 (rehearing denied); Whalen v. Smith, 163 Cal. 361, 363, 125 Pac. 904; Ann. Cas. 1913E, 1319; Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 143 Pac. 1025; Lake v. Superior Court, 200 Pac. 1041; Goodlett v. St. Elmo Investment Co., 94 Cal. 297, 29 Pac. 505; First Natl. Bank v. Wakefield, 138 Cal. 561, 72 Pac. 151.

The petition for a writ of supersedeas is denied.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; SHURTLEFF, J.

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187 Cal. 667

PITMAN v. WALKER. (S. F. 9277.)

(Supreme Court of California. Jan. 4, 1922. Rehearing Denied Feb. 2, 1922.)

1. Corporations ⚷428(2)—Notice of fraudulent acts of agents not imputed to officer of corporation in private dealings.

A corporation is bound by the unlawful or fraudulent acts of its agents within the scope of their employment, and notice of such wrongful acts is imputed to the corporation, but this rule does not extend to the imputing of such notice to the officer of the corporation without actual notice or connection with the transaction, and in matters affecting his private and independent dealings with the corporation.

2. Bills and notes ⚷333—Notice of fraudulent acts of agents not imputed to officer of corporation purchasing note from corporation.

Notice of fraudulent and wrongful acts of agents of a corporation while selling stock and taking a note therefor is not imputed to an officer of the corporation, and where such officer purchases the note from the corporation for value and without actual notice of the fraudulent act, the maker is not entitled to set up the fraud in an action on the note.

3. Mortgages ⚷235—Instrument held mortgage which passed to assignee without formal assignment.

An assignment of an interest in the estate of a deceased person as security for a note is a mortgage under Civ. Code, § 2924, and passes to an assignee of the note without formal assignment under section 2936.

4. Bills and notes ⚷167—Mortgage security operates to destroy negotiability.

Mortgage security executed at the time a note is made operates to destroy the negotiability of the note in the hands of a purchaser with notice thereof.

5. Bills and notes ⚷167—Not rendered nonnegotiable by subsequently executed mortgage as security so as to give notice of defects.

Where a note is negotiable as first executed and delivered, but subsequently mortgage security is demanded and given, such note is negotiable in the hands of a subsequent purchaser with knowledge of the security so far as defects in the note are concerned, though the mortgage is binding upon him as to restrictions placed by Code Civ. Proc. § 726, upon actions to collect a debt secured by mortgage, in view of St. 1917, p. 1539, § 3128.

In Bank.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Eli E. Pitman against Agnes J. Walker. Judgment for defendant, and plaintiff appeals. Reversed.

Short, Lindsay & Woolley and Short & Sutherland, all of Fresno (F. W. Docker, of Fresno, of counsel), for appellant.

M. K. Harris and Geo. Cosgrave, both of Fresno, for respondent.

SLOANE, J. The plaintiff has appealed from a judgment in favor of the defendant in an action to recover $5,000 on a promissory note.

The note was executed by the defendant to the Boden Automatic Hammer Company, a corporation, in consideration for the purchase price of certain shares of the capital stock of the corporation, and was assigned to the plaintiff before maturity and for a valuable consideration. While the note was negotiable in form, it was assigned to plaintiff with security from the maker given after the execution of the note, but prior to the assignment, and consisting of an equitable mortgage upon the maker's interest in the estate of her deceased husband. It was claimed that, by reason of such security, the negotiability of the instrument had been destroyed, and that the plaintiff took it subject to any defense existing against the original payee.

The defenses pleaded were that there had been a failure of consideration in that the stock of the corporation received therefor was without value, and that the defendant had been induced to purchase the same and execute said note therefor by false and fraudulent representations, and that said sale of stock was void under the "blue sky" law by reason of the fact that no certificate or permit of the commissioner of corporations had been exhibited to defendant before the purchase of said stock and execution of said note therefor, as required by law.

The primary question to be determined is whether or not these affirmative defenses are available to the defendant; and this depends upon whether or not the note was negotiable, and the plaintiff a purchaser in due course.

That the note was negotiable in form, and was assigned for value and before maturity, is beyond dispute. Respondent contends, however, that the assignment was taken by plaintiff with notice of defendant's equities, or at least under circumstances imputing notice sufficient to put the purchaser on inquiry. Plaintiff was at all times covered by the transaction a stockholder, director, and vice president of the corporation, named as payee in the note. He was aware that the note was given on the purchase of the corporate stock. He knew that defendant had a made previous purchase of 5,000 shares of the stock and had paid $3,000 of the purchase price. She had, subsequent to the purchase, spoken to him about her investment, and asked him if he thought the stock was good. He replied that he thought it was; that he had invested in it himself, which was the fact. He testifies that he had no knowledge prior to taking the assignment of her note that she was dissatisfied, knew nothing of any representations that had been made to induce her to buy stock, and was not aware of any irregularity or failure in exhibiting to her the corporation commissioner's permit, which permit had been duly issued. There is nothing in the evidence in rebuttal of this testimony. The only theory upon which can rest the implied finding from the verdict of the jury in defendant's favor that plaintiff was not a purchaser in good faith and without notice of any infirmities in the note is that a presumption or inference arises against him from his connection with and general familiarity with the corporate business. To whatever extent this might be the rule as to transactions in the ordinary course of the corporation's business, it would not apply to irregular conduct or fraudulent acts of other corporate agents not actually brought to his attention. The presumption, if any such may be indulged by the officers of the company, is that the sales agents acted fairly and in accordance with law.

[1, 2] The corporation on familiar principles of law is bound by the unlawful or fraudulent acts of its agents within the scope of their employment, and notice of such wrongful acts is imputed to the corporation, but this rule does not extend to the imputing of such notice to an officer of the corporation without actual notice or connection with the transaction, and in matters affecting his private and independent dealings with the corporation. Washburn v. Inter-Mountain Min. Co., 56 Or. 578, 109 Pac. 382, Ann. Cas. 1912C, 357; Peckham v. Hendren, 76 Ind. 47; Cook on Stock and Stockholders, 727; 14A Corp. Jur. 100; Doane v. King (C. C.) 30 Fed. 106; King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84.

It has been held that a director or a managing officer of a banking corporation may not claim the immunities of a purchaser without notice of the commercial paper of his bank, where the infirmity of the paper appears on the records of the corporation or arises within the scope of the officer's employment. McCarty v. Kepreta, 24 N. D. 395, 139 N. W. 992. This decision however rests upon the peculiar provisions of the banking laws, and the fact that the infirmity in the note in question appeared from the records of the bank's business.

Such doctrine of notice cannot be fairly applied to a director of a business corporation with relation to undisclosed representations of an agent of the corporation in the sale of its stock.

It remains to be determined if the note in question is entitled to the privileges of a negotiable instrument.

That it was negotiable at the time of its execution and delivery is conceded. It is claimed, however, that its negotiability was destroyed by the subsequent acts of the parties thereto in demanding and receiving from the maker a mortgage securing its payment.

[3] The facts as disclosed by the evidence are that, in the negotiation between the plaintiff and the corporation for the assignment of the note, the former demanded as a condition of the purchase that the corporation obtain from the maker of the note an assignment of her interest in the estate of her deceased husband as security for the note. The estate consisted of real and personal property. This instrument was executed, and assigned in turn to plaintiff with the note as a part of the same transaction. It does not appear at what precise date the transfer of the note was made to plaintiff, but it does sufficiently appear from the evidence that the obtaining of this security by the corporation and its assignment to the plaintiff was a condition precedent to his purchase of the note, and, as it was executed to the corporation as security for this note, it is to be presumed that it was made while the corporation still owned the note. The instrument creating this security is a mortgage under section 2924 of the Civil Code; and it passed to the assignee of the note even without formal assignment under the provisions of section 2936 of the Civil Code.

The plaintiff, then, purchased this note, not only with notice, but upon the express consideration that it was secured by a mortgage executed by the maker to the original payee.

[4] That such mortgage security would operate to destroy the negotiability of the note in the hands of a purchaser with notice thereof if it had been executed at the time the note was made is the settled law under the decisions of this court. National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881; Helmer v. Parsons, 18 Cal. App. 450, 123 Pac. 356; Metropolis, etc., Bank v. Monnier, 169 Cal. 592, 147 Pac. 265; Anderson v. Wickliffe, 178 Cal. 120, 172 Pac. 381; Crocker Nat. Bank v. Byrne & McDonnell, 178 Cal. 329, 173 Pac. 752.

[5] It will be noticed, however, that in every case in which this court has declared the nonnegotiability of a note secured by a mortgage, it has been with the qualification that the mortgage is executed contemporaneously with the note as part of the same transaction. In fact, we know of no instance in the decisions where a note duly executed as a negotiable instrument has been held to have lost that quality by a subsequent contract introducing some qualification or limitation which, if originally made part of the note contract, would have destroyed its negotiable character.

The rule as stated by Daniel on Negotiable Instruments is that, although an agreement be written upon the same paper that the note is written on, and yet if it be evident that it was not intended to incorporate the terms of the agreement within the instrument itself, the transferability and negotiability of the instrument will not be affected by it. Daniel, Neg. Inst. § 155; Odiorne v. Sargent, 6 N. H. 401; Ewing v. Clark, 76 Mo. 545; Am. Gas Co. v. Wood, 90 Me. 516, 38 Atl. 548, 43 L. R. A. 449; Bay v. Shrader, 50 Miss. 326; Parsons Bills & Notes, vol. 2, § 544; Randolph Com. Paper, §§ 190, 191.

The Negotiable Instruments Act, as adopted in this state in 1917, prior to the execution of this note, provides that:

> "An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed, or discharged by payment or otherwise." Stats. 1917, p. 1539, § 3128.

This is, however, but the expression of the common-law rule. The doctrine is stated in Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741, 26 L. R. A. (N. S.) 804, as follows:

> "When a paper is started on its journey into the commercial world, it should retain to the end the character given to it in the beginning and written into its face. If it was intended to be a negotiable instrument, and was so written, it should * * * so remain. Then every one who * * * discounts or purchases it will need only to read it to know what it is and what his rights and liabilities are."

The laws distinguishing negotiable from nonnegotiable instruments are not based upon any inherent distinctions between the obligations assumed in the one class or the other of such contracts, but upon arbitrary rules established by the law merchant to create a form of commercial paper that, may pass from hand to hand unchalleneged by undisclosed defenses. The qualities of negotiability are therefore fixed and arbitrary, and cannot be enlarged or extended upon mere considerations of logic or even equity. The negotiable instrument is expected to go through its commercial life with the qualities it is born with and none other.

This does not mean that an instrument negotiable in its origin cannot be limited and modified by subsequent contract between the parties, so as to affect the rights of subsequent holders, but only, however, to the extent that they take the paper with notice of the specific limitation.

For instance, a contemporaneous memorandum on a promissory note authorizing its payment in merchandise, or from some particular fund, would render the instrument nonnegotiable, but such an agreement subsequently attached, while enforceable between the parties and against an indorsee with notice of the limitation, would not open the instrument to other defenses of which the purchaser had no notice.

So in the instant case the acceptance of this note by plaintiff, with knowledge that it is secured by mortgage made subsequent to the execution of the note, doubtless binds the plaintiff by all the restrictions which section 726 of the Code of Civil Procedure places upon actions to collect a debt secured by mortgage, and might have barred the action in its present form had it been pleaded, but does not render the note nonnegotiable to the extent that the maker may set up defenses of fraud in its procurement, or failure of consideration, of which the assignee has had no notice.

It follows from these conclusions that the note sued on was entitled to all the immunities of a negotiable instrument in the hands of an innocent holder for value, and it is unnecessary to determine whether as between the original parties the transaction was tainted with fraud either by reason of misrepresentations or failure to comply with the Corporate Securities Act.

The judgment is reversed.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; SHURTLEFF, J.

(187 Cal. 716)

McCASLIN v. SOUTHERN PAC. CO.
(L. A. 6918.)

(Supreme Court of California. Jan. 5, 1922.)

1. Carriers ⟹184—Complaint for conversion held to require proof of relation of carrier of plaintiff's goods at time thereof, or contractual liability for loss by other carrier.

Under a complaint for a conversion by a carrier while goods were in defendant's possession as a carrier between the point of shipment and the point of destination, alleging that defendant was a common carrier, and that it unlawfully and wrongfully sold goods shipped by plaintiff, without his knowledge or consent, plaintiff cannot recover except on proof that defendant sustained the relation of a carrier of plaintiff's goods at the time of their conversion, or had so contracted with plaintiff as to be liable for loss by any other carrier or bailee.

2. Carriers ⟹177(3) — Carrier accepting goods for transportation over its own and connecting lines not liable by common law beyond its own lines.

A carrier accepting goods for transportation over its lines, and thence over connecting lines to destination, incurs no liability by common law beyond its own lines.

3. Carriers ⟹177(3) — Carmack Amendment did not apply to shipment to a foreign country, and neither does Cummins Act if shipment made before its enactment.

The Carmack Amendment,[1] making initial carriers liable for loss caused by them or any connecting carrier, did not apply to a shipment to a foreign country, and the Cummins Act,[2] extending the liability, does not apply to such a shipment before its enactment.

4. Carriers ⟹180(2)—Initial carrier limiting liability to its own line held not liable for conversion by connecting carrier.

Where the bill of lading issued by an initial carrier expressly limits liability to its own line, no recovery can be had against it for conversion by a connecting carrier.

5. Carriers ⟹184—Shipper held not entitled to recover for negligence in action based on wrongful conversion.

In an action against an initial carrier for conversion by a connecting carrier in selling the shipment for transportation charges on refusal thereof by consignee, the shipper cannot recover for negligence in failing to notify the connecting carrier that it held, as alleged in the complaint, an indemnity bond for payment of the freight, and that plaintiff was arranging to sell the goods to others; the allegation as to the bond being necessary to show that the sale by the carrier was wrongful.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by W. E. McCaslin against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Reversed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

Nathan Newby, of Los Angeles, for respondent.

RICHARDS, Justice pro tem. The appeal is from a judgment in favor of the plaintiff in an action brought by him to recover damages for the loss of a carload of vegetables, delivered to the defendant for shipment to Regina Fruit Company, in the city of Regina, Canada.

The complaint is in form an action for conversion. The plaintiff, after alleging the corporate character of the defendant, and that it was a common carrier of freight and passengers, and, after alleging his ownership of the goods in question, proceeded to allege that on or about December 2, 1913, he delivered said carload of vegetables, the same being of the then value of $568.70, to the defendant to be by it shipped, transported, and delivered to said Regina Fruit Company at said place; that, prior to the time of making said shipment, the plaintiff, being a dealer and shipper of fruit and vegetables, had executed and delivered to the defendant his general indemnity bond, whereby, as a

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] U. S. Comp. St. §§ 8604a, 8604aa. [2] U. S. Comp. St. §§ 8592, 8604a.

consignor of goods over the lines of said company and other connecting lines in conjunction with the said Southern Pacific Company, he bound himself to the payment of all freight charges which should become due to the said Southern Pacific Company, or any connecting lines over which any shipment made by him should be made and forwarded. It was also alleged in the complaint that it was agreed between the plaintiff and defendant that the freight on such shipment was to be collected from the said consignee, Regina Fruit Company, and that, if the Regina Fruit Company failed or refused to pay such freight, then the same was to be paid by the plaintiff, as provided in the indemnifying bond aforesaid; that said carload of vegetables reached its destination on or about December 15, 1913; that the consignee of said shipment refused to accept the said goods, and the plaintiff was thereupon notified of such refusal, and he immediately began negotiations for the disposal of said goods; that, while he was so engaged in negotiating for the disposal of the goods, the defendant unlawfully and wrongfully sold and disposed of the said vegetables without prior, or any, notice to the plaintiff, and without his knowledge, and contrary to the will and against the instructions of plaintiff; that plaintiff has demanded said goods, but the defendant has wholly failed and refused to deliver the same or any part thereof to plaintiff, to his damage in the sum of $568.70, for which sum the plaintiff has filed his claim with the defendant, but which claim has by it been wholly rejected, and said sum, together with interest thereon, remains and is wholly due and unpaid.

The defendant's answer to this complaint consisted of specific denials, based in the main upon want of information and belief, of its various averments. Subsequently the defendant amended its answer by setting forth a further and separate defense, alleging:

> "That at all the times mentioned in plaintiff's complaint, and particularly at all of the times during which said shipment of vegetables therein referred to was being transported, and until delivery or disposal thereof at destination, the Carmack Amendment to the Interstate Commerce Act was in force and effect, and that this defendant's liability as a common carrier terminated upon the delivery of said shipment by it to its connecting carrier in Canada, and that the alleged conversion of said shipment, and the damage, if any, sustained by plaintiff, occurred at Regina, Canada, and for which this defendant is in no way liable."

The plaintiff also amended his complaint, increasing somewhat the demand for damages, but not otherwise changing its form. The cause went to trial upon the issues as thus made, whereupon evidence was admitted showing without serious conflict that the carload of vegetables had been delivered by the plaintiff to the defendant at the city of Los Angeles, consigned at first to one Liddicott at Rosevale, Cal., but subsequently diverted, by the plaintiff's order, to the city of Regina, in the province of Saskatchewan, Dominion of Canada, under a bill of lading for their delivery to the Regina Fruit Company at said place, the freight charges to be collected from the said last-named consignee, provided that, if the said Regina Fruit Company failed or refused to pay such freight and transportation charges, the same would be paid by the plaintiff as provided in the indemnifying bond as referred to in plaintiff's complaint; that the railroad lines of the defendant did not extend into Canada, and in consequence said shipment of vegetables was transported beyond the lines of the defendant to its destination by other connecting carriers, the last of which reaching Regina was the Canadian Pacific Railway; that the Regina Fruit Company, upon notice to it from said last-named railway of the arrival of said carload of vegetables, refused to accept same, of which refusal the defendant was immediately notified; that the defendant did not notify the plaintiff of such refusal, but the plaintiff was informed by some outside party that his said consignee had refused to accept said vegetables, and he immediately proceeded to make arrangements by wire for the disposal of the same through a firm of brokers at Regina; that the defendant did not notify the Canadian Pacific Railroad that the plaintiff was making such arrangements, nor did it notify the latter railway that it was the holder of a good and sufficient indemnity bond for the payment by plaintiff of the freight and transportation charges on said car of vegetables; that the Canadian Pacific Railway Company, having no notice of these facts, caused the said carload of vegetables to be sold for the freight and transportation charges, amounting to the sum of $357.50; that the reasonable value of the vegetables in the city of Los Angeles at the time of their said shipment was $568.70, and the reasonable value thereof in the city of Regina at the time of their arrival there, and thereafter during the month of December, was $1,039; that the bill of lading issued by the defendant to the plaintiff at the time of the shipment of said vegetables was in the usual form of bills of lading issued by said defendant under the interstate commerce regulations in force at said time, and that it had indorsed upon it the following provision:

> "Section 2. In issuing this bill of lading, the company agrees to transport only over its own lines, and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own lines. No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said

property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed."

The trial court upon the foregoing facts made its finding to the effect that the defendant was guilty of negligence in failing to notify the Canadian Pacific Railway that it held a good and sufficient indemnity bond from the plaintiff for the payment of the freight and other transportation charges on said carload of vegetables, and also in failing to notify the Canadian Pacific Railway that plaintiff was making arrangements for the sale of said carload of vegetables to other persons, and further found that the defendant had violated its duty as a common carrier and agent of said plaintiff in failing to notify the plaintiff that the carload of vegetables had been rejected by the Regina Fruit Company, and in failing to notify the said Canadian Pacific Railway Company to hold the said carload of vegetables subject to the order of the consignor. The court further found that, by reason of the violation of its obligation to the plaintiff as a common carrier, the said plaintiff had been damaged by the loss of said carload of vegetables in the sum of $568.70, with interest thereon from December 30, 1913, at the rate of 7 per cent. per annum, no part of which has been paid. Judgment was accordingly rendered and entered for said sum with interest from said day, and from such judgment the defendant prosecutes this appeal.

[1] In discussing the questions presented on this appeal, it is to be noted at the outset that the cause of action, as set forth in the plaintiff's complaint, is one sounding in conversion of the plaintiff's goods, while they were in the possession and under the control of the defendant as a common carrier between the point of shipment and the point of destination of these goods. It is expressly alleged:

> "That said defendant, together with its connecting lines, was a common carrier of freight and passengers between the said two cities."

It is further alleged:

> "That the defendant unlawfully and wrongfully sold and disposed of said goods without prior or any notice to or knowledge of plaintiff, and contrary to the will and against the instructions of plaintiff."

The only breach of duty alleged to have been committed by the defendant is that just above quoted. Upon such a complaint it would seem to be clear that a recovery by the plaintiff could only be had upon proof either that the defendant, as a matter of law, sustained the relation of a carrier of the plaintiff's goods at the time of their alleged unlawful conversion, or that, if it did not stand in this relation at said time, it had so contracted with the plaintiff in relation to the carriage of said goods to their destination as to be liable for whatever wrong or loss was inflicted upon plaintiff by any other carrier or bailee of said goods.

[2] That the defendant by the acceptance of said goods from said plaintiff for transportation over its railroad lines to their destination, and thence over the connecting lines of other carriers to the destination of said goods, did not have imposed upon it by common law any liability as a carrier of said goods beyond the terminal of its own lines, would seem to be well settled. The rule is thus stated in 4 Elliott on Railroads, § 1432:

> "As a general rule no carrier is bound by law to accept and carry goods beyond the terminus of its own lines. In the absence of any agreement, either express or implied, for transportation beyond its own lines, the common-law liability of an independent carrier is performed by safely transporting the goods over its own lines and delivering them to the consignee or connecting carrier, as the case may be. If in such case goods are merely to be delivered by the initial carrier for further transportation, the former is considered as a forwarding agent, rather than a carrier, as to such further transportation, and is not liable for the default of subsequent carriers."

See 4 R. C. L. p. 896, and cases cited.

[3] Neither was the defendant under any liability as a carrier for the plaintiff beyond its own lines by any federal statute defining the rights and liabilities of carriers of interstate commerce beyond the boundaries of the United States. The so-called "Carmack Amendment" to the Hepburn Act (34 U. S. Stat. L., pt. I, p. 595 [U. S. Comp. St. §§ 8604a, 8604aa]) was in existence at the time of the shipment of the goods in question from a point in the United States to a foreign country, and it has been held that this act was by its terms confined in its application to strictly interstate commerce, and was not applicable to a case where the shipment was to a destination outside of the United States. Best v. Great Northern Ry., 159 Wis. 429, 150 N. W. 484; Chicago, etc., Co. v. Jewett, 169 Wis. 102, 171 N. W. 757; Hamlen v. Ill. Cent. Ry. (D. C.) 212 Fed. 324; Burke v. Gulf, etc., Ry. (Mun. Ct. N. Y.) 147 N. Y. S. 796. The Carmack Amendment was subsequently replaced by what is known as the Cummins Act, adopted in March, 1915 (U. S. Comp. St. §§ 8592, 8604a), which did have the effect of extending the liability of the initial carrier so as to cover losses upon connecting lines; but the shipment in question, having been made in 1913, does not come within the terms of this act.

[4] If, therefore, the defendant was liable to plaintiffs as the carrier of his goods, or is responsible for their safe-keeping beyond its own lines, that liability must be found in some contract between the defendant and the plaintiff creating it. The first place to look

naturally for such an agreement is to the contract of shipment as contained in the bill of lading issued by the defendant upon receipt of the plaintiff's goods. This bill of lading was introduced in evidence and is in the standard form of such contracts, approved by the Interstate Commerce Commission. The provision in said bill of lading defining and limiting the defendant's liability as a carrier is to be found in section 2 thereof, above quoted; and, in view of the express limitation of the defendant's liability as a carrier of the plaintiff's goods over its own lines, and of the further fact that whatever loss the plaintiff sustained was occasioned by the alleged conversion of said goods by another carrier beyond the defendant's own lines, it would seem to follow that, in so far as the plaintiff has counted upon the conversion of its goods by this defendant in the capacity of a carrier of said goods, he would not be entitled to recover damages for said conversion in this form of action, and, in so far as the findings and judgment of the trial court in the plaintiff's favor were predicated upon the existence of any such liability, the trial court was clearly in error.

[5] The plaintiff, however, seeks to sustain this judgment upon the ground that the trial court has found that the defendant was guilty of negligence in the specified respects above referred to in our résumé of the findings of fact. It would seem to be a sufficient answer to this contention to point to the fact that this is not an action for damages based upon negligence. It is simply an action for damages for conversion. The defendant is sued as a carrrier wrongfully converting the plaintiff's goods to its own use. The allegation in the plaintiff's complaint that the defendant at the time of such conversion held the plaintiff's indemnity bond guaranteeing the payment of the freight charges upon said goods in the event of the consignee's refusal to receive or pay for the same was a necessary averment in order to the showing that the defendant's alleged sale of said goods to pay the transportation charges thereon was a wrongful act. There is no other alleged breach of duty on the part of said defendant pleaded, or attempted to be pleaded, in plaintiff's complaint. The defendant's answer consisted simply in denials of the plaintiff's averments, with the added defense, by way of amendment thereto, setting forth that its liability as a carrier terminated, under the Carmack Amendment, with the delivery of said goods to connecting carriers beyond its own lines. Upon the issues as thus made up, the trial court proceeded to make findings as to the defendant's liability for the conversion of said goods as the carrier thereof, and also as to the defendant's liability for negligence in the respects above set forth. In so far as such findings refer to the defendant's liability as a carrier for the conversion of said goods, they are entirely unjustified by the evidence in the case, and in so far as said findings undertake to hold said defendant guilty of negligence, they are entirely beyond the issues in the case, and hence, upon either ground, could not have been made the basis of a judgment in plaintiff's favor.

At the close of the plaintiff's case the defendant made a motion for a nonsuit, specifying as one of the grounds thereof that, the suit being one for conversion, no cause of action against the defendant had been shown. This motion should have been granted. The motion of the defendant for a new trial was specifically made upon the ground that the evidence was insufficient to show any liability for loss occurring beyond its own lines. This motion should also have been granted. Both of these motions were denied by the trial court, and for these errors the judgment is reversed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; WASTE, J.

(187 Cal. 695)

HOTALING v. HOTALING et al.
(S. F. 9461.)

(Supreme Court of California. Jan. 5, 1922. Rehearing Denied Feb. 2, 1922.)

1. **Gifts 🔑47(1)—Donor has burden of avoiding transfer of stock regular on its face.**

In mother's action to recover shares of stock from son who claimed a gift from her, the production by him of a transfer regular on its face cast upon her the burden to show that the transfer was inoperative, or that the gift, if actually made, was avoidable on ground of fraud or undue influence.

2. **Appeal and error 🔑1011(1)—Finding on conflicting evidence not disturbed.**

Finding of trial court on conflicting evidence will not be disturbed, regardless of the appellate court's views as to the comparative strength of the testimony.

3. **Gifts 🔑38—Mother who transferred stock to son without knowledge of character of transaction entitled to restoration of stock.**

If a mother, as president of a corporation, frequently signed papers at request of her son, an officer and director and active in the management, and without knowledge as to contents signed a transfer of her stock to the son at his request, without consideration, she was entitled to restoration.

4. **Evidence 🔑590—Weight to be accorded attorney's testimony for client dependent on inherent quality of testimony, attorney's interest in case, and his appearance on the stand.**

The testimony of an attorney given in favor of his client, like the testimony of other witnesses, will be received and considered with a view to the inherent quality of the testimony, his interest in the case, and his appearance on the stand.

5. Witnesses 🔑67—Practice of attorney appearing as witness for client not to be encouraged.

The practice of attorneys appearing as witnesses for their clients is not to be encouraged, but conditions may exist where an attorney cannot justly or fairly withhold from his client either his legal services or his testimony as a witness.

6. Gifts 🔑49(1)—Evidence held to prove that mother did not make gift of shares of stock to son.

A mother's denial of having to her knowledge transferred her stock in a corporation to her son, and her testimony that, as president of the corporation, she frequently signed papers at son's request without reading them and without knowledge as to the contents thereof, *held* to sustain finding of trial court that she did not make gift of the stock.

7. Gifts 🔑48—Dividend checks not admissible to show familiarity with stock certificates.

In mother's action against son to recover corporate stock transferred to son, on theory that she, as president of corporation, frequently signed papers at his request without reading them and without knowledge of the contents, that she was not familiar with stock certificates and that the transfer was effected by procuring her signature to transfer by representing it to be a paper to be signed by her as president, dividend checks received by her did not tend to show her familiarity with stock certificates; hence were properly excluded.

8. Appeal and error 🔑1056(2)—Exclusion of immaterial evidence held harmless.

In an action involving the issue as to whether a mother made a gift of her corporate stock to son, in which there was testimony that the son in a letter to his brother stated that his will was in the brother's favor, exclusion of testimony as to contents of the will offered to rebut implication raised by declaration in the letter that the son had not provided for his mother in his will *held* harmless, since whether son had made provision for mother in his will was immaterial on issue of whether mother had given son her stock.

9. Appeal and error 🔑1057(1)—Exclusion of evidence held harmless in view of other undisputed evidence.

Where corporation was organized to administer decedent's estate, and stock therein issued to the surviving wife and children, the exclusion of unissued and canceled certificates showing that the original plan was to issue all the stock to the children, in mother's action to recover stock from son who claimed mother had made a gift thereof to him, offered by son to show mother's obligation to him on theory that he frustrated such a plan, *held* harmless in view of undisputed evidence that such a division of the stock was not attempted, and the mother's testimony that the plan was abandoned on her own objections.

10. Witnesses 🔑286(4)—Cross-examination of defendant as to whether he had claimed stock to persons connected with corporation did not warrant redirect examination as to statement to other persons.

In action involving ownership of corporate stock, cross-examination of defendant as to whether he had said anything to certain persons connected with the corporation relative to his ownership of the stock after mother's transfer thereof did not warrant redirect examination as to whether he had not informed other named persons not connected with the corporation that he was the owner of the stock.

11. Evidence 🔑273(5)—Declarations as to ownership of stock, in absence of adverse claimant, inadmissible as self-serving.

In action involving ownership of stock, defendant's testimony that he had claimed ownership of the stock to persons not connected with the corporation, in absence of plaintiff, *held* inadmissible as self-serving.

12. Evidence 🔑271(2) — When self-serving declarations are admissible.

Declarations made by a party in his own interest are commonly inadmissible, but may be admitted where a failure to assert a claim or right may be construed against the party as an implied negation, or where the assertion of such claim at a later date is attributed to conditions and exigencies which have arisen since the transaction in question, which motive would be disproved by showing earlier declarations to the same effect.

13. Appeal and error 🔑1056(2)—Exclusion of evidence cumulative of undisputed evidence as to collateral matter harmless.

The exclusion of evidence which was merely cumulative of other undisputed evidence, and which related merely to a transaction which was remote and entirely collateral in relation to the main issue, *held* harmless.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Lavinia J. Hotaling against Richard M. Hotaling, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Metson, E. J. McCutchen, and Peter F. Dunne, all of San Francisco, for appellants.

Gavin McNab, Nat Schmulowitz, and R. P. Henshall, all of San Francisco, for respondent.

SLOANE, J. This action was brought by the plaintiff, Lavinia J. Hotaling, to declare a trust in her favor and have restored to her 2,499 shares of the capital stock of the Hotaling Estate Company, a corporation, which stock at the time suit was begun stood on the books of the corporation in the name of the defendant Richard M. Hotaling.

The fact is undisputed that these shares of stock, with one additional share, had originally been issued to and belonged to the plaintiff as her interest in a family estate represented by the above-named corporation. The remaining stock was held in blocks of 2,500 shares each by her son, Richard M. Hotaling, the defendant, another son, Fred Hotaling, and a daughter-in-law, Ella Hotaling, the widow of a deceased son of plaintiff. The plaintiff was the president of this corporation, and she and her sons and daughter-in-law constituted its board of directors. The certificate representing these shares in plaintiff's name had been subsequently indorsed by the plaintiff and canceled, and a new certificate signed by the plaintiff as president of the corporation was issued in the name of Richard M. Hotaling.

On the face of the corporation records the shares in controversy had been transferred from the plaintiff, Lavinia J. Hotaling, to the defendant, Richard M. Hotaling. The plaintiff and Richard M. Hotaling, as already stated, are mother and son. The whole controversy in the case centers about the claim of the latter that his mother made him a gift of this stock on the 2d of September, 1913, the date of the transfer on the stock books, and some five and a half years before this action was begun. Richard testifies circumstantially to this transaction, and represents that it was unsolicited on his part, and was made on his mother's own initiative, and that she came to the office of the corporation, of which she was president, and of which he was an officer and director, and that the transfer was then and there made by delivering to him the indorsed certificate and issuing the new certificate over his mother's signature as president.

Mrs. Hotaling admits the genuineness of her signature upon written evidences of the transfer, but denies the gift, and disclaims any remembrance of the transaction which resulted in the transfer. There is no other direct evidence as to the transaction than that of the documents and the corporate records above referred to, and the testimony of these two principals.

All the other voluminous record in the case, comprising in all over 1,000 typewritten pages, is directed to evidence on collateral matters and events tending more or less strongly to corroborate one or the other of the parties as to the main issue.

The trial court found for the plaintiff on all the material issues presented, and it is from the judgment on these findings that the defendants have taken this appeal. The grounds of error relied on are insufficiency of the evidence to support the findings and the exclusion on the trial of certain evidence offered in behalf of defendants.

The one controlling fact in this case is in the finding of the court that the plaintiff, Lavinia J. Hotaling, did not make a gift of these shares to the defendant, Richard M. Hotaling.

As stated by the trial judge in reviewing the evidence:

> "The issue is the pivotal point and vital issue in this case. The plaintiff swears that she never made it; the defendant swears that she did; and, as no other person was present at either of the alleged conversations relating thereto, or upon the occasion when it is claimed the gift was made, the issue of veracity lies directly between mother and son, and this issue must be resolved by a consideration of the actual conduct, writings, declarations, motives and relations of the parties, the amount and value of the gift, the financial condition of the donor after such gift, and her ability to make it."

In passing upon this point the function of this court is much less complicated than was that of the trial court. The trial judge was called upon to delicately adjust the balance so as to determine upon which side, in this great mass of conflicting evidence and inference, the preponderance might lie, while upon this appeal our only duty is to ascertain if there was any substantial showing in behalf of the court's finding to give rational support to the conclusion reached.

It may be conceded that the defendants' evidence made a prima facie case in his behalf. The fact was shown that there had been a legal transfer of this stock from Lavinia J. Hotaling to Richard M. Hotaling on the corporate records. It is conceded that the mere fact of the existence of the relationship of parent and child between them does not create that confidential relation which raises a presumption of fraud in a voluntary transfer of property from the parent to the child.

[1] The plaintiff was therefore confronted with a transfer of this stock, regular on its face, which cast the burden upon her to show, in order to avoid the transaction, either that the transfer never operated to invest the ownership of the shares in the defendant, or that, if the gift was actually made, it was voidable on the ground of fraud or undue influence.

[2] The plaintiff here testified that she never gave this stock to her son, or knowingly transferred her title thereto. If there is any weight to be given to this testimony it will not be disputed under the established rules of law in this state that a finding of the court in accordance with such testimony cannot be disturbed, whatever views of the appellate court as to the comparative strength of the testimony to the contrary.

It is appellants' contention, however, that the plaintiff's testimony in this connection was so meager, vague and equivocal and so inherently improbable, as not to be entitled to consideration, and indeed did not constitute a denial of the transaction as claimed by defendants. The following is the testimony by question and answer as given by Mrs. Hotaling on this point:

"Q. (Mr. McNab): Mrs. Hotaling, I show you a certificate dated December 2, 1913, purporting to be a certificate for 2,499 shares, certificate No. 15 in the Hotaling Estate Company, and your signature, in favor of R. M. Hotaling; is this your signature (exhibiting signature to the witness)? A. Yes; that is my signature, all right.

"Q. Do you have any memory; have you any recollection? A. Of signing that?

"Q. Have you any recollection of ever signing this certificate? A. None whatever.

"Q. Did you ever, at any time, give 2,499 shares of your stock in the Hotaling Estate Company, or any other number of shares, to Richard M. Hotaling, your son, or to anybody else? A. Not that I know of—of the Hotaling Estate?

"Q. Of the Hotaling Estate Company? A. No.

"Q. Did you ever give any shares to Richard M. Hotaling, your son, or to anybody else, at any time? A. No."

Certificate No. 15, in words and figures as follows, was introduced in evidence:

"San Francisco, Cal., Dec. 2, 1913. No. 15. This certifies that R. M. Hotaling is entitled to 2,499 shares of the capital stock of the Hotaling Estate Company, incorporated Nov. 30, 1904, transferable on the books of the company by indorsement hereon and surrender of this certificate. [Signed] C. W. Conlisk, Secretary, Lavinia J. Hotaling, President."

Corporate seal attached, and indorsed: "R. M. Hotaling."

"The Court: I suppose it is admitted that that is the signature of the defendant, is it?

"Mr. Dunne: On the back; yes, sir.

"Mr. McNab: Will you let me have the certificate book showing the previous certificate to this?

"Q. Mrs. Hotaling, I show you this signature on the certificate of stock purporting to be Hotaling Estate Company for 2,499 shares, in which the figures are written on the upper line and the name 'R. M. Hotaling' on the lower line.

"Mr. Dunne: For the purpose of identification, bearing date?

"Mr. McNab: Bearing date December 2, 1913.

"Q. Is that your signature (exhibiting certificate of stock to the witness)? A. Yes.

"Q. Do you have any recollection—No. 14. I am going to have it read in after—do you have any recollection whatever of ever having signed this certificate? A. I have not.

"Q. Mrs. Hotaling, did you ever give this certificate, or any other certificate of any shares of stock in the Hotaling Estate Company to your son, Richard M. Hotaling, at any time? A. No."

The witness then had her attention called to the indorsement of her name on the back of the paper, and was asked if she signed it. After considerable quibbling over certain dissimilarities from her ordinary signature, she conceded that it was her signature.

"Q. Well, whether it is your signature or is not your signature, have you any memory of ever having placed your signature on the back of this certificate of stock? A. No. I don't in no way; it would be a funny thing for me to give away my stock.

"Q. There is a stub, showing a stub connected with the Certificate No. 1, December 6, 1904, in the Hotaling Estate Company. Is that your signature to the stub (exhibiting to the witness)? A. Let me look at that 'Lavinia' —I am a little suspicious of that—well, it looks like my signature; 'Lavinia' is written pretty well—better than I generally write it—but, however, let it go; say I signed it.

"Q. Have you any remembrance whatever of having signed this stub that I showed you the signature? A. Have I what?

"Q. Have you any remembrance of signing it? A. No.

"Mr. McNab: Q. I am showing you a certificate dated December 6, 1904, certificate No. 6, purporting to be for 2,498 shares, is the name of Lavina J. Hotaling, showing you the indorsement on the back of that, 'Lavinia J. Hotaling.' Is that yours (exhibiting to the witness)? A. I am suspicious of the 'Lavinia,' but, as I say, all right; say I signed it; the 'Hotaling' looks like my writing, and the 'J', that is too good; I do not write as even as that 'Lavinia'; that is written exactly the same; let it go; say 'Yes.'

"Q. Have you any remembrance of either having signed the stub of this certificate or the back of this certificate? A. Not the slightest remembrance; so it might just as well go I signed it, because they are all signed the same.

"Mr. McNab: Q. Mrs. Hotaling, did you ever give these certificates that I have last shown you, or any other certificates of your shares of stock, to the Hotaling Estate Company at any time to your son Richard M. Hotaling? A. Not to my knowledge.

"Q. Well, did you ever give them at any time? A. No."

The witness further testified that she first learned that Richard Hotaling made any claim to her stock some years later, shortly before the beginning of this action.

The testimony as quoted contains a bare denial by plaintiff that she made any gift or conveyance to her son Richard, qualified, however, by the admission that the signatures shown her are her signatures, and the repeated statement that she has no recollection of the event, of being shown the documents, of signing her name, or of any conversation between herself and Richard leading up to the transaction. Assuming that these statements of the witness are credible, and were believed by the court—and they evidently were so accepted—they are not lacking in probative force, as appellants assume.

Of course, if this transaction took place, as Richard M. Hotaling testified; if it was preceded by a conversation in which Mrs. Hotaling told Richard that, on account of the reckless character and disposition of her younger son, she had made up her mind to turn over all her stock to him (Richard); if she on the day in question went to the office of the corporation, and called upon Richard to produce her certificates that she might make the transfer they had previously talked about—it would be indeed incredible that she could not remember about it. On the other hand, if all that occurred was that, on an occasion of her visit to the office, Richard, as the active and responsible manager of the affairs of the company, brought to his mother certain papers and documents, and asked her to sign them as the corporation's president, and she signed them, as she testified that she was accustomed to sign such corporate papers, at his request and without reading them or having their contents explained, then it would be the most natural thing in the world that she would several years later retain no knowledge or memory of the event or anything connected with it.

Indeed, if it is true—and the trial court evidently accepted her statement to that effect as true in passing upon the sufficiency of this evidence to support the findings—that Mrs. Hotaling actually had no memory at the time of the trial as to the circumstances and conditions upon which she attached her name to these papers, it would afford very persuasive evidence that she was not at the time consummating a gift of $1,000,000 worth of stock to her son. If she was conscious of the fact that she was transferring this stock to Richard Hotaling with the purpose of making a gift of it to him, of course she, being a woman of sound mind, would have remembered it. If she did not remember it, it doubtless was because no such gift was made. She said she did not give the stock to her son. She said she had no recollection of the circumstances of signing the certificate. The trial court believed her. It is true that there is room for controversy as to the application of some of her averments of want of recollection. They might be open to the construction that she meant to say that she did not remember whether she made a present to Richard of her stock on that day, but, in the light of all the evidence, it is fairly apparent that what she was testifying to was that she did not give away her stock, that she was not aware of the fact that she was executing such a transfer as the records show, and that she had no recollection whatever as to the circumstances leading up to signing of the papers. If such was the case, and the court has so found, it of course follows, in the absence of any facts creating an equitable estoppel against her—and there are none—that Richard Hotaling could acquire no beneficial interest in this corporate stock as against his mother.

This conclusion is further supported by evidence sustaining the further finding of the trial court that the personal and business relations between Richard Hotaling and his mother were such as to establish the existence of confidential relations between them which called for the exercise of the strictest good faith on his part, and which would tend to corroborate her testimony that she had no intimate knowledge of the business of the corporation itself; that it was under the management of her son, Richard; that she had implicit confidence in him both as her son and as the managing head of the corporation, and was accustomed to sign all papers pertaining to the corporation at his request and without investigation or knowledge of their contents.

[3] It is unnecessary to go any further than this in defining the confidential relations between Mrs. Hotaling and her son Richard. They were at least such that he could not hold her to a transfer of her stock made inadvertently and without knowledge of what she was doing, and without consideration. This proposition is elementary. Counsel on both sides have ably and with great research compiled the decisions of the courts upon the degrees of confidential relations between parent and child and the conditions and circumstances under which a conveyance from a parent to the child will be avoided unless shown to have been made freely and voluntarily, with full knowledge of all the facts, and after the parent has had independent advice. It is not necessary to apply that rule here in all its strictness. It may be granted that, if Mrs. Hotaling made this transfer to Richard, as he testifies that she did, it would constitute a valid executed gift. Though 74 years of age, she was a mentally vigorous and competent woman, who evidently looked after her own private interests, and even dominated the affairs of the corporation in matters where she felt herself personally concerned. She was quite capable of forming an independent judgment where her son Richard was concerned, as well as in matters relating to other members of her family.

According to the story narrated on the witness stand by Richard Hotaling, the plaintiff told him one night, after her younger son had come home under the influence of liquor from a social function, where he had, it appears, made something of a scandal, that she was not going to bother with Fred any longer; that if he was going to conduct himself in that manner, and lose everything he had, she was determined that he was not going to lose any more than he now has. She then said, according to this testimony:

> "Now, Dick, I can rely on you. I have been thinking this thing over, and I want to give you all of my stock in the family estate, and then if Fred makes any trouble he will have you to deal with."
>
> "Then," the witness continues, "I said to her, 'Why, now, Mama, why you are excited now; just don't think any more about this.' 'Oh, no,' she said, 'this is not the only time; I have put up with him in this kind of thing for a great many years. He has promised me on many occasions that he would give up drinking, and he does not keep his word. * * * My mind is made up, Dick, and I think it is the best thing to do. You know how it was with

Anson. When Anson passed away, he had made everything over to Ella, and there was no fuss and there was no trouble. I have a very bad heart, Dick; I get that from Mother. You see how my head shakes, and some day I may get one shock too many. Now, I am determined in this thing. I have made up my mind. I think it is the best thing that you should have my stock and I want to give it to you.'"

The witness testifies to more conversation of this nature, and says that he advised her to wait awhile; that he was going to Marin county to spend Thanksgiving, and when he came back next week they would see about it; that when he returned after Thanksgiving his mother renewed the topic, and reiterated her purpose to give him the stock, and it was finally agreed if she felt that way for her to come to the office the next afternoon and they would fix it up; that she came to the offices of the corporation the afternoon of the following day, and said, "I am here, Dick, to fix that matter up and give you my stock"; that he, at her suggestion, then procured the certificates, and the transfer was made as heretofore stated, Mrs. Hotaling at his suggestion retaining one share of the 2,500 shares she owned in the corporation to qualify her to remain as the president and a director of the corporation. Mrs. Hotaling at the time owned a considerable amount of other property, and it appears was fully aware of her financial condition.

If the facts could be accepted as thus testified to by Richard Hotaling, we are not prepared to say they would not establish a valid and binding gift of the 2,499 shares to the son Richard. The facts thus narrated would show a deliberate, independent transfer on the part of Mrs. Hotaling, with a full knowledge of all the consequences of her act necessary to make the gift complete and binding. But the trial court found that this version of the transfer was not true, and, unless we can disregard the finding of the court, and ignore the testimony of Mrs. Hotaling, together with such evidence as was produced in corroboration of her denials of having made a gift to Richard, the judgment cannot be disturbed for want of proof to support the findings as to the ultimate issue in the case.

It seems scarcely worth while to discuss the other evidence in detail. As we have stated, it is wholly concerned with collateral matters, bearing but indirectly and inferentially upon the primary facts testified to by mother and son. While the facts developed have evidentiary value on one side and the other, they are in sharp conflict both as to their substance and as to their probative effect. The trial court may have gone further than would be justified by the cold print, if it were our province to weigh the evidence, in accepting all the testimony on behalf of the plaintiff, and rejecting all that for defendants, but it had the witness before it, and received the evidence in detail through a trial lasting many days. There were circumstances testified to which give color to Richard Hotaling's story, and witnesses testified to statements made by Mrs. Hotaling in the years subsequent to the transfer which might fairly be construed as admissions of the gift of her stock.

On the other hand, it was shown that Mrs. Hotaling continued to deal with, and in some instances dictate, the affairs of the corporation, as if she were an interested stockholder, and transactions were had and statements made by Richard Hotaling apparently inconsistent with his claim of ownership of his mother's stock.

Subsequent to the alleged gift and transfer of practically all of the plaintiff's interest in the corporation, she is found disputing with Richard as to the retention of certain employees of the company, the management and disposal of some of the corporate property, the manner of conducting the business, in most of which matters Mrs. Hotaling succeeded in having her own way, and in the discussion of which no question was raised as to her having no beneficial rights in the premises. It is conceded that no person besides Richard Hotaling and the plaintiff is claimed to have had any direct knowledge of the transfer of this stock, and whatever indirect evidence was produced as to such a gift consisted of two or three casual conversations by the plaintiff testified to by Ella Hotaling and a Mrs. Sullivan, a former employee in the family, in which Mrs. Hotaling made reference to having divided her property between her sons. It appears that she had given to each of them property other than this stock, and the references to the gifts were to vague and uncertain to include definitely the transfer of the corporate stock. The same indefiniteness and inconclusiveness may be ascribed to a number of oral statements attributed by plaintiff's witnesses to Richard Hotaling, which were construed as admissions that his mother continued to be the owner of her original shares in the corporation.

As conceded by both parties, evidence of oral admissions, particularly where inferential rather than direct and explicit, is about the most unreliable and uncertain evidence that can be produced.

But on the part of plaintiff there were introduced in evidence certain letters of Richard M. Hotaling written subsequently to the alleged gift, which at least are not subject to the taint of uncertain memory, and which may be fairly held inconsistent with his claim of ownership of substantially the whole of his mother's stock. He refers in one letter, in connection with a reference to his mother, to "a list of the inactive properties that we have in San Francisco, as well as some of our outside properties." In another he alludes to his mother being "thoroughly acquainted with the change in the handling of our real estate, for it was discussed with her and thoroughly explained." Another, in response to a letter from Mr. McNab calling for a statement and report of certain of the corporate properties to be placed in the hands of Mrs. L. J. Hotaling, states that the report is being made and will be furnished, but that the writer "is very sorry that this request has been made, because I know that Mrs. Hotaling is surrounded by some persons into whose hands it will be just as well that detailed matters connected with our estate should not go." The statement in a letter to Frederick C. Hotaling that "Mother has told me that she is perfectly willing that Hind & Co. should look after our affairs." These quotations are not, in themselves, of special significance, but, covering a period of time and transactions affecting the corporate business, and containing no word in any instance to negative the mother's continued rights in the premises, they were matters which the trial court had a right to weigh in the consideration of the plaintiff's categorical denial that she had made the alleged gift of her stock.

A great volume of the testimony in the trial related to a transaction concerning the disputed right of Richard M. Hotaling to other property consisting of a ranch known as the Sleepy Hollow ranch, in Marin county, and to which he had obtained a conveyance from the corporation. It had no relation to the stock transfer, and is of such doubtful relevancy, and of so slight evidentiary value, that it does not require discussion.

[4] We are of the opinion that too much importance has been given, and too much irritation developed, over the fact that much of the evidence for the plaintiff was given by one of the attorneys in her behalf, as a witness in the case. So far as the court is concerned, such testimony is to be received and considered, as that of any other witness in view of the inherent quality of his testimony, his interest in the case, and his appearance on the witness stand.

[5] The propriety of a lawyer occupying the dual capacity of attorney and witness is purely one of legal ethics, largely to be determined by the attorney's own conscience. While it is not a practice to be encouraged, it may often occur that conditions exist in which an attorney cannot justly or fairly withhold from his client either his legal services or his testimony as a witness.

We have scarcely referred in this opinion to the elaborate and resourceful discussion of learned counsel of the questions of law involving confidential relations, and burden and degree of proof, and have but touched upon a review of the voluminous evidence, because of the fact that it is too manifest that any nice distinctions in these matters are foreclosed by the findings of the trial court on the outstanding issue as to whether or not Mrs. Hotaling ever made or attempted to make a gift of this stock to her son.

[6] The decision of the trial court that there was no act or purpose on the part of plaintiff to so dispose of her rights reduces the question before us to the simplest elements. Was there sufficient evidence to support the finding? We are clearly of the opinion that there was. Had a gift or intent to make a gift been proven, it may be conceded that such transfer could only be set aside on clear and convincing proof of fraud or mistake. But the finding here goes to negative the effect of the original transaction and holds that there was no gift.

[7] In supplement to the objection to the sufficiency of the evidence to support the findings, appellants allege certain errors of the trial court in the rejection of evidence offered in behalf of defendants:

First: The plaintiff had testified, in support of her claim of ignorance of the details of the corporate affairs, that to her knowledge she had never seen any stock certificates. In rebuttal of this statement defendants showed that Mrs. Hotaling had owned shares of stock in other corporations. There were also offered in evidence certain dividend checks on this stock that had been received by Mrs. Hotaling. These checks were excluded from evidence, and the ruling of the court is assigned as error. In making this ruling the trial judge said:

> "I admitted in evidence the certificates of stock just referred to as bearing upon the question whether or not this lady had any knowledge, or rather the extent of her knowledge, if any, as to what a certificate of stock was, its appearance, and the like. Consequently I don't see how these are relevant, and I will sustain the objection."

In other words, the court held that familiarity with dividend checks containing an order for the payment of dividends on her stock would not tend to establish any familiarity with the physical aspects or contents of the stock certificate itself, and that was the point to which the evidence was directed. The general familiarity of the plaintiff with corporate shares and the dividends therefrom was abundantly evident, and we do not think seriously disputed. In explaining how she may have signed the certificate transferring her stock to Richard Hotaling without knowing what it was, she had made this statement, that she did not know what a stock certificate looked like, and her knowledge of dividend checks would throw no light on this point.

Second: Question was raised on the trial whether, after the alleged gift by his mother of her interest in the estate of Richard Hotaling, he had made any provision for her possible future needs. He testified that he had provided for her in a will executed in August, 1914, but that this will had been destroyed. It was then brought out that a new will was made in August, 1918, some two months prior to the beginning of this action. He was asked by plaintiff's counsel if he had made any provision for his mother in this latter will, but, upon the objection of his own counsel that this would be incompetent, he was not permitted to answer. Counsel for plaintiff then demanded the production of the will, but when later it was produced refused to offer it in evidence. We find nothing to comment upon thus far under this head. Plaintiff's counsel were not required to offer the will in evidence, and defendants' counsel did not do so, and are not claiming that it contained anything relevant to the case.

Attention, however, is called to an offer on the part of defendants' counsel to prove the contents of the destroyed will in explanation of a statement brought out on cross-examination in a letter of Richard Hotaling to his brother Fred, in which it was stated:

> "My will, as you know, is in your favor. When I die you will get all I possess."

This was in apparent contradiction of the testimony that he had provided for his mother in such will. On redirect examination counsel for defendants offered to show, by proving the contents of the lost will, that the will in question left Richard's entire estate to his brother, Fred, in trust, to pay the proceeds to his mother during her life, then to Fred during his life, then the entire remainder to the children of the deceased brother. The court sustained an objection to this proof. We think this ruling was clearly erroneous if any significance is to be attached to the declaration in the letter that everything had been left to Fred. That declaration raised the implication that the statement in the former testimony, that he had provided for his mother by this will, was untrue, and the proffered proof of the contents of the will would have explained the apparent contradiction in the evidence.

[8] But we fail to see the materiality of the issue thus raised. What bearing does the question as to whether Richard Hotaling made subsequent provision for his mother have upon the question as to whether or not she made him a gift of her corporate stock? It is not claimed by any one that this was a condition or consideration for the transfer. If it stands upon any foundation whatever, it is upon a purported statement long subsequent to the transfer made by Richard to his mother that he would provide for her every need. At the time of the alleged gift Mrs. Hotaling had ample remaining property in her own right to support her.

The evidence as to the apparently contradictory statements of Richard Hotaling as to the provisions of his will were brought out by plaintiff's counsel without objection, so far as we have been able to discover, but it was a collateral and immaterial issue, and not the subject of impeachment. Its remoteness from the main issues of the case, we think, removes it from the class of prejudicial error.

Thirdly: In order to show the obligation to her son, Richard, under which Mrs. Hotaling rested, Richard had testified that, before the division and distribution of the interests in the family estate among the members of the family, which were then operated under an incorporation known as A. P. Hotaling & Co., a plan had been drawn up whereby the stock of the corporation was to be distributed in equal shares to the three sons, the elder son, Anson, since deceased, then being alive, and the mother was to be left out, with some indefinite provision for her support during her lifetime; that when this plan was presented at a family meeting for the purpose of considering it Richard, as soon as the proposal was made, protested against it, declaring that it was unjust to his mother, and that this was the first he had heard of such a scheme; that, as a result, this proposed settlement was abandoned, and the mother was given an equal share in the estate with each of the children, which adjustment resulted in her receiving full 2,500 shares in the estate company, afterwards incorporated, which is the stock involved in this action. In corroboration of this testimony the defendants offered in evidence certain canceled and unissued certificates of stock in the stock certificate book of the A. P. Hotaling Company showing the preparation of such certificates for issuance in blocks of one-third each, of the entire stock to the three sons, in connection with the alleged settlement, which Richard Hotaling claims to have frustrated.

[9] On objection of plaintiff's counsel, the trial court excluded this evidence. There was no prejudicial error in this ruling. It is not disputed that such a division of the stock was attempted. The plaintiff herself testifies that she was present at the meeting when this proposed settlement was presented; that she indignantly voiced her objection, and that the plan was abandoned. The only point in controversy is as to Richard's part in defeating it. These canceled and unissued certificates could throw no light on the proposition. The only evidence as to Richard Hotaling's agency in the matter is his own version, as already referred to, supported, as we remember, by the testimony of another witness as to admissions to the same effect by Mrs. Hotaling, and Mrs. Hotaling's own testimony, in which she agrees with Richard as to the preliminary facts, but gives a somewhat different version as to the nature and extent of his disclaimer and protest.

[10, 11] Fourth: Richard Hotaling was asked, on cross-examination, whether, "in the conduct of the corporation," or "in the various transactions of the business," he ever did anything or said anything either to Mr. McNab, Mr. Richardson, or Mr. Umbsen to inform them or either of them that he was the owner of this stock, to which he answered that he had mentioned said matter to none of these excepting to Mr. McNab, on January 18, 1918. Upon redirect examination counsel for defendants asked the witness if he knew certain persons, none of whom, excepting Ella K. Hotaling, appear to have had any connection with the Hotaling family, or the affairs of the parties to this action. He answered that he did know them. The following question was then put to the witness:

> "I will ask you, Mr. Hotaling, if subsequently to the 2d day of December, 1913, and during the years 1914 and 1915 you did not inform each and every one of the persons I have just named that your mother had given you her interest in the Hotaling Estate Company?"

The witness answered in the affirmative, but the answer was stricken out on plaintiff's objection that it was "self-serving, irrelevant, incompetent, and immaterial, and not shown to have been made in the presence of Mrs. Hotaling."

The testimony thus excluded cannot be said to have been properly offered in rebuttal of the matter drawn out on cross-examination. The question on cross-examination was directed to any claim of ownership of the stock, to persons connected with the corporation in matters relating to the transactions of the business.

One of the contentions of the defendants on the trial was that, subsequent to the date of the alleged gift, the affairs of the corporation were carried on precisely as though Mrs. Hotaling was a party in interest in the corporate affairs, and without anything to indicate Richard Hotaling's claim of ownership of this stock. The parties named in the question put on cross-examination were all persons in close relation with the corporate affairs during this period. The persons regarding whom the evidence on redirect examination was excluded, with the exception of Ella Hotaling, who was aligned with the defendants in the action, were strangers to the corporation and its business. Statements made to them would not constitute a challenge to Mrs. Hotaling's rights as a stockholder.

[12] Such declarations made by a party in his own interest are commonly inadmissible. Exceptions to this rule exist under circumstances where a failure to assert a claim or right may be construed against the party as an implied negation, or where the assertion of such claim at a later date is attributed to conditions and exigencies which have arisen since the transaction in question, which motive would be disproved by showing earlier declarations to the same effect. Calif. Elec. L. Co. v. Safe Deposit & Trust Co., 145 Cal. 124, 78 Pac. 372; People v. Rodley, 131 Cal. 240, 63 Pac. 351; People v. Doyell, 48 Cal. 85; Commonwealth v. Jenkins, 10 Gray (Mass.) 485, 40 Cyc. 2789. The declarations here excluded do not purport to have been made to parties or under circumstances to bring them within any of the recognized exceptions to the rule.

If the excluded testimony was offered on the broader ground that it was intended to rebut any implication that may have arisen on the trial that Richard Hotaling had tried to keep secret any claim of ownership of his mother's stock from the time of the transfer, it might be admissible for that purpose, even though not strictly redirect testimony, But, in view of the facts that none of the parties communicated with were concerned in the ownership of the stock, or were interested in or hostile to the witness' claim of ownership, and that the evidence but inferentially tends to prove a fact that, in itself, if proved, would only give rise to another inference, the error, if there was such, cannot be given such prejudicial weight as to justify a reversal.

It is true that Ella K. Hotaling, one of the persons named, was a member of the family and a stockholder in the corporation, but she has herself testified to facts showing her understanding that Richard Hotaling owned his mother's stock, and is a witness in his behalf. To show further that Richard had declared to her his claim of ownership would aid little in removing the stigma of secrecy, if any such existed.

[13] Fifth: The final exception to the court's rulings on the exclusion of evidence presented in appellants' brief arises on the rejection of a letter written by Fred C. Hotaling in which he confesses to the circulation of certain slanderous reports concerning Ella K. Hotaling. Appellants claim that this letter, written to the defendant, Richard Hotaling, is relevant and material in explaining Richard Hotaling's unfriendly relations with Fred, and the motive and inducement governing Richard in making certain alleged statements to his mother regarding the recording of the deed to the Sleepy Hollow ranch, which he had held without record for so many years, and in the making of his wills. The unfriendly relations of the two brothers are undisputed. Richard had already testified to the fact of the scurrilous stories circulated by Fred, and to the confession of the latter that he had circulated them, and to the breaking of all relations with Fred. The existence of these facts and conditions are undisputed; indeed, are conceded. The letter in question, though perhaps the best evidence of the fact of confession, was but cumulative. As we have already indicated, the Sleepy Hollow ranch transaction was remote and entirely collateral in relation to the main issue of this case. Any possible application of the acts of Fred Hotaling, either in making or admitting his insinuations against Ella K. Hotaling, was supplied by Richard's uncontradicted testimony as to his understanding of the matter, and does not depend upon Fred's confession. We can see no possible error or prejudice in its exclusion.

As already stated in this opinion, we find in this record on appeal many reasons for putting a more favorable construction upon the defendants' side of this controversy than were indulged by the trial court; but upon a review of the whole case, it is clear that the findings which support the judgment have substantial support in the evidence. And the alleged errors of law which counsel for appellants themselves refer to as "presented for argument's sake, and that alone," if they amount to error, do not, "after an examination of the entire cause including the evidence," indicate "a miscarriage of justice."

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SHURTLEFF, J.; LENNON, J.

(187 Cal. 741)

BUDD v. MORGAN. (L. A. 6246.)

(Supreme Court of California. Jan. 5, 1922.)

1. Marriage 🔑50(2)—Provable by testimony of fact and subsequent living together.

In view of Civ. Code, § 57, Code Civ. Proc. § 1963, subd. 30, and Pen. Code, § 1106, testimony of a woman that she was married to a man and lived with him as his wife for several years was prima facie proof of marriage, without record proof.

2. Evidence 🔑260—Statements by conspirator held admissible.

In wife's action for alienation of husband's affections, where defendant claimed a conspiracy to get her into a false and apparently improper position with the husband, evidence *held* to be sufficient prima facie proof that one employed by plaintiff's counsel was a coconspirator to render admissible his declarations and statements prior to the consummation of the conspiracy and in furtherance thereof.

3. Criminal law 🔑423(7)—Conspirator need not have originated conspiracy.

It is not necessary for one to have been one of the original conspirators in order to be a member of a conspiracy.

4. Trial 🔑29(2) — Judge's remarks held not misconduct.

In wife's action for alienation of affections, where, on counsel's objection to the court's statement, "There is no question but what the wife lost the affections of her husband at the time at least when he said he was leaving, never to return," the court replied, "The court is not intending in any way to pass upon the facts; merely had reference to the statement made by the plaintiff that at a certain time her husband left her and stated he was never coming back," there was no misconduct.

In Bank.

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Florence M. Budd against Ida Alys Morgan. From judgment for plaintiff, defendant appeals. Reversed.

H. C. Millsap and Ward Chapman, both of Los Angeles, for appellant.

Roland G. Swaffield and Swaffield & Swaffield, all of Long Beach, for respondent.

SHURTLEFF, J. This is an action by plaintiff for damages for the alleged alienation by defendant of the affections of one Orris O. Budd, the plaintiff's husband. The amended and supplemental complaint alleged that the plaintiff and said Orris O. Budd were, and ever since the 4th day of March, 1901, had been, husband and wife, and stated in detail the acts and conduct of the defendant alleged to have caused and resulted in such alienation. The defendant in her answer denied, for want of knowledge, information, or belief, that plaintiff was lawfully or otherwise married to said Budd, or that they are or at any of the times mentioned in the complaint were husband and wife, and also denied both the alienation of the husband's affections and the alleged means and acts by and through which it was claimed that the same had been accomplished. The answer further averred that the defendant was the victim of a conspiracy entered into by the plaintiff, her husband, the said Orris O. Budd, and certain other named persons, by and in pursuance of which the said Budd was to make love to defendant and was to intrap her into compromising positions with him in order to lay the foundation for, and further this action, and to extort money from the defendant.

The action was tried upon the issues thus framed before the court and a jury, and resulted in a verdict for $15,000 damages in favor of plaintiff, for which amount judgment was entered, and from which judgment this appeal is prosecuted.

The appellant does not contend that the evidence upon the issue of alienation was insufficient to support the verdict, but confines her claim for reversal to the following: First, that the marriage between plaintiff and the said Orris O. Budd was not sufficiently established; second, error in the exclusion of certain evidence; and, third, misconduct by the court in the use of certain language when ruling upon one of defendant's objections.

[1] The first of these contentions was, we think, correctly determined by the District Court of Appeal in the following language, which we approve and adopt:

> "The first * * * contention of the appellant is that the evidence which was offered by the plaintiff for the purpose of establishing the marriage between herself and Orris O. Budd was insufficient to establish such marriage, and that the objections of the defendant to the admission of the same should have been sustained. The evidence which was thus offered and objected to was, first, that of the plaintiff herself, who, after testifying to her age and place of residence, was interrogated as follows: 'Q. Whereabouts were you married? A. Kokomo, Ind. Q. To whom were you married? A. Orris O. Budd.' * * * The defendant hereupon interposed an objection to this evidence as incompetent, irrelevant, and immaterial, as calling for the conclusion of the witness, and not the best evidence. The objection was overruled, whereupon the witness proceeded to testify that she had the certificate of marriage with her. * * * The plaintiff was then asked by whom she was married, a minister or an official, and, an objection to this question having been offered and overruled, she answered that she was married by the Rev. Mr. Floyd, a minister of the Christian Church in Kokomo. She was then asked whether a license had been issued to herself and husband prior to said marriage, which question she answered in the affirmative. She then proceeded to testify that from the time of this marriage in 1901 herself and husband had lived together as husband and wife in various places, and that a strong and mutual affection had existed between them up to about the year 1913, when the affections of her husband began to cool until a few months later, when they reached a point of estrangement without any fault on her part, but in spite of her efforts to retain her husband's affections. He finally left her, suggesting that she had better get a divorce. The plaintiff then proceeded to testify to the relations which she began to discover as existing between her husband and the defendant, and finally to the episode of surprising her husband at the mine, where he was employed, in a compromising position with the defendant. We are of the opinion that the evidence thus presented by the plaintiff in relation to her marriage to Orris O. Budd, and to the fact that for several years prior to the misconduct of the defendant resulting in the alienation of his affections the plaintiff and Orris O. Budd had been deporting themselves as husband and wife, was properly admitted by the trial court, and was sufficient to establish prima facie the fact that the plaintiff and Orris O. Budd were husband and wife. Conceding that the laws of Indiana with relation to the solemnization of marriages will be presumed to be the same as those of California upon that subject, it does not follow therefrom that in making proof of the existence of the marriage relation it would be necessary to establish the successive statutory steps to be taken prior to and including the solemnization of such marriage specified in sections 68 to 74, inclusive, of our Civil Code. Section 57 of the Civil Code provides as follows: 'Sec. 57. Consent to marriage and solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases.'
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> "We are of the opinion that the intent of this section of the Civil Code was to enable parties to or persons present at the solemnization of a marriage to testify to the fact within their knowledge that such marriage actually took place; and, when to such testimony the additional evidence is educed showing that since said marriage the parties thereto have deported themselves as husband and wife, a prima facie case has been sufficiently shown. Subdivision 30 of section 1963 of the Code of Civil Procedure, dealing with disputable presumptions, specifies as one of these the presumption 'that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.' That it was the intent of our lawmakers to render such proof sufficient to make out prima facie the status of husband and wife would seem to be also deducible from the fact that even in criminal cases no higher form of proof is required in this state. Section 1106 of the Penal Code provides that 'upon a trial for bigamy it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases.' That the rules of evidence above stated are applicable to proof of the existence of the marriage relation in other states, see Barber v. People, 203 Ill. 543, 68 N. E. 93; Franklin v. Lee, 30 Ind. App. 31, 62 N. E. 78; Mathews v. Silvander, 14 S. D. 505, 85 N. W. 998; Jacobsen v. Siddal, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360; Commonwealth v. Dill, 156 Mass. 226, 30 N. E. 1016; Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702; Commonwealth v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. Rep. 468.
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> "We are therefore of the opinion that the plaintiff, by the form of evidence which she presented to the trial court, sufficiently made out a prima facie case of the existence of the relation between herself and Orris O. Budd of husband and wife, that the objections of the defendant to such evidence were properly overruled, and that her present contention that the same was insufficient to prove the fact in issue cannot be sustained."

[2] Appellant's second contention is that the trial court erred in excluding certain statements and declarations made by one R. E. Fisher, claimed by appellant to have been a member of the conspiracy which she affirmed had been formed for the purpose, through a trick, of getting her in a false and apparently improper position with Budd. An understanding of this point requires a somewhat extended reference to the proceedings which occurred in reference thereto at the trial. John F. McClure, a witness on behalf of appellant, was asked this question:

> "Did you at any time during that year [1913] have a conversation with R. E. Fisher and Mr. Macy in the city of Los Angeles relative to any controversy or proceedings had or taken by Mr. Fisher in any case?"

An objection to the question was overruled and the witness answered, "I heard a conversation." He was then asked:

> "State when and where and the parties present at the time of the conversation"

—which question was objected to as incompetent, irrelevant, and immaterial, calling for hearsay testimony. The court thereupon asked:

> "This is the same conversation taken up before as to acts of various conspirators and matters relating thereto, that is the purpose of the offer?"

To which appellant's attorney replied in the affirmative. A colloquy then followed between court and respective counsel, in which the court inquired if it was claimed that Fisher was a conspirator, and respondent's counsel replied that it was not so claimed in the answer, the averments of which did not in terms name Fisher as a conspirator as it did the plaintiff, Budd, and several others, but averred that respondent's attorney had employed Fisher "special deputy constable of the city of Long Beach" to serve a copy of the complaint and summons in this action upon defendant, and instructed and directed him to go to the Perris mine, where the defendant was living and Budd was working, and serve said copy of summons and complaint in the manner set forth in the answer. Thereupon the court said:

> "The court * * * is going to hold that any act or declaration of Mr. Fisher relative to matters arising out of, and within the scope of his employment, are admissible in evidence. * * * I am only holding that they can prove what they aver in the answer, * * * that they can prove, the employment of Fisher being admitted, that they can prove the allegations of the answer concerning that employment."

Thereupon counsel for defendant made a comprehensive statement of what he offered to prove by the witness, which included that the declarations of Fisher, which he desired to put in evidence, were made on March 10, 1913 (the day following the discovery of defendant and Budd in a compromising position in defendant's room at the Perris mine); that the return of the summons had not then been made; that Fisher had not then been paid his compensation; that in pursuance of his employment Fisher had telegraphed plaintiff's attorney, who employed him, to meet him either at Long Beach or at Los Angeles on the morning of March 10th; that on that morning, and before Fisher had reached the office of plaintiff's attorney, Fisher, in the presence of one Macy and the witness, stated he had been to the Perris mine and had gone there under the instructions and directions of plaintiff's attorney "for the purpose of executing a frame-up, and that it had been agreed between Mrs. Budd, Whealton (plaintiff's attorney), Burroughs (plaintiff's brother), and other parties at the mine that Budd should enter the room of Mrs. Morgan at a time and place to be agreed upon, and that the whole deal was carried out as planned; that it took him to frame up and pull off a deal like that; that the house of Mrs. Morgan was entered on the night of March 9th, and that he held a gun on Mrs. Morgan and compelled her to submit to the taking of a flash light picture; that a demand was made for a settlement or a payment of money; and that Mrs. Morgan did then and there agree to pay, and that he (Fisher) would get his, to wit, $3,000." Plaintiff objected to the introduction of this testimony on the "ground that it was incompetent, irrelevant, and immaterial, calling for hearsay testimony, especially that portion * * * as to what the conspiracy was, and that it is prejudicial," calling for the recital of transactions by an officer, made after he had made the service for which he was employed, and that any statement or remarks made by him after he had performed his services as an officer could in no way bind any of the parties to the action. The court, in ruling upon this objection, said, "The court will hold no declarations, except those made during the pendency of the conspiracy and in furtherance of its objects, are admissible as against the coconspirators;" which would mean that the statements made by Fisher, after returning to Los Angeles, relative to the things he went to the mine to do, were not admissible, "in so far as all proof is concerned at the present time the court does not see there is sufficient before it to justify it in holding that the employment was in effect after March 9th or 10th, whatever it may be." The result was that the proffered evidence was rejected, which ruling we think was error, and that defendant should have been permitted to introduce the declarations. At the time they were made the objects of the conspiracy had not been fully accomplished, nor was Fisher's active participation in it at an end. He had not at that time made his final report to plaintiff's attorney, neither had he received the $3,000 which he stated was to be paid him out of the money which might be forced from the defendant by threats to send a copy of the flash light picture showing defendant in bed with Budd, taken by those acting with and for plaintiff at the mine, on the night of March 9, 1913, to each of the heirs of defendant's deceased husband, all of which was fully known to Fisher, he being one of the party that took the photograph and having taken an active part not only in what transpired that night, but in planning and carrying out the invasion of defendant's room. It is apparent that the trial court correctly regarded Fisher as a member of the alleged conspiracy. Conceding that he may have been employed to serve the summons and complaint upon the defendant, the record shows that his connection with the matter went beyond that of an officer engaged for the sole purpose of serving legal papers. The evidence established prima facie that in reality he was a member of the alleged conspiracy, rather than an employee thereof. It was not necessary for Fisher, in order to make the aforementioned service, to spend two days and nights in the vicinity of defendant's mine before making such service, and to make it at nighttime, under the circumstances which he did, when it clearly appears that it could have been made at a much earlier date in the daytime and in the usual way. It was not necessary that he should become a member of a party organized for the express purpose of forcibly entering the defendant's room in the nighttime upon receipt of a signal that Budd had entered it, such entrance not to be made without such signal. It was not necessary that, upon accomplishing such entrance by force, he should read the complaint to the defendant. It was not necessary that he should, on the night of March 8, 1913, accompany plaintiff and others of the alleged conspiracy to a barn upon defendant's said mine and near the room occupied by defendant, stay there about an hour, and finally return to the Death Valley mine, where the party, including Fisher, were staying, without making the service, because they were advised that nothing would be going on that night. It was not necessary that, when making the service of the papers in this action, he should read the names of the heirs of defendant's deceased husband to the defendant in her room on the night of March 9th. Add to the foregoing the statement of the plaintiff, that she knew Fisher carried a pistol, and of the defendant, made under oath, that on the night of March 9th, while the plaintiff and others were in her room, that some one (probably Fisher) pointed a revolver at her (defendant's) head, and the further testimony of the defendant that she was innocent of each and every act of misconduct charged against her, that there had been no improper relations between her and Budd, we think there was, as we have said, sufficient prima facie proof that Fisher was a coconspirator to admit in evidence his alleged declarations, made during the existence, and before the consummation, of the conspiracy. As said in Del Campo v. Camarillo, 154 Cal. 647, 653, 98 Pac. 1049. 1052–1053:

> "The rule is that * * * declarations of one conspirator, made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment, are admissible against both."

While the plaintiff testified that the purpose of the incident of March 9th was to secure evidence in support of her alienation suit, the facts showed, prima facie at least, that its main and real object was to force defendant, through fear of disgraceful exposure, to pay plaintiff a large amount of money to keep the matter quiet and suppress the photograph so frequently referred to herein, which object (the collection of money) had not been accomplished at the time the alleged declarations of Fisher were made. Of course, the formation of the conspiracy itself could not have been proved as against his alleged coconspirators by the declarations of Fisher (Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1, 405; Del Campo v. Camarillo, supra), but such was not the purpose of the offer; it was to show what Fisher, as one of the conspirators, had done and said after its formation and before its consummation in furtherance thereof, and in connection therewith.

[3] Nor was it necessary for Fisher to have been one of the original conspirators in order to become a member thereof. If he knew of its existence, as he unquestionably did, he became a party thereto as completely as he would had he been one of its original organizers. People v. Kizer, 22 Cal. App. 10, 133 Pac. 516, 521, 134 Pac. 346; U. S. v. Cassidy (D. C.) 67 Fed. 698.

[4] We discover no ground for reversal in appellant's final claim that the following remarks, made by the trial court when ruling upon one of defendant's objections, amounted to misconduct. The court said:

> "I think, in so far as the alienation is concerned, there is no question but what the wife lost the affections of her husband at the time at least when he said he was leaving, never to return. * * * If she did not possess his affections at that time, why, certainly they could not thereafter be alienated."

Thereupon the appellant's counsel asked the court to instruct the jury that—

> The "court does not mean to say as a matter of fact it has been established, as your honor's words would indicate, that beyond doubt the alienation has been proved."

To which the court replied:

> "The court is not intending in any way to pass upon the facts; merely had reference to the statement made by the plaintiff that at a certain time her husband left her and stated he was never coming back."

While these last-quoted remarks were not cast in the form of an instruction, they were in effect the equivalent thereof, and substantially told the jury that the court was not passing upon the facts, and that that was their function.

For the reasons already stated, the judgment is reversed.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; WASTE, J.

187 Cal. 655

BLACKWOOD v. McCALLUM et al.
(S. F. 9441.)

(Supreme Court of California. Jan. 3, 1922.)

1. Principal and surety 🔑155—Act of obligee releasing sureties affirmative defense, and complaint need not allege plaintiff's performance.

In order to fasten prima facie liability on sureties on contractor's bond, it was not essential for plaintiff owner to allege that he had performed the contract upon his part, since, if plaintiff was guilty of any act which would release in whole or in part the obligation of the sureties, it was an affirmative defense to be specially pleaded by them.

2. Pleading 🔑8(7)—Allegation in answer of sureties held mere conclusion of law.

In action against sureties on bond of building contractor who failed to pay claims for materials, an averment in the answer that the building was erected "in accordance with and pursuant to a new and different contract or agreement with plaintiff" was not the statement of an ultimate fact, but of a mere conclusion of law, and in this connection the burden rested upon the defendants to allege the covenants and conditions of the claimed new contract with sufficient particularity and detail to acquaint plaintiff with its terms.

3. Principal and surety 🔑100(4)—Provision in bond held waiver of consent of owner and contractor.

A provision in a construction contract that there should be no changes or modifications in the plans unless agreed upon and fixed in writing, signed by the owner and the contractor, could be waived as between the owner and the contractor, and such waiver as to a minor change would bind sureties under a provision in the bond that changes involving decreased expenditure or increased expenditure of less than $1,000, or not involving any change in cost, could be made without the consent of the sureties.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Harry T. Blackwood against J. H. McCallum and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

J. W. Henderson, of Eureka, and Hartley F. Peart, of San Francisco, for appellants.

G. T. Wright and Wright, Wright & Stetson, all of San Francisco, for respondent.

SHURTLEFF, J. This is an appeal by the defendants, J. H. McCallum and E. O. Benner, from a judgment against them and their codefendant, Hansbrough-Johnson Company, the latter not joining in the appeal.

The complaint alleges that on June 5, 1916, the plaintiff, as owner, entered into a building contract with the defendant Hansbrough-Johnson Company, whereby the latter agreed, for the price of $9,712, to erect for plaintiff a two-story frame residence upon a lot of land in San Francisco; that to secure the performance of said contract the Hansbrough-Johnson Company, as principal, and the appellants McCallum and Benner, as sureties, executed and delivered to plaintiff a bond in the penal sum of $4,856, conditioned that said Hansbrough-Johnson Company would in all respects comply with all the terms, covenants, and conditions of said contract and furnish the materials and perform the work according thereto, free of liens or claims arising out of materials furnished or work performed thereunder; that said bond further stipulated that, in the event of any liens being filed upon the building or land upon which it was erected, arising from the performance of the work or furnishing of the materials, or in the event of plaintiff being compelled to pay any sums of money, for said work or materials, by reason of the failure of Hansbrough-Johnson Company to pay the same, then the said McCallum and Benner would repay plaintiff said sums, not exceeding the amount of the bond; that said building was completed on or prior to September 18, 1916, and that on said last-mentioned day notice of completion and acceptance was filed for record in the office of the county recorder of the city and county of San Francisco (this date is evidently a clerical error, and should be December 15, 1916); that on January 17, 1917, two claims of lien against the building and land for materials furnished and used in the construction of said building were filed for record, and actions were commenced to foreclose them; that in each of these actions the plaintiff and Hansbrough-Johnson Company were named as defendants and were respectively served with the summons and a copy of the complaint in each of them; that the plaintiff appeared and answered in each action; that Hansbrough-Johnson Company made no appearance in either of said actions; that the actions were consolidated and tried; judgments rendered in favor of the claimants, the liens foreclosed, and the property ordered sold; that plaintiff was compelled to pay $250 for the services of attorneys in defending said actions; that prior to the commencement of said actions to foreclose said liens plaintiff had paid the defendant Hansbrough-Johnson Company all sums due and owing by him to said company for the work, labor, and materials furnished by it in the construction of said building, "save and except the sum of $746.30, which sum constituted a fund in plaintiff's possession applicable to the payment pro tanto of said "final" judgments; that on December 4, 1918, in order to protect said building and property from an execution sale, plaintiff paid said judgments in full, amounting to $2,846.49, for which amount, and the said sum paid for the services of attorneys, less said $746.30, plaintiff asked judgment against the defendants.

The appellants did not demur to the complaint, but answered, admitting, either expressly or by failure to deny the same, all the allegations of the complaint, except the following: Denied that the building was completed in accordance with said contract, but alleged that it was completed by said company in accordance with and pursuant to a new and different contract with plaintiff; denied that there is anything due or owing on account of the payment of said judgment or on any other account; denied that said $746.30 constitutes a fund in plaintiff's possession for the purposes alleged in the complaint. The answer contains the further denial that the company completed the building "on the 18th day of September, 1916," which is, in effect, an admission that it was completed upon some other date.

When plaintiff rested, the appellants moved for a nonsuit upon the ground that the building was not completed in accordance with the contract for the faithful performance of which they became sureties, but in accordance with or pursuant to a new and different agreement made between the plaintiff and the Hansbrough-Johnson Company, which motion was denied, and we think properly so.

The court found upon all the issues raised by the answer as follows: That the building was completed on December 15, 1916, and "was not constructed or completed in accordance with or pursuant to a new contract with plaintiff, nor a contract different from the one of June 5, 1916, set forth in said complaint"; that there is due and owing from the defendants, J. H. McCallum and E. O. Benner, and each of them, on account of the payment of the judgments referred to in plaintiff's complaint, after crediting said sum of $746.30 thereon, a balance of $2,100.19 and interest. For these amounts, together with the said sum of $250, paid for attorney's fees, as alleged and not denied, judgment was ordered and entered in favor of plaintiff, in accordance with the findings and conclusions of law.

Defendants raise the point in this court, and for the first time, that the complaint fails to state a cause of action, in that it does not allege, either by setting forth the facts showing the same or in the manner permitted by the Code (section 457, Code Civ. Proc.), that plaintiff has duly kept and performed the covenants and stipulations of the building contract which by its terms are to be kept and performed by him, and which performance appellant claims must be established in order for plaintiff to successfully maintain the action.

[1] But in order to fasten prima facie liability upon the defendants' sureties under their bond, it was not essential for plaintiff to allege that he had performed the contract upon his part. Their undertaking was that Hansbrough-Johnson Company, not the plaintiff, would perform the agreement. Furthermore, they by the express terms of their bond agreed to pay all liens placed upon plaintiff's property arising from the performance of the work or the furnishing of materials in connection therewith, and it is the alleged breach of this condition that forms the foundation of the complaint, and which breach we think is sufficiently pleaded to state a cause of action. If plaintiff was guilty of any act which would release, in whole or in part, the appellants' obligation as sureties, it was an affirmative defense to be specially pleaded by them, which was not done.

[2] The answer wholly failed to plead any facts showing that the original contract had been modified in a material or in any respect. It did, however, attempt to allege a new contract, but was fatally defective in that regard. The averment that the building was erected "in accordance with and pursuant to a new and different contract or agreement with plaintiff," which is all the answer contains upon the subject, is not the statement of ultimate fact but of a conclusion of law. Moreover, if treated as an allegation of fact, there is no evidence to support it. If appellants claimed that a different contract had been entered into between plaintiff and their principal, they should have stated its covenants and conditions with sufficient particularity and detail to acquaint plaintiff with its terms, which we have seen they omitted to do. The contract is not pleaded either in the complaint or answer, nor do the findings set it out or state its effect, nor was there any defense pleaded based on premature payments, from which it follows that these questions were not in the case—they were not presented by the pleadings. In short, the appellants made no adequate attempt in their answer to bring themselves within the provisions of sections 2819 and 2840 of the Civil Code, or to show any exoneration by reason of the suspension or impairment of their remedies or rights against Hansbrough-Johnson Company, and their case cannot be "better proven than alleged."

[3] Appellants make the further contention that certain extra work claimed to have been performed by the Hansbrough-Johnson Company was not "added to the contract" in the method by it prescribed, and that such departure exonerated them, but the pleadings present no such issue, and, in any event, the claim is without merit. The contract provided that the owner or architect could request changes, alterations, or deviations in or omissions from the contract or plans or specifications, and that it should not render it void, and that the rule of practice to be

observed in accomplishing such changes and modifications should be that they "be agreed upon and fixed in writing, signed by the owner and the contractor, prior to execution," which in some instances, as appellants claim, was not done here. The contract further declared that—

> "No such change or modification shall release or exonerate any surety or sureties upon any guaranty or bond given in connection with this contract."

The foregoing provisions could have been waived, as between the plaintiff and the Hansbrough-Johnson Company, which was the case where modifications were made without first agreeing upon them in writing; but they could not bind the appellants by such waiver without their consent, and the consent is found in the bond, and is as follows:

> "And their [sureties] written consent must be secured to any change or alterations made in the original drawings or specifications by the said obligee costing in excess [of] one thousand dollars, but any change in the original drawings or specifications involving decreased expenditure on the said contract or an increased expenditure therein of less than one thousand dollars, or not involving any change in cost, may be made without the consent of the sureties and shall not release the sureties from liability hereunder."

The case was tried and decided upon the pleadings as framed and the evidence supports the findings.

Judgment affirmed.

We concur: SHAW, C. J.; WILBUR, J; SLOANE, J.; LENNON, J.

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187 Cal. 727

MOREY v. PALADINI. (S. F. 9114.)

(Supreme Court of California. Jan. 5, 1922. Rehearing Denied Feb. 2, 1922.)

1. Appeal and error 🔑648—Supreme Court properly permitted motion in lower court to secure relief from failure to notify clerk to prepare transcript.

Where on motion to dismiss an appeal it was shown that the clerk, without the notice required by Code Civ. Proc. § 953a, prepared the transcript, and the trial court approved the transcript with the qualification that no notice was given, it was proper for the Supreme Court, having acquired jurisdiction by the notice of appeal from the judgment which was duly given, to continue motion to dismiss, and permit appellant to apply to lower court for relief under section 473, on ground of mistake; and, on lower court granting the relief on affidavits filed, the motion to dismiss is properly denied.

2. Contracts 🔑138(1)—Void contract not basis of action.

A void contract, a contract against public policy or the mandate of the Sherman Anti-Trust Act (U. S. Comp. St. §§ 8820–8823, 8827–8830) may not be made the foundation of any action, either in law or equity.

3. Contracts 🔑138(6) — Court discovering fact of illegality, on own motion will instigate inquiry.

When the court discovers facts indicating the contract sued on is illegal, it will, of its own motion, instigate inquiry.

4. Monopolies 🔑17(1)—Contract to deliver lobster from Mexican waters, giving exclusive sale north of parallel 36 degrees, held in restraint of trade.

Contract to deliver lobster from April 2, 1917 to October 15, 1917, from Mexican waters at a time when under Pen. Code, § 628, no lobster could be taken in California waters, giving defendant exclusive sale north of parallel 36 degrees, *held* illegal, as violating the Sherman Anti-Trust Act (U. S. Comp. St. §§ 8820–8823, 8827–8830) and Civ. Code, § 1673.

5. Monopolies 🔑12(1)—Agreement having direct effect on interstate commerce within Sherman Anti-Trust Law.

An agreement which has some direct or immediate effect on interstate commerce is within the inhibition of the Sherman Anti-Trust Act (U. S. Comp. St. §§ 8820–8823, 8827–8830), and it is not essential that the result should be a complete monopoly.

6. Monopolies 🔑12(1)—Contract in partial restraint of trade, where terms nonseverable, wholly void.

Civ. Code, § 1673, makes no exception in contracts only in partial restraint of trade, and a contract that secures defendant a monopoly in selected territory and nonseverable is wholly void.

7. Evidence 🔑437—Admissible to show contract was in restraint of trade.

In an action on contract to deliver lobster from foreign waters during the closed season in California, evidence that plaintiff had monopoly of the lobster business *held* admissible to show the contract one in restraint of trade, but not under the rule that ambiguities of the contracts could be explained by parol.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by J. Morey against A. Paladini. Judgment for plaintiff, and defendant appeals. Reversed.

C. V. Riccardi and Hoefler, Cook & Snyder, of San Francisco, for appellant.

Wm. H. Chapman, of San Francisco, and Geo. T. Kerr, of Watsonville, for respondent.

WASTE, J. This action is one brought to recover damages for the breach of a contract. Plaintiff had judgment, and the defendant has appealed. After final judgment the trial court made an order relieving the defendant from his default and failure to file the notice and request for transcript required by the provisions of section 953a of the Code of Civil Procedure. The respondent has appealed from that order, and has presented the questions thus raised in a motion to dismiss the appeal of the defendant.

[1] The facts germane to the preliminary motion and appeal are: Judgment was entered in favor of the plaintiff and against the defendant on February 4, 1919. On February 10th the defendant filed his notice of intention to move for a new trial, which motion was made and denied on February 28th. The defendant gave notice of appeal from the judgment, which was filed March 6th. During the proceedings on motion for a new trial the court reporter had made and delivered to the defendant a transcript of the testimony in the case. Upon the denial of the motion the defendant handed back the transcript to the reporter, and orally requested him to also prepare the clerk's transcript, and to file both transcripts with the clerk of the superior court. This the reporter did, although no such written notice and request for such transcript had been given to him, or to the clerk, as required by the provisions of section 953a of the Code of Civil Procedure. Thereafter, and on April 12th, the plaintiff moved the trial court for an order disapproving and declining to certify to the truth and correctness of the reporter's transcript, upon the ground that the defendant had failed to file with the clerk of the court any written request for the preparation of such transcript, as required by the above section of the Code. Upon the hearing of that motion, the trial court made an order refusing to certify to the reporter's transcript on said ground, but later, and on the 17th day of June, as appears from the transcript filed in this court upon the appeal from the judgment, the court did append to the transcript its certificate to the correctness of the same. In so doing it also found and certified that there had never been any request to cause said transcript to be prepared in conformity with the requirements of the Code. Thereupon the plaintiff moved the Supreme Court for an order dismissing the appeal, upon the ground that no notice requesting a transcript of the record, such as is required by section 953a of the Code of Civil Procedure, had ever been given. Upon the hearing of the motion it was suggested by the Supreme Court that the defendant should apply to the superior court for relief, under the provisions of section 473 of the Code of Civil Procedure, and the motion to dismiss the appeal was continued to allow the defendant an opportunity to make such application. Thereafter the defendant filed in the superior court a notice of motion to be relieved from his failure to file the request for the transcript, accompanying his notice with affidavits intended to bring the matter within the provisions of said section 473. Upon the hearing of said motion the superior court made an order permitting the defendant to file the request for the transcription of the record, and relieved him from the effect of his failure to file the same at an earlier date upon the ground of mistake, inadvertence, surprise, and excusable neglect. A certified copy of the order was filed in the Supreme Court on September 3, 1919. The cause having been thereafter transferred to the District Court of Appeal for the First Appellate District, Division 1, for hearing and determination. That court first considered the question presented by the foregoing facts, and, speaking through Mr. Justice Richards, said:

> "It is conceded that the defendant's notice of appeal from the judgment herein was duly given, and that a timely and proper undertaking on appeal was duly filed. This being so, the Supreme Court thus acquired jurisdiction to hear and determine the appeal from the judgment. The preparation and filing of a proper record upon which said appeal should be heard was a matter of after consideration, and was one which in most cases still required action on the part of the trial court or of the judge thereof, notwithstanding the taking and perfection of the appeal. That portion of section 953a of the Code of Civil Procedure which refers to the request of the appellant for the preparation and filing with the clerk of the trial court of the transcript has reference to such subsequent proceedings in the trial court as shall result in the preparation and proper certification of the transcript which is to be used upon the appeal, and hence all of these matters are matters entirely within the jurisdiction of the trial court, notwithstanding the taking of such appeal, and are not matters which affect the jurisdiction of the Supreme Court to hear and determine the appeal. This being so, we are of the opinion that when the motion to dismiss the appeal from the judgment in this case was presented to the Supreme Court, based as it was upon the ground that no such written request for a transcript as is required by the provisions of section 953a of the Code of Civil Procedure had ever been filed with the clerk of the trial court, the suggestion of the Supreme Court that the appellant's remedy for such defect or default was by way of an application for relief made to the trial court was in all respects a proper and timely suggestion; and that the appellant in acting thereon was pursuing the only method which was open to him for remedying his defective record; and that the trial court, upon his motion for such relief under the provisions of section 473 of the Code of Civil Procedure, had jurisdiction, upon a proper showing, to grant him such relief.
>
> "The showing which the defendant there made, supported as it was by affidavits was deemed sufficient by the trial court to entitle the defendant to the relief asked; and since the granting of such relief was within the powers of the trial court, and since its order made in that behalf enables this court to hear and dispose of the appeal from the judgment

herein upon its merits, we shall not inquire too closely into the efficiency of the affidavits presented to the trial court upon the hearing of said motion. The record as thus finally made up, is sufficient in form to satisfy the requirements of the statute; and, this being so, we are of the opinion that the motion to dismiss the appeal from the judgment should be denied, and that the order of the trial court permitting the defendant to amend his record in the respect indicated should be affirmed. It is so ordered."

We approve and adopt the foregoing conclusion of the District Court of Appeal.

This brings us to a determination of the merits of the appeal from the judgment. The facts necessary to a complete understanding of that matter may also be gleaned from the clear and succinct statement of Mr. Justice Richards:

"The action was one brought to recover damages for the breach of a contract entered into between one W. E. Zander, plaintiff's assignor, and the defendant, by the terms of which said Zander agreed to deliver to the defendant, f. o. b. San Diego, live lobsters at 17 cents per pound, and boiled lobsters at 19 cents per pound, to the extent of five tons per week, from the date of said agreement, to wit, April 2, 1917, to October 15, 1917, to be paid for upon presentation of shipping receipts showing that the goods were received in good order by the transportation company. The agreement contained a clause to the effect that the defendant should have 'the exclusive right to sell these lobsters in California north of parallel 36 degrees north latitude, and in the states of Oregon, Washington and Nevada.' The defendant received certain shipments of these lobsters between April 2 and May 15, 1917, but on or about the latter date refused to order or receive or accept any further shipments of said lobsters or to further comply with his said agreement, to the plaintiff's damage, according to the averments of the complaint, in the sum of $5,579.41. The defendant in his answer, while admitting the making of said agreement, made certain denials as to his refusal to accept said lobsters under said agreement, and also as to the profit which would have accrued to the plaintiff or his assignor as a result of the keeping of said agreement. In addition to these denials the defendant filed an amendment to his answer, in which he affirmatively averred that at the time of entering into said contract the said W. E. Zander represented to defendant that he was the sole agent for a certain fisheries company at San Diego, Cal., of which said company one M. Kondo was the manager, and that said fisheries company would control the entire supply of lobsters which could be shipped into California from Mexican waters during the term of said contract, and that if said defendant would agree to take the number of tons of said lobsters per week from said Zander, during said time, the said Zander or the said fisheries company would supply no lobsters during said period to any other person or persons north of the thirty-sixth parallel, and that the defendant would have the exclusive right to sell such lobsters in the territory named in said contract north of said parallel of latitude. He further alleges that he relied upon said representations in entering into said contract, but that he at no time received or had the exclusive right to sell said lobsters north of said parallel, nor did the said Zander live up to or perform his part of the agreement in that regard, and for that reason said defendant refused to order or receive any lobsters from said Zander after the 15th day of May, 1917."

Upon the issues as thus made up the cause proceeded to trial, and upon such trial plaintiff's assignor, Zander, testified to an agreement between himself and the fisheries company represented by said Kondo, by which Zander was to receive the lobsters, which in turn he was to sell to the defendant. He testified also that so far as he, Kondo, and the fisheries company were concerned, it was understood that during the pendency of the contract Kondo would not ship lobsters into the territory, and consequently they did not, nor did either of them, sell or supply lobsters to any other person than said defendant for delivery or use north of the thirty-sixth parallel of latitude; that he deemed himself obligated not to sell lobsters to any other parties than the defendant in that territory. There was some testimony offered on behalf of the defendant to the effect that the fisheries company violated this understanding. Upon the submission of the cause findings were waived, and the court rendered judgment in plaintiff's favor for the sum of $4,500 and costs. From such judgment the defendant has prosecuted this appeal.

[2, 3] The appellant in his reply brief makes for the first time the contention that the contract, upon which the plaintiff seeks to recover, is illegal and void for the reason that it is such a contract in restraint of trade as would constitute a violation of the terms of the Sherman Anti-Trust Act (U. S. Comp. St. §§ 8820–8823, 8827–8830). The respondent objects to a consideration of the point upon the ground that objection comes too late. But a void contract, a contract against public policy or against the mandate of the statute, may not be made the foundation of any action, either in law or in equity. Santa Clara Mill & Lumber Co. v. Hayes, 76 Cal. 387–390, 18 Pac. 391, 9 Am. St. Rep. 211; Estate of Groome, 94 Cal. 69–72, 29 Pac. 487; Chateau v. Singla, 114 Cal. 91–94, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63. As the appellant comes now into court pleading that he has violated the law, and is seeking relief based upon his own unlawful acts, respondent contends that the court should leave him where it finds him. But neither the silence nor the consent of the parties justifies the court in retaining jurisdiction of such an action. Ball v. Putnam, 123 Cal. 134–140, 55 Pac. 773. Any one sued upon a contract may set up a defense that it is a violation of an act of Congress, and if it is found to be so, that fact will constitute a

good defense to the action. Bement v. National Harrow Co., 186 U. S. 70–88, 22 Sup. Ct. 747, 46 L. Ed. 1058. The burden ordinarily rests upon the party asserting the invalidity of the contract to show how and why it is unlawful (Harbison-Walker Co. v. Stanton, 227 Pa. 55–63, 75 Atl. 988), and, as a general rule, cases will not be reversed upon points which the respondent has not had an opportunity to discuss, but in cases of this kind it matters not that no objection is made by either party. When the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto. Kreamer v. Earl, 91 Cal. 112–118, 27 Pac. 735; Pac. Wharf & Storage Co. v. Dredging Co., 192 Pac. 847. In this case, however, appellant raised the objection as to the invalidity of the contract in his closing brief in the District Court of Appeal, and the point was discussed by both parties to the appeal in the petition and answer on application for hearing in this court.

[4] The contract entered into by the parties to this controversy is contained in two written documents reading as follows:

"San Francisco, April 2, 1917.

"A. Paladini, San Francisco, Cal.—Dear Sir: I agree to deliver to you f. o. b. San Diego live lobsters at seventeen (17) cents per pound, and boiled lobsters at nineteen (19) cents per pound, and will agree to deliver to you up to five tons per week, from date to October 15, 1917, subject to weather conditions and run of lobsters.

"You are to have the exclusive right to sell these lobsters in California north of parallel 36 degrees north latitude, and in the states of Oregon, Washington and Nevada.

"This is contingent upon your agreeing to take at least four tons of lobsters a week from me on these terms. The payments to be made upon presentation to you of shipping receipts showing that goods were received in good order by the transportation company.

"Yours truly, W. E. Zander."

"San Francisco, April 2, 1917.

"W. E. Zander, San Francisco, Cal.—Dear sir: I agree to take from you or your shipper at least four tons of lobsters a week from date to October 15, 1917, in lots of boiled and live lobsters as I shall require, at the price quoted to me in your letter of this date, and on the terms and conditions therein contained. I am to have the exclusive right to sell the lobsters in California north of parallel 36 degrees north latitude, and also in the states of Oregon, Washington and Nevada.

"Yours truly, A. Paladini."

During the year 1917 the defendant was engaged in the fish trade in San Francisco. Part of his business consisted in buying and selling lobsters. At that time, as now, under the fish and game laws of the state the months from March 1st to October 14th constituted a closed season during which no lobsters may be taken in California, or in waters lying south for a distance of 10 miles from the international boundary line between the United States and Mexico, extended westerly in the Pacific Ocean. Pen. Code, § 628. W. E. Zander, plaintiff's assignor, had contracts with fishing companies operating in Mexican water south of the prescribed boundary line. He entered into the foregoing contract with appellant, and supplied the lobsters under its terms until the latter part of May, or first part of June, when the appellant refused to accept any further shipments upon the ground that, according to Zander's testimony, the market was overstocked, and he could not sell them as fast as they were to be delivered under the contract. The evidence for the appellant was that he refused the shipments because Zander refused to stop the fisheries companies from selling lobsters to other persons in his exclusive territory.

Whatever may have been the reason for appellant refusing to go forward in the performance of the agreement, it seems to be conclusively established that in the inception of the transaction it was contemplated by the parties that the contract was one which would result in at least a partial restraint of trade. In that connection it appears that Zander obtained from the companies supplying him the exclusive right to sell lobsters in the northern two-thirds of California and in the states of Oregon, Washington, and Nevada. He testified that under his agreement with appellant he was obligated not to, and did not, sell any lobsters in that territory to any one else than the defendant, and that the fisheries company understood, and were bound by, his contract. The evidence for the appellant is to the same effect, but went further and tended to establish a breach of this agreement on the part of the fisheries companies. The plain terms of the contract itself confirm the intent of the parties to prevent either Zander or the parties supplying him from engaging in the business of selling lobsters to any one but appellant within the specified territory. There can be no escape from the conclusion that, underlying the agreement, and as part of the consideration for the contract, was the purpose of putting it into the power of the appellant to control the lobster market within the limits of the states mentioned, so far as lay within the power of Zander and the fisheries companies, by restraining themselves from exercising their own lawful business of supplying the market generally. The result would tend toward a monopoly of the trade in appellant and a restriction of the trade of the other parties to the contract. We think the contract is illegal, not only as being in violation of the federal statute (Sherman Anti-Trust Law), but also as being contrary to the provisions of our own Code section, which provides that every contract by which one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than relating to exceptions in favor of sales of good will and in favor of partnership arrangements, is to that extent void. Civ. Code, § 1673. This last objection to the contract was not raised by either party, but it suggests itself so logically in relation to the transaction that we have considered it in connection with the point raised by the appellant.

[5] The Sherman Anti-Trust Act, by the first section, declares that—

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is * * * illegal." 26 U. S. Stats. at Large, 209; Fed. Stats. Ann. vol. 7, p. 336; U. S. Comp. Stats. of 1918, Compact Ed. § 8820.

The act was passed for the purpose of protecting trade and commerce among the several states, or with foreign nations, from unlawful restraints and monopolies. An agreement which has some direct and immediate effect upon interstate commerce is within the inhibition of the statute. Standard Oil Co. v. United States, 221 U. S. 1–66, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. It is not essential that the result of the contract should be a complete monopoly in order to vitiate the agreement. It is sufficient if it really tends to that end and deprives the public of the advantages which flow from free competition. United States v. Knight Co., 156 U. S. 1–16, 15 Sup. Ct. 249, 39 L. Ed. 325. The effect of the contract at bar may be well understood in view of the fact that its duration was only for the closed season for lobsters in the state during which the supply for the trade must of necessity come from an outside source. It seems to us to be very plain that the agreement was intended to effect a virtual monopoly of the lobster trade in the central and northern portions of this state, and so far as shipments to Oregon, Washington, and Nevada were concerned. It was therefore within the provisions of the federal act. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211–241, 20 Sup. Ct. 96, 44 L. Ed. 136. So far as our own statute is material, we think argument on the question is concluded by the decision of this court in Santa Clara Mill & Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211, which approved and followed Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 559, 23 Am. Rep. 190. The case had to do with a combination among manufacturers of lumber, limiting the amount to be manufactured, and giving the plaintiff in the action control of the supply for one year within certain territory. The action was one to recover damages for a breach of the agreement. The trial court gave judgment for the defendants. In affirming the judgment this court said:

> "Plaintiff had an undoubted right to purchase any or all of the lumber it chose, and to sell at such prices and places as it saw fit, but when as a condition of purchase it bound its vendor not to sell to others under a penalty, it transcended a rule the adoption of which has been dictated by the experience and wisdom of ages as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade.
>
> "With the results naturally flowing from the laws of demand and supply the courts have nothing to do, but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto."

[6] The desire and the intention of the parties to secure to defendant, so far as possible, a monopoly of the lobster business in the selected territory, and the consequent covenant in restraint of the trade, entered so fundamentally into the inception and consideration for the transaction as to render the terms of the contract nonseverable, and it is wholly void. Santa Clara Mill & Lumber Co. v. Hayes, supra, p. 393; Arnot v. Pittston and Elmira Coal Co., supra; Prost v. More, 40 Cal. 347. Whether or not the defendant obtained what he sought, an entire monopoly of the trade, is immaterial. The statute (Civ. Code § 1673) makes no exception in favor of contracts only in partial restraint of trade. Chamberlain v. Augustine, 172 Cal. 285–288, 156 Pac. 479. That the covenants of the contract are illegal as being in restraint of trade, and against the express mandate of the law of the United States and of this state, we entertain no doubt. Getz Bros. & Co. v. Federal Salt Co., 147 Cal. 115–118, 81 Pac. 416, 109 Am. St. Rep. 114.

[7] The appellant offered to show by parol testimony that, under the terms of the contract, it was meant by the parties to the agreement and was intended that he should have the exclusive right to sell lobsters within the restricted territory; that at the time the contract was made Zander represented to him that the M. Kondo Fisheries Company and M. Kondo would control the entire supply of lobsters which could be shipped into California from Mexican waters, thus assuring appellant the exclusive control and a monopoly of the lobster trade on the Pacific Coast. The court excluded the evidence. Appellant now contends that it was admissible upon the ground: First, under the general rules that ambiguities in written contracts may be explained by parol; and, second, to show that the contract was illegal as being one in restraint of trade. As to the first of

these grounds, the only one assigned in the trial court, we think the evidence was properly excluded. On this point the District Court of Appeal correctly held that—

> The "only exclusive right which the defendant obtained under the terms of this contract was one which was exclusive only so far as it bound the other party to the contract, and possibly also the fisheries company, not to ship or sell lobsters in said territory in competition with the defendant; and, as we have seen, the evidence showed that the contract was kept by the plaintiff's assignor in this regard. The contention of the appellant that the seller of the product bound himself and the company from which he purchased said lobsters to see to it that no other persons whatever shipped or sold lobsters within the specified territory in competition with the appellant would be a strained construction, to which the language of said contract taken in its ordinary signification is not susceptible; and the trial court, therefore, committed no error in refusing to the defendant the right to introduce oral evidence which would have the effect of varying and contradicting the terms of the written agreement."

On the second ground suggested, however, for the first time on this appeal, the evidence was admissible in support of appellant's offer to show that the contract was one in restraint of trade. Buffendeau v. Brooks, 28 Cal. 642; Benicia Agricultural Works v. Estes, 3 Cal. Unrep. Cas. 855, 32 Pac. 938, 940; Daw v. Niles, 104 Cal. 106–118, 37 Pac. 876; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. The rule is thus stated in Williston on Contracts, vol. 3, § 1753, p. 3060:

> "Parol evidence is always competent to show that a written contract, though lawful on its face, was illegal or part of an illegal transaction; and illegality, if serious, need not be pleaded or urged to enable the court to act upon it."

The evidence was not offered for that purpose, and the lower court did not have the point in mind when ruling on its admissibility. Consequently we would not be justified in reversing the judgment on this ground alone, for, as already pointed out, sufficient evidence was presented to show the nature of the contract. The additional testimony offered would merely serve to emphasize the point.

The appellant contends that there is no testimony as to the market value of the lobsters at the time of delivery at San Diego under the contract, and that therefore the evidence is insufficient to support the judgment fixing the amount of damages suffered by the plaintiff. The respondent's first reply to the contention is that the denials in that respect, contained in the answer, are framed in the objectionable form of the negative pregnant which raised no issue. Assuming that to be so, the cause proceeded to trial upon the theory that the issue had been properly tendered, and respondent's objection should not now be considered. The contract called for delivery f. o. b. San Diego. Considerable evidence was presented by the plaintiff as to the cost of lobsters to him during the time the contract was being performed by the appellant, and as to what would have been their cost during the entire term of the agreement had the appellant on his part continued to perform. No objection was offered to this testimony. Under section 3311 of the Civil Code the measure of damages suffered by the respondent was "the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller," and it has been decided by this court that under similar circumstances the value to the plaintiff for the purpose of fulfilling his agreement to sell personal property would be, prima facie, the cost thereof to him. Thompson v. Hamilton Motor Co., 170 Cal. 737–739, 151 Pac. 122, Ann. Cas. 1917A, 677.

The judgment is reversed.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.

(187 Cal. 661)

HOUGHTON v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (S. F. 9951.)

(Supreme Court of California. Jan. 4, 1922.)

Continuance ⚷10—Court may properly continue action pending appeal from judgment pleaded as set-off.

Where the trial of an action involves a consideration of a previous judgment rendered between the parties to the action, which, if final, would be res judicata on some or all of the issues involved in the trial, the trial court, in the exercise of a sound discretion, may continue the trial of the case until a final adjudication of the matter in the other action; and court did not abuse its discretion in granting a continuance in an action on a promissory note, where defendant, by way of set-off, pleaded a joint judgment against the plaintiff in favor of the defendant and a third person for an amount greatly in excess of the balance unpaid on the note, to await the outcome of an appeal from such judgment.

In Bank.

Application by C. S. Houghton for writ of mandate to be directed to the Superior Court in and for the county of Alameda, and Dudley Kinsell, Judge thereof, to require the latter to proceed with the trial of a certain action. Writ denied.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Courtney L. Moore, of San Francisco, for petitioner.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

WILBUR, J. The petitioner seeks a writ of mandamus to require the respondent Dudley Kinsell, judge of the superior court, to proceed with the trial of an action entitled C. S. Houghton v. Franklin A. Kales. That action is one to recover $2,538.60, the balance due upon a promissory note of F. A. Kales for $3,538.60. The defendant Kales, by way of set-off, pleads a joint judgment in favor of F. A. Kales and Jasper S. Connell for $36,230.59, upon which $8,039.38 has been paid. The case came on for trial March 9, 1921. Thereupon counsel announced that they were ready to proceed.

Upon the trial it was stipulated that no part of the promissory note sued upon by the plaintiff had been paid except the sum of $1,000. This stipulation, in the absence of any set-off, would entitle the plaintiff to a judgment for the full amount claimed. Thereupon the defendant offered in evidence the judgment pleaded as a set-off. Plaintiff objected to the introduction of this judgment on the ground that it was not a final judgment, and the court sustained said objection on the ground that an appeal from said judgment was then pending and undetermined. Thereupon the defendant moved for a continuance of the trial, pending the final decision of the case on appeal, upon the ground that the judgment pleaded as a set-off is not final because an appeal is pending therefrom and because the plaintiff objects to the introduction of the judgment or the consideration of it as a set-off while the appeal is pending. The plaintiff objected to the continuance upon the ground that at the time of the filing of the action and at the time of the trial the defendant had no defense and that the court is without jurisdiction to grant the continuance. The lower court thereupon granted the motion and continued the trial until June 6, 1921, at 10 o'clock a. m. On June 6, 1921, and thereafter from time to time, the trial has been continued, over the objection of the plaintiff, pending the determination of the appeal.

The petitioner therefore seeks a writ of mandate to compel the trial court to proceed with the trial and thus enable him to secure a judgment for $2,538.60, together with interest at 6 per cent. from June 21, 1916, against the defendant, who holds a judgment for nearly ten times that much against him. It is obvious that the action of the trial court was in furtherance of justice and the proper exercise of discretion, if authorized by law. The action of the trial court is amply sustained by authority. In the case of Smith v. Jones, 128 Cal. 14, 60 Pac. 466, a petition for writ of mandamus was sought in this court to compel a judge of the superior court to render judgment in an ejectment suit. The defendant in that case pleaded the rendition of a prior judgment between the same parties wherein said defendant was adjudged the owner of the premises; that an appeal had been taken from the judgment and remained undetermined. Upon the trial of that action plaintiffs had offered evidence in support of their complaint and demanded judgment according to the prayer of their complaint, but the defendant asked that the cause be stayed until the judgment pleaded in his answer should become final. The motion was granted, the submission of the case set aside, and all proceedings stayed until the further order of the court. In determining the matter this court in bank said:

> "The jurisdiction of the trial court in a case like the one recited is unquestioned, and the power of the court in a proper case to set aside a submission and postpone final determination is also unquestioned. Many cases may be supposed wherein it would not only be the right of the judge to do so, but it would be his duty in the interest of justice and to promote the substantial rights of the parties. To justify this court in interfering with and controlling the action of the trial courts in proceedings of this nature, it would require a clear showing that the act complained of was an abuse of discretion. In this case no such showing has been made; on the contrary, from an inspection of the petition and the return thereto, it would appear that the order of the court complained of, under the circumstances, was one very proper to be made."

In the case of Brown v. Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314, the court in bank had under consideration an action to recover from trustees a surplus in the hands of such trustees derived from the sale of certain real property and being the balance due after satisfying the indebtedness for which the trust deed was given. The amount was claimed both by plaintiff, the record owner of the property, and by one Priest, who based his claim upon a judgment in an attachment suit against Joseph Brown and the claim that the conveyance from Joseph Brown to A. M. Brown, the plaintiff, of the attached property was in fraud of creditors. Plaintiff, A. M. Brown, pleaded in bar of the right of the defendant Priest a judgment rendered November 24, 1888, in an action wherein Priest was plaintiff and Brown defendant, wherein it was adjudged that the conveyance made by Joseph Brown to A. M. Brown was not made with intent to hinder, delay, or defraud creditors. The defendant pleaded the pendency of that action in abatement. The latter plea was stricken out on plaintiff's motion.

In ruling on the questions thus presented, the court in bank stated:

> "That judgment was not a bar to the matters alleged in the defendant's answer as a defense, nor to the same matters set out in the cross-complaint, and upon which he demanded the re-

lief given him by the court below. It had not become final when the cross-complaint was filed, nor yet when the action was tried, and the doctrine of res adjudicata only applies to final judgments. The time to appeal from the judgment of November 24, 1888, had not expired when the cross-complaint was filed, and, although no appeal had been taken therefrom the action was still pending within the legal meaning of that term (Code Civ. Proc. § 1049), and the judgment was not a bar to a retrial of the matters alleged in the cross-complaint, under the rule announced by this court in Harris v. Barnhart, 97 Cal. 546; Naftzger v. Gregg, 99 Cal. 83; Estate of Blythe, 99 Cal. 472.

"But, while the judgment in Priest v. Brown et al. was not, for the reason stated, a bar to the cause of action alleged in the cross-complaint, still the pendency of that action would have been good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant Priest in his cross-complaint, and the refusal of the court to have granted either of such motions would, perhaps, have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in Priest v. Brown et al. as an estoppel, and as ground for a judgment in his favor. Under these circumstances we cannot say that the court erred in proceeding to the trial, although it might well have continued the case of its own motion until the final determination of the former action."

It will be observed that the judgment in the former action was pleaded by one side as a bar and by the other in abatement. The court proceeded to render final judgment in favor of Priest, who had pleaded the judgment in abatement; consequently the failure to abate the action on his plea was not prejudicial to him, so that the question considered on appeal was the duty of the trial court with reference to the plea of the judgment in bar, and it is suggested that, although the plaintiff did not request a continuance, the court might well have continued the case of its own motion. The same day that the Supreme Court affirmed the judgment in Brown v. Campbell, it also affirmed the judgment in Priest v. Brown, 100 Cal. 626, 35 Pac. 323; thus, in one day affirming a judgment holding that a conveyance from A. M. Brown to Joseph Brown was fraudulent and void (Brown v. Campbell, supra), and a judgment that it was valid (Priest v. Brown, supra). Upon the going down of the remittiturs in these two cases, Brown moved for an order setting aside the judgment and granting a perpetual stay of execution upon the theory that the first judgment rendered, that in the case of Priest v. Brown, supra, should control. The Supreme Court, in department 1, in passing upon this claim (Brown v. Campbell, 110 Cal. 644, 43 Pac. 12), held that because of the failure of the plaintiff Brown to secure a continuance of the case of Brown v. Campbell, supra, and because of preventing Priest from securing a judgment in abatement by having that defense stricken out of his answer, he could not have the relief asked, but was bound by the judgment in Brown v. Campbell, supra.

From the foregoing decisions it is clear that a judgment which would be res adjudicata of matters involved in an action may be availed of during the pendency of an appeal from such judgment, either by a plea in abatement upon proof of which a judgment may be rendered that the action abate (Connor v. Bank of Bakersfield, 174 Cal. 400, 163 Pac. 353), or by a continuance of a second action until the result of the appeal has been determined (Brown v. Campbell, supra, and Smith v. Jones, supra).

The petitioner here relies upon the case of Dunphy v. Belden, 57 Cal. 427. In that case a writ of mandamus was sought to compel the trial of the issues in a case then pending in the superior court. The court there said:

"* * * It appears that the issues awaiting trial in the court below have been formed in a new and independent action, to the complaint in which a plea of the pendency of another actioin has been interposed. It will be observed that it is no part of our duty now to decide whether or not the plea is maintainable."

Upon the authority of Avery v. Superior Court, 57 Cal. 247, it was held that the trial court had no power or discretion to refuse to try the action until the conclusion of the action pending. Justices Thornton and Morrison dissented, saying:

"Certainly the court below is invested with the discretion to postpone the trial of the cause last named until the former appeal is determined in this court, thus saving expense to the parties. If the party appealing should fail to bring on the hearing on this appeal within a reasonable time, the court would and should proceed to hear the cause, and no doubt would do so. The order of the court below merely postpones the hearing of the cause, but it is in the power of the court to order a trial at any time, and no doubt it would do so on a showing of facts indicating such a course to be proper."

It thus appears that the court was divided as to whether it was the duty of the trial court to proceed and determine the plea in abatement, as held by the majority, or whether the case might be continued until the determination of the action thus pleaded in abatement, as held by the minority. The decision of the majority of the court in Dunphy v. Belden, supra, is in effect overruled by the case of Smith v. Jones, supra, decided by the court in bank in March, 1900, for there the action of the trial court in continuing the case rather than rendering a judgment of abatement was approved and a writ of mandamus refused. In any event, we now expressly overrule the case of Dunphy v. Belden, supra, and hold that, where the trial of an action involves the consideration of a previous judgment rendered between the parties to the action, which, if final, would be res adjudicata on some or all of the issues involved in the trial, the trial court, in the exercise of a sound discretion, may continue the trial of the case until the final adjudication of the matter in the other action. It follows that the respondent in this case was justified in its order postponing the trial of the action of Houghton v. Kales until the determination of the former action on appeal, for if the judgment in the former action is affirmed on appeal and is a proper set-off, it would follow that the plaintiff is not entitled to the judgment which he seeks to secure by forcing this action to judgment before that appeal can be determined.

Writ denied.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; RICHARDS, Justice pro tem.

SLOANE, J. I concur in the decision, although I am of the opinion that the trial court was in error in excluding the judgment pleaded by defendant as a set-off and should have admitted it in evidence and proceeded with the trial, since although an appeal had been taken from the judgment, no stay bond had been filed, and, under section 942 of the Code of Civil Procedure, the judgment continued in effect for all purposes of its enforcement, and defendant had a right to use it as a set-off against the plaintiff's claim. Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167; Sewell v. Price, 164 Cal. 265, 128 Pac. 407. However, as it was excluded from evidence upon petitioner's objection that it had not become final, he is not in a position to protest a postponement of the trial to await the determination of the appeal.

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187 Cal. 578

BISINGER v. SACRAMENTO LODGE NO. 6, B. P. O. E. (Sac. 3173.)

(Supreme Court of California. Dec. 19, 1921.)

1. Appeal and error 🔑1170(1)—Elevator operator, allowing injury to occupant, being negligent as matter of law, reversal not permitted for minor errors.

Where a woman tenant, after going to basement to ascertain why water would not run, rang for elevator and on entering it fell, whereby one leg was crushed between cab and floor above on the operator starting the car, evidence *held* to disclose such negligence as rendered defendant liable as a matter of law, whatever the relation of the parties, and the case to be within Const. art. 6, § 4½, forbidding reversal for errors in charge; evidence, pleading, or procedure not resulting in miscarriage of justice.

2. Landlord and tenant 🔑169(11)—Evidence held to show that contributory negligence in stumbling in elevator cab was not proximate cause of injury, and was properly withdrawn from jury.

In a tenant's action against her landlord for injuries sustained in an elevator, through her leg being crushed between the car and the floor above after she had stumbled and fallen to the floor of the cab, where the fall of plaintiff was not as a matter of law the proximate cause of the injury, withdrawal of the issue of contributory negligence from the jury was not error.

3. Damages 🔑132(6) — $28,191.91 held not excessive for injury to leg.

Where a woman sustained a fracture of the left leg and also an injury in the right foot through being crushed between an elevator cab and the floor of defendant's building, so that after two years she was still able to get about only by the use of a wheel chair, and it was agreed that her injuries were total and to some extent permanent, a verdict of $39,975, reduced to $28,191.91 *held* not excessive.

4. Trial 🔑112—Allowing plaintiff to address jury after waiver of argument by defendant held not error.

Where in a personal injury action it was stipulated that the parties should have an hour each in which to present their case to the jury, and where plaintiff had consumed one-half hour in opening, and defendant thereafter waived argument, it was within the discretion of the court to allow plaintiff the remaining half hour in which to address the jury, the court having offered to allow defendant to withdraw its waiver.

5. Evidence 🔑5(2)—Judicial notice not taken that story of person injured was false as involving a physical impossibility.

Where a tenant in defendant's building was injured by having her leg caught between the floor of an elevator cab and the floor above, and claimed that the elevator made several trips up and down, crushing her leg between the car and the floors each time, the court could not take judicial notice that her testimony was false, because the space between the cab and the wall of the shaft was insufficient, and that therefore her story involved a physical impossibility.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Bessie Bisinger against Sacramento Lodge No. 6, Benevolent and Protective Order of Elks, to recover for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Irving D. Gibson and J. W. S. Butler, both of Sacramento, for appellant.

William A. Gett and O. F. Meldon, both of Sacramento, for respondent.

WILBUR, J. The facts are thus stated by the appellant:

"This is an appeal of defendant, Sacramento Lodge No. 6, Benevolent and Protective Order of Elks, from a judgment upon a verdict in favor of plaintiff for damages for personal injuries sustained by her on June 22, 1918, while attempting to enter an elevator in the basement of defendant's building in Sacramento, and alleged to have been received through the negligence of an elevator operator employed by defendant. A jury returned a verdict for $39,975, but afterward, upon an order of the trial court that unless the sum of $11,783.09 be remitted from the judgment, a new trial would be granted on the sole ground that the verdict was excessive, plaintiff by stipulation remitted that amount. As reduced by stipulation the actual amount of the judgment, from which this appeal was taken, is therefore $28,191.91.

"Statement of Facts.

"At the time of her injury plaintiff was a tenant of 24 rooms on the third and fourth floors of a building owned by defendant and known as the Elks' Building. Plaintiff had become such tenant by assignment of a written lease made by defendant to one Mrs. M. Brown on May 31, 1911. The term of the lease had expired prior to plaintiff's injury, but plaintiff continued to hold over, and occupied the premises under the same tenancy, and was in such occupancy at the time of her injury.

"Defendant gave its written consent to the assignment of the lease to plaintiff and coincidentally with the assignment of the lease, on January 6, 1915, Mrs. Brown, the predecessor of plaintiff, executed to her a bill of sale of 'all the furniture and household goods contained in those twenty-four (24) rooms and halls connected therewith' described in the original lease. The bill of sale makes reference to the lease 'for the purpose of description and location of the rooms and building where the said furniture and household goods are situated.' Afterward, on February 24, 1916, plaintiff also executed to defendant, as security for her performance of the lease, a chattel mortgage embracing 'all of the upholstery, furniture and household goods,' etc., contained in the 24 rooms on the third and fourth floors of defendant's building, 'during the continuance of that certain lease agreement * * * for those certain premises consisting of the 24 rooms on the third and fourth floors of the said Elks' Building, which is hereinbefore particularly described. * * *'

"The building in which plaintiff was tenant and where she was injured consists of four floors and a basement, or, including the roof, a portion of which is used by defendant for its own purposes, five floors. An ordinary passenger elevator and shaft runs from the basement to the roof. The first or ground floor is occupied by stores and the lobby or entrance to the upper floors. The lodge and clubrooms of defendant occupy the whole of the second floor. The third and fourth floors consist of offices and rooms rented to various tenants, including plaintiff. Practically the only use of the elevator is to carry persons from the entrance or lobby of the building on the first or ground floor to the upper floors. The elevator, however, can be taken to the basement floor of the building. There is a light well in the center of the building over a part of the rooms on the fourth floor included in plaintiff's tenancy.

"Plaintiff was injured about 7 o'clock in the evening, as she was attempting to enter the elevator from the basement floor, after she had gone to the basement of her own accord and for her own purpose to satisfy her curiosity as to the reason that water would not run on the roof. Plaintiff testified that her maid had previously gone up on the roof to sprinkle the roof and the light well from a hose attached to a faucet on the roof, for the purpose of cooling the rooms occupied by her tenants on the fourth floor. Having been informed by the maid that the water would not run from the hose, plaintiff telephoned to one Ward, defendant's janitor, who was then alone in the clubroom of defendant on the second floor, concerning the failure of the water to run on the roof, and asked him to see to it. Ward responded that he could not do so just at that time, as he was alone, but that he would see to it later, as soon as some one came to relieve him. Plaintiff then asked Ward the location of the faucet or valve in the basement connected with the water pipe that ran to the roof, and went herself to the basement in the elevator, examined the faucet, and in attempting to enter the elevator from the basement on her return tripped on the edge of the floor of the elevator, fell and was injured, plaintiff alleges, through the negligence of the elevator operator.

"According to the testimony of her surgeon, plaintiff sustained a severe crush of the left leg, above the ankle, with a compound fracture of the tibia."

The respondent, in stating the facts, adds the following:

"In order to reach the basement, respondent signaled for the elevator, and was carried therein to the basement floor; the elevator being at the time under the control of, and operated by, an employee of appellant. After respondent had completed her mission she returned to the point where the elevator could be taken on return to her own apartments in the building on the fourth floor thereof. The usual means of ingress and egress to and from the elevator, and device for signaling the elevator, were provided for at the basement floor.

"Respondent signaled for the elevator; in other words, respondent rang the bell provided for the purpose, in response to which the elevator was brought to the basement. The operator stopped the elevator some distance above the floor, and then, after lowering it some more, opened the door for respondent to enter. According to plaintiff's version of what then happened, the operator, just as respondent stepped into the elevator, started it suddenly upwards, throwing respondent off her balance and causing her to fall upon the floor of the elevator with her left foot extending beyond the edge of the elevator floor. The elevator continuing in its ascent, respondent's left foot was caught between the floor of the elevator and the casing of the first floor of the building, crushing and breaking the tibia and fibula of respondent's left leg just above the ankle. The operator then ran the elevator up to the fourth floor and back to the basement several times, the respondent still lying upon the floor, unable to rise, suffering intense pain and her foot hanging by the skin and stretched tendons under the floor of the elevator. Upon one of these obviously needless and uncalled for passages of the elevator up and down the elevator shaft, respondent, in her agony, changed her position, and her right foot was also caught, as the left had been, and the toes thereof were crushed and broken."

The only dispute in the testimony is as to the manner in which plaintiff was thrown to the floor. Plaintiff testified that after she entered the elevator it started with a sudden jerk, which threw her to the floor in a sitting posture, with her left foot extending beyond the edge of the elevator. The elevator man, J. W. Allen, testified that he had stopped the elevator slightly above the basement floor, and that plaintiff started to step in the elevator just as he started to lower, and that plaintiff caught her foot under the elevator floor and stumbled into the elevator with her foot extending beyond the edge; that he saw her lying on the floor of the elevator with her foot extending beyond the edge of the elevator. The testimony of the elevator man was given by deposition, and, acting under the instruction of defendant's counsel, he refused to answer all questions as to what occurred thereafter. The only evidence as to what occurred in the elevator after she was on the floor with her foot extending over the edge of the elevator is that of the plaintiff, who testified as above stated, and that, after her leg was broken, the operator continued up to the fourth floor and returned to the basement, went from the basement to the third floor and back and from the basement to the second floor twice, and then finally stopped the elevator while it was between the first and second floors. According to plaintiff's testimony, each time they passed a floor her leg was struck in such fashion that she suffered great agony. This occurred about 23 times. During this entire period she was crying in agony and begging and beseeching the operator to stop the elevator.

[1] We have stated the facts somewhat fully because of the constitutional provision which prohibits us from reversing the case unless there has been a miscarriage of justice. In view of the fact that it can be said as a matter of law from these facts that the elevator operator was guilty of negligence, and that the defendant was liable for such negligence, whatever her relation to the defendant may have been, many questions raised by the defendant and appellant are immaterial. The appellant claims that the complaint does not state a cause of action because it does not allege the relation of passenger and carrier; that the court erred in denying defendant's motion for a nonsuit; that plaintiff had no right by virtue of her tenancy to go to or from the basement in the elevator; that plaintiff's failure to show she was a "passenger" is fatal to her cause of action; that plaintiff was a trespasser, and only entitled not to be wantonly injured; that plaintiff failed to show permission to use the elevator; that the instructions that plaintiff was a "passenger" and entitled to the highest degree of care were erroneous; that the use of the basement by consent or acquiescence made plaintiff a licensee only; that if plaintiff was not a trespasser she was a mere licensee, and defendant was required to use only ordinary care toward her; that the defendant owed only ordinary care for the further reason that it was a carrier without reward; that the issue as to plaintiff's right to be in the elevator was withdrawn from the jury by the instructions; that whether plaintiff was a passenger was a question of fact for a jury, and was made an issue by the pleadings; that the court erroneously refused to instruct that unless plaintiff's right to be in the basement was shown she could not recover; that the jury were erroneously instructed that plaintiff could recover even if guilty of contributory negligence; that the attempted instructions as to last clear chance failed to embrace all the elements, and were erroneous; that the last clear chance rule was not applicable to complaint or evidence; that the instruction as to measure of damages was erroneous; that the court erred in admitting evidence of statements by plaintiff's predecessor and of conversations between plaintiff's predecessor and the janitor of defendant; that the court erred in permitting plaintiff to testify as to the present use of the basement and elevator; that the court erred in permitting a former janitor of defendant to testify concerning the use of the basement; that the court erred in refusing to permit the secretary of defendant to be asked whether plaintiff had any permission to go to the basement to attend to the water supply; that it was error to admit evidence of loss of profits from farming certain lands; that the court erred in stating that it would instruct the jury as to facts proven; and that it was reversible error to permit plaintiff's counsel to make a second argument to the jury after defendant had waived its argument.

In view of the constitutional rule (art. 6, sec. 4½) that "no judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," the case cannot be reversed for these reasons.

All the errors complained of relate to the right of the plaintiff to recover for the injury which she suffered, and, in view of the fact that she was invited to enter the elevator and accepted the invitation to enter therein and was thereafter injured by the negligent management of the elevator by the employee of the defendant, who knew that she was lying helplessly in a position which must necessarily have resulted in her injury if the elevator was moved before she had an opportunity to withdraw her foot from a position of danger, it is unnecessary to consider in detail the points made by the defendant, for it is clear that there has been no miscarriage of justice in holding the defendant liable for plaintiff's injuries.

[2] The defendant claims that certain instructions given by the court to the jury withdrew the defense of contributory negligence from their consideration. Defendant had pleaded that the plaintiff was guilty of contributory negligence in that she entered the elevator while it was in motion. The only evidence in that regard is the evidence of the elevator man that he had stopped the elevator a short distance above the floor of the basement, and that just as she was stepping in he lowered the elevator and her foot caught under the floor of the elevator, so that she stumbled into the elevator. Assuming that this evidence is true, neither her entry into the elevator while it was in motion, if it was, nor her fall, was the proximate cause of the injury. The injury was caused by plaintiff's leg coming in contact with the floors of the building above the point where she stumbled, and resulted, not from the descent of the elevator at the time she stumbled, but the ascending of the elevator after she was lying upon the floor of the elevator. It can be said as a matter of law that the fall of the plaintiff into the elevator was not the proximate cause of the injury. Therefore, even if the instructions complained of had the effect asserted by counsel of withdrawing the issue of contributory negligence from the jury, they were not erroneous.

The other questions raised by the appellant relate to the measure and amount of damages.

At the time of the trial, more than two years after the time of the accident, the plaintiff was still able to get about only by the use of a wheel chair. She was unable to bear her weight upon her left leg, and suffered some pain when she bore her weight upon her right leg. The physicians who testified in the case agreed that for the time being that her injuries were total, and were to some extent permanent. The witnesses agreed that, in the absence of an operation to correct the disability, she would not be able to put her left heel to the floor. The physician called by the defendant testified that, while she would suffer some permanent limitation of the functions of the left foot and ankle, such defects could be so far cured by an operation that the total disability of the left leg would be less than 10 per cent.—that is to say, she would ultimately recover more than 90 per cent. of the function of the limb. On the other hand, the plaintiff's physician testified that the limb was permanently injured and it was impossible to tell how long it would be before she would be able to walk upon the limb, but that she might at some time be able to walk with the aid of a cane. The jury were at liberty to accept the testimony most favorable to the plaintiff, and evidently did so.

[3] It is claimed that the judgment is excessive. The rule on that subject on appeal is thus stated in Hale v. San Bernardino, etc., Co., 156 Cal. 713, 715, 106 Pac. 83, 84:

> "The amount of damages in such cases is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.'"

We cannot say that the verdict is excessive as a matter of law.

[4] It had been stipulated that both parties could have an hour in which to present their case to the jury. After plaintiff had closed its opening argument, the defendant waived its argument, and the court permitted the plaintiff to further argue to the jury. This is claimed to be error. The plaintiff had evidently planned to have Mr. Meldon open and Mr. Gett close the argument, each to take one-half hour, and was undoubtedly surprised by the defendant waiving argument. The plaintiff thereupon requested that William A. Gett be permitted to address the jury for one-half hour. The court thereupon stated that he would grant the request, and offered to allow the defendant to withdraw its waiver of argument and to proceed with its argument for one hour, in accordance with the stipulation, if defendant desired to do so. After consultation, defendant's counsel declined to argue the case, contenting themselves with an objection to the plaintiff's further argument. The court, over defendant's objection, thereupon permitted plaintiff's counsel to argue the case further to the jury. If, after stipulating that each side should have an hour for argument before the jury, the defendant, without previous notice to the plaintiff, waives argument, and thus takes the plaintiff by surprise, the court, in the exercise of a sound discretion, should allow the plaintiff what-

ever argument to the jury is necessary in order to overcome the effect of the surprise. And, similarly, should allow the defendant whatever argument was necessary in order to prevent any prejudicial result flowing from the fact that it waived argument before it knew that the court would permit further argument by plaintiff. This was done in this case. The ruling of the court was not erroneous, but proper.

[5] In the appellant's reply brief we are asked to take judicial notice that an elevator is fitted so closely into the shaft as to leave practically no space between the edge of the floor and the wall of the shaft, and that it was a physical impossibility to run the elevator to the top story and back again, as described by plaintiff, because there was barely room enough for clearance of the elevator itself. Appellant states:

> "Plaintiff's recital of the accident was manifestly not only grossly exaggerated, but actually untrue, as it is clear that her injury must have occurred through her limb striking the ceiling of the basement. These embellishments were obviously added by her for the purpose of arousing the prejudice and sympathy of the jury."

As no punitive damages were asked or allowed, the question of how many times the elevator was moved up and down is immaterial except as it indicates the amount of suffering inflicted upon the plaintiff and the degree of negligence of the elevator man, and the truth or falsity of the plaintiff's testimony was to be determined by the jury. We cannot take judicial notice that it was false.

Judgment affirmed.

We concur: SHAW, C. J.; WASTE, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.

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55 Cal. App. 502

MILLER et ux. v. FERGUSON et al.
(Civ. 4047.)

(District Court of Appeal, First District, Division 2, California. Dec. 2, 1921.)

1. Fraud 🔑44 — Complaint by husband and wife for deceit held not to charge duress in procuring her signature.

In an action by a husband and wife for damages for deceit in an exchange of land, a complaint which does not allege that she was confined by anybody is insufficient to show that she signed the contract under duress as defined by Civ. Code, § 1569, subd. 3.

2. Fraud 🔑44—Complaint held not to allege undue influence in procuring wife's signature.

In an action by a husband and wife for deceit in the exchange of land, allegations that one of the defendants and the plaintiff husband annoyed and oppressed the wife until she signed the contract without knowing its contents is insufficient to show undue influence in obtaining the wife's signature, especially since the charge would rest against the husband, who was not being sued by the wife.

3. Fraud 🔑44—Allegations of conspiracy add nothing to complaint for deceit.

In a complaint against defendants for deceit in the exchange of lands, allegations of conspiracy by the defendants do not add strength to the complaint, since a conspiracy gives no right of action, unless it results in damage to the plaintiff.

4. Fraud 🔑20 — Complaint held not to show reliance on representations as to value.

A complaint, alleging that defendants misrepresented the value of the property which they conveyed to plaintiffs in exchange for plaintiffs' property, but which showed that one of the plaintiffs had examined the property before signing the contract, does not show reliance by plaintiffs on the alleged misrepresentations as to value, especially where the contract claimed an express provision that the parties had examined the respective properties, and that defendants were released from all responsibilities regarding valuation of the same and representations of any nature.

5. Evidence 🔑10(6)—Court takes judicial notice of distance between two cities in different counties.

The court takes judicial notice that the distance between El Centro in Imperial county and Venice in Los Angeles county is short.

6. Fraud 🔑9—Contract by vendor disclosing want of title not fraudulent.

A complaint for deceit in the exchange of lands, which alleged that the defendant, who agreed to convey the property to plaintiff, did not own it at the time, and that defendants represented the title was in another one of the defendants, does not show fraudulent misrepresentations, but rather a statement of the fact as to the title to avoid the charge of fraud.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by O. N. Miller and wife against J. M. Ferguson and others for damages for deceit. Judgment for the defendants on sustaining demurrer to the complaint, and plaintiffs appeal. Affirmed.

Robt. G. Hill, of El Centro, for appellants.

Conkling & Brown, of El Centro, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to recover damages for alleged deceit. The defendants appeared and demurred, the demurrer was sustained, and the plaintiffs declining and neglecting to amend, judgment was entered in favor of the defendants. The plaintiffs have appealed under section 953a, Code of Civil Procedure.

[1-3] In their complaint the plaintiffs allege

that O. N. Miller, the husband, signed an agreement to exchange lands, and they set forth the agreement; that Margaret Miller, the wife, later signed a paper agreeing to the terms of the paper signed by her husband; that the lands of the plaintiffs are located in Imperial county, and that the other lands are located at Venice in Los Angeles county; that the defendants represented that the latter properties were worth $35,000; that said representations were false; that defendants represented that said lands were owned by J. E. Combs, and so read the written paper to O. N. Miller; that Margaret Miller learned that said lands were owned by Ira N. Combs; that O. N. Miller had had confidential relations with the defendants Delozier and Colvin, and therefore acted on their representations as to value; that Margaret Miller signed under the following circumstances:

> "That the said Colvin and O. N. Miller, her husband, and coplaintiff herein, annoyed her, and persisted throughout the said day on her signing the same, and finally, under the influence of being harassed and oppressed, she signed the said writing, approving the said contract without ever having seen it or knowing the contents thereof, and that the same was signed under duress."

The plaintiffs further allege that at the time the exchange agreement was executed the defendant Ferguson did not own the property at Venice in Los Angeles county, and that the value of the property at Venice is $16,000, and no more; that before signing the agreement O. N. Miller went to the property at Venice to examine it; that plaintiffs believed all of the representations of the defendants, and acted thereon. The appellants have filed a brief; the respondents have not filed a brief. As we understand the appellants, they contend that their complaint shows actual damages and exemplary damages which they are entitled to recover; that fraud was practiced upon them, and they are entitled to rescind; that they are the victims of a fraudulent conspiracy; and that the wife signed acting under duress and undue influence. It is not necessary to discuss the contention regarding damages because, if the appellants are entitled to relief, it is not necessary to determine the amount thereof at this time. The complaint does not allege that Margaret Miller was confined by anybody, hence the complaint may not stand on the theory of duress as defined by subdivision 3 of section 1569 of the Civil Code. The averments regarding the inducement to obtain the signature of Margaret Miller do not show undue influence. In re Langford, 108 Cal. 608, 622, 623, 41 Pac. 701. Furthermore, even though it did, the charge would rest against O. N. Miller, but the wife is not suing her husband at this time. The allegations on the subject of conspiracy neither add to nor detract from the strength of the case made on behalf of the appellant. In Bowman v. Wohlke, 166 Cal. 121, at page 124, 135 Pac. 37, 39 (Ann. Cas. 1915B, 1011), the court quotes from an earlier California case as follows:

> "A simple conspiracy, however atrocious, unless it results in actual damage to the party, never was the subject of a civil action; and though such conspiracy is charged, the averment is immaterial and need not be proved. Where two or more are sued for a wrong done, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it, and if alleged it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done."

[4, 5] The actionable fraud on which the appellants rely is that the defendants represented the value of the property at Venice to be $35,000, whereas its value was $16,000. The court will take judicial notice that the distance between El Centro in Imperial county and Venice in Los Angeles county is short. The appellants alleged that before signing the agreement in question, O. N. Miller went to Venice to examine the property which he was to receive in exchange. Under these circumstances, without any other fact entering into the controversy, the representation as to value was the expression of an opinion which the appellants did not rely on and it is not sufficient to support their cause of action. Hackelman v. Lyman, 195 Pac. 263. Furthermore, the agreement was signed by O. N. Miller on May 15, 1919; it was signed by the defendant Ferguson on May 26, 1919. It is not alleged that Ferguson was present when the alleged false representation was made. It is consonant with appellants' pleading that the representation, if any, was made by the other alleged conspirators during the existence of the conspiracy and in this connection it is important to note that the written instrument contains the following provision:

> "It is presumed and understood that all principals to this agreement have investigated the respective properties and J. G. Delozier and B. E. Colvin is hereby released from all responsibility regarding valuation of same, and representations of any nature."

[6] The appellants rely in some way upon the fact that Ferguson did not own the property at Venice at the time that the agreement was executed. They allege, nevertheless, "that the defendants represented to the plaintiff O. N. Miller, before the signing of the said contract, that one J. Ellsworth Combs owned the said property to be exchanged for plaintiffs' property." If the last fact occurred as it is alleged, the very nature of the act seems to negative rather than to sustain anything in the nature of fraud. It is not alleged that O. N. Miller can neither read nor write; it is not alleged that he did not read the paper

before he signed it, nor is there an allegation to the effect that he signed it in the dark, nor that he was prevented by any one of the defendants from reading it. In the face of these facts appellants' complaint is not made any stronger by inserting "that the defendants prepared the said written contract and read it to the said Miller, in the name of the said Combs, and not in the name of the defendant J. M. Ferguson." Under these circumstances, we think the instant case is controlled by Brimmer v. Salisbury, 167 Cal. 522, 530, 140 Pac. 30, 34, where the court says:

> "* * * Where the dealings between the parties are open-handed and where, as is the general rule, the vendee is charged with the duty of acquiring his own knowledge of the condition of the vendor's title, such contracts will be enforced upon the theory that the vendee contracted with his eyes open and contracted not in the belief that the vendor did have title, but in the expectation that he would be able to make title."

In other words, under the facts as pleaded, the respondent Ferguson was agreeing to deliver to the appellants title to a certain piece of property for a certain price, at a certain time, but in advance he was stating to the appellants that he was not the then owner of the property. Instead of being a fraud, this act was in the nature of taking due precaution to prevent fraud being charged against the respondent.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(55 Cal. App. 391)

LEE et al. v. UNITED STATES FIRE INS. CO. et al. (Civ. 2368.)

(District Court of Appeal, Third District, California. Nov. 26, 1921.)

1. Money lent 🔑1—Promise to repay implied.

The law implies a promise to repay borrowed money.

2. Mortgages 🔑298(4)—Obligation to reconvey land deeded as security merely upon payment of debt.

Where land is conveyed as security for a loan, the law imposes an obligation to reconvey upon payment of the indebtedness secured in view of Civ. Code, § 2941.

3. Appeal and error 🔑1011(1) — Mortgages 🔑38(2)—Deed must be clearly shown to be a mortgage; province of trial court to determine on conflicting evidence whether deed is shown to be mortgage.

Clear and convincing evidence is required to show that a deed is a mortgage, but where there is a substantial conflict it is primarily for the trial court to determine whether the evidence in favor of claim of mortgage is clear and convincing.

4. Mortgages 🔑38(1)—Finding that deed was mortgage sustained.

Evidence *held* to support a finding that a deed absolute on its face was a mortgage merely.

5. Insurance 🔑328(7)—Where right to reconveyance retained, there is no change of title.

An absolute deed was not a "change of title" avoiding insurance policy by the fact that the grantor authorized the grantee to sell and pay the owner's indebtedness to the grantee and on a prior mortgage, and, if there was any proceeds left, give it to the grantor's wife, since such authorization was not irrevocable before a sale by the grantee.

6. Insurance 🔑282(2)—Equitable title compliance with condition that insured must have sole and unconditional ownership.

An equitable title in the insured is a sufficient compliance with a condition of the policy avoiding it if insured's interest is other than sole and unconditional ownership.

7. Insurance 🔑328(7)—Deed constituting a mortgage merely held not to avoid policy.

That insured has conveyed property covered by a fire policy under absolute deed does not avoid the policy on the ground that insured has relinquished sole and unconditional ownership, where the deed is a mortgage merely, and only creates a lien incident to the secured debt.

8. Insurance 🔑558(2)—Failure to make proof of loss no bar to recovery where prevented by insurer.

Where insurer's agents prevented insured from making proof of loss, failure to make such proof did not bar a recovery under the policy.

9. Insurance 🔑559(1)—Denial of liability on another ground held waiver of proof of loss.

Denial by insurer of all liability under the policy because of alleged change of ownership, made prior to the expiration of time to make proof of loss, is a waiver of the policy condition requiring such proof.

10. Insurance 🔑556(2)—Adjuster may waive proof of loss.

Notwithstanding policy provision that no representative of the company "shall have power to waive any provision or condition of this policy," an insurance adjuster had authority to waive proof of loss.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by J. F. Lee and others against the United States Fire Insurance Company and another to compel conveyance of real property. Judgment for plaintiffs, and defendants appeal. Affirmed.

Miller, Thornton, Miller & Watt, of San Francisco, for appellants.

Lamberson & Lamberson, of Visalia, for respondents.

FINCH, P. J. Judgment was rendered requiring the defendant United States Fire Insurance Company to convey certain real property to plaintiff C. W. Carey upon payment by the latter of the indebtedness found to be due the company from Carey.

The company issued its policy to Carey, insuring the dwelling house on the property against loss by fire in the sum of $2,000. At that time the property was incumbered by a trust deed securing the payment to Charlotte E. Miot of an indebtedness due her from Carey of $2,500. The policy made the loss, if any, payable to Mrs. Miot as her interest might appear, and provided that, as to her, the insurance should not be invalidated by any act or neglect of Carey. After the issuance of the policy Carey and his wife deeded the property to plaintiff J. F. Lee. Thereafter the dwelling house was totally destroyed by fire. Mrs. Miot made proof of loss, and the company paid her the full amount of the insurance and took an assignment from her of the trust deed and the indebtedness secured thereby to the extent of $2,000, and later paid her the remainder due her from Carey, and took an assignment of the whole indebtedness. The company then demanded of Carey the payment of the whole indebtedness which the trust deed was given to secure, and, on his failure to make payment thereof, caused the trustee to give notice of sale of the property. Thereupon the plaintiffs commenced this action, and caused summons to be duly served upon defendants. After such service the trustee sold the property to the company for the sum of $3,220.50, the whole amount of the original indebtedness with interest, costs, and attorney fees. The court gave judgment requiring the company to convey the property to Carey upon his payment of the amount due under the trust deed, after crediting him with the $2,000 for which the dwelling house was insured. The court found that Carey did not offer to pay the company the amount so found due prior to suit, but that such an offer would have been unavailing.

Appellants contend that—

> By the deed from Carey to Lee "there was a change in the title and interest of the insured in violation of the provisions of its policy, which precluded him from making any recovery thereon."

The policy provided that—

> "This entire policy shall be void * * * if the interest of the insured be other than unconditional and sole ownership."

Respondents meet this contention with the claim that the deed was given to Lee only as security for money loaned by him to Carey. Lee testified:

> "Mr. Carey was sick a couple of years * * * and he had to have an operation performed on him, and he had to be sent to San Francisco to the hospital, and he didn't have any money, and he deeded this land to me in lieu, as security, and if I had a show to sell the land, I was to sell it and pay Mrs. Miot, the mortgagor, and myself, and if there was any left after that, why I was to give it to his wife," and that he loaned the money to Carey.

The Careys kept possession of the property, and had the full use and control thereof. Carey testified to the same effect as Lee, and further:

> "I never made any note because I had been in the habit of getting money from him any time I wanted it; I never did give him a note for security, and I told him I would, being they had raised me since I was three years old, and I guess they figured they didn't need a note"; that he always did business with them "that way; * * * any time I needed any money, I always went over and got it"; that Mrs. Lee is his aunt.

[1-4] There is no evidence that Carey expressly promised to repay Lee the money loaned him, but the law implies such a promise. Couts v. Winston, 153 Cal. 688, 96 Pac. 357; Todd v. Todd, 164 Cal. 258, 128 Pac. 413. Neither does the evidence show a direct promise by Lee to reconvey to Carey, but the law imposes such obligation upon payment of the indebtedness secured by the deed. Civ. Code, § 2941. There is no conflict in the evidence other than such inferences as may be drawn from the facts stated and the additional facts that revenue stamps to the value of $1.50 were attached to the deed, such stamps not being required on a mortgage, and the statement of Carey, hereinafter considered, that he had deeded the property to Lee. Clear and convincing evidence is required to show that the deed is not what it purports to be, but "where there is a substantial conflict, it is primarily for the trial court to determine whether the evidence in favor of the claim of mortgage is clear and convincing." Todd v. Todd, supra. It cannot be said that the trial court was not justified in concluding that the deed was intended as a mortgage.

[5, 6] Appellants urge that, even if the deed was intended as a mortgage, Carey had parted with all dominion over the property by his authorization to Lee to sell and deliver the net proceeds to Mrs. Carey. Such authorization, however, was not irrevocable, and Carey retained the right, on payment of the indebtedness to Lee before a sale by the latter—and no such sale was in fact made or attempted—to a reconveyance of the property.

> "The clause of the policy providing that it shall be void if the insured's interest is other than sole and unconditional ownership, * * *

is designed to remove from him the temptation to profit by the willful destruction of property not entirely owned by him. * * * 'It therefore follows that the clause is in most cases held to refer to the character and quality of the title—to the actual and substantial ownership, rather than to the strictly legal title.' * * * An equitable title in the insured is a sufficient compliance with the condition in question." McCollough v. Home Ins. Co., 155 Cal. 662, 102 Pac. 815, 18 Ann. Cas. 862; Raulet v. Northwestern, etc., Ins. Co., 157 Cal. 213, 107 Pac. 292; Ramirez v. United Fireman's Ins. Co., 189 Pac. 309.

[7] Since the deed to Lee was intended as a mortgage it transferred no interest in the land, but created a lien only "which was an incident of the secured debt." Anglo-California Bank v. Cerf, 147 Cal. 389, 81 Pac. 1077; Chapman v. Hicks, 41 Cal. App. 158, 182 Pac. 336.

[8] Carey did not make proof of loss, and it is urged that by such failure he lost all right of recovery under the policy. The court found that he "was prevented from making such proof of loss by the special agent of the said insurance company who had the adjustment of such loss in his hands and by Fred D. Steele, the local agent" thereof. Steele testified that proofs of loss were made out by Mr. Reddling, the adjuster of the company, and, as Carey "was going to sign the proofs of loss," Reddling "asked him if he was the sole owner of the property, and he said no, he wasn't, hadn't owned it for something like a year or year and a half." Reddling testified to like effect, and that he then said to Carey that he had no further use for him, and put the prepared proofs in his pocket. Carey testified:

> "I started to explain to them just the situation of the case. I am no attorney or anything, and I didn't know just how it should be, and I started to explain the case to them, about it, and he just threw up his hands, and said they didn't owe me or Lee anything in the case. * * * He says, 'I have those proofs here for you to sign.' Then I says, 'Well, now I better go get my uncle, as he is interested in this proposition;' and he says, 'In what way is he interested in it?' * * * And so I started to explain how it was; * * * told him that I had given my uncle a deed to the property. * * * I thought they were interested in it, and in fact I didn't get it, go through with the talk, because when I told him that, he threw up his hands and says, 'Well, * * * we don't owe you or Mr. Lee'—something to that effect—'any insurance.'"

The testimony is sufficient to support the finding that Carey was prevented from making proof of loss by the company's agents.

[9] The statement of Reddling, together with the subsequent acts of the company, was a denial of all liability on other grounds than failure to furnish such proofs. Before the expiration of the 60 days allowed Carey in which to furnish such proof, the company took an assignment from Mrs. Miot, subrogating it to her rights under the trust deed to the extent of $2,000. The instrument recited that the policy of insurance provides that it "shall be void * * * if the interest of the insured be other than unconditional and sole ownership"; that Carey had conveyed the property to Lee, and that the company claimed that, by reason of such conveyance, "as to the said C. W. Carey and/or J. F. Lee no liability therefor exists." The company had no right to subrogation under the policy except upon its "claim that, as to the mortgagor or owner, no liability therefor existed." Its act in taking the assignment of the trust deed was in itself a denial of liability to Carey. At the trial and on this appeal the company has continued to deny all liability to Carey because of his deed to Lee. The denial of such liability prior to the expiration of the time to make proof of loss is a waiver of the condition of the policy requiring such proof. Farnum v. Phœnix Ins. Co., 83 Cal. 263, 23 Pac. 869, 17 Am. St. Rep. 233; Royal Ins. Co. v. Martin, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385.

[10] Appellants contend that under the provisions of the policy to the effect that no representative of the company "shall have power to waive any provision or condition of this policy" the adjuster was without authority to waive proof of loss. The cases are all to the contrary. McCollough v. Home Ins. Co., 155 Cal. 663, 102 Pac. 814, 18 Ann. Cas. 862; J. Frank Co. v. New Amsterdam C. Co., 175 Cal. 293, 165 Pac. 927; Ramirez v. United Fireman's Ins. Co., 189 Pac. 309.

The court admitted evidence to the effect that after the fire Carey made an agreement to sell the property. The testimony was apparently offered for the purpose of showing acts of ownership by Carey. Whether properly admitted or not, the evidence was of slight importance. The uncontradicted evidence, independent of that to which objection is made, shows that, at all times after the execution of the deed to Lee, Carey had the full possession, use, and control of the property. The evidence in dispute could show no more.

There is no suggestion of bad faith or wrongful conduct on the part of the plaintiffs, and the defense interposed is purely technical and wholly without support in natural justice.

The judgment is affirmed.

We concur: **BURNETT, J.**; **HART, J.**

(55 Cal. App. 511)

Ex parte KNIGHT. (Cr. 594.)

(District Court of Appeal, Third District, California. Dec. 3, 1921.)

1. Counties ⊂⊃55—County ordinance on prohibition enforcement held not to apply within limits of municipality.

A municipality and a county are separate government entities, and each being supreme within its own territorial limits, the operative force of a county ordinance which involves the exercise of police powers directly granted to cities, towns, and counties by Const. art. 11, § 11, cannot be so extended as to apply to persons violating within the limits of a municipality the provisions of a prohibition enforcement ordinance.

2. Municipal corporations ⊂⊃55—Municipality organized within territory of county withdrawn from county control on all matters cognizable by municipal authorities.

When a municipality is organized within the boundaries of a county, the territory embraced within the limits of such municipality is withdrawn from the legislative control of the county as to all subjects which the charter of such municipality declares shall be cognizable by authorities of the municipality.

3. Municipal corporations ⊂⊃592(2)—If not conflicting with state law, municipality may make penal an act already penal by state law.

A municipal corporation has the power to make penal an act already made penal by state law, so long as the ordinance does not conflict with state law, and when this is done the act becomes a separate offense against the state and municipality.

4. Habeas corpus ⊂⊃29—Writ granted for arrest on county ordinance for act within municipality in county.

An arrest under Prohibition Ordinance No. 307, county of Butte, for an act committed within the limits of the city of Oroville, is illegal, and accused will be released on writ of habeas corpus.

Application by Eugene Knight for a writ of habeas corpus to secure release of petitioner from custody on a charge of violation of prohibition enforcement ordinance. Writ granted.

J. A. McGregor and George F. Jones, both of Oroville, for petitioner.

J. R. Robinson, of Chico, for respondent.

HART, J. The petitioner is held in custody by the sheriff of Butte county upon an order made by a justice of the peace of said county, sitting as a committing magistrate, holding him to trial in the superior court of said county for the violation of Ordinance No. 307, passed and adopted by the board of supervisors of said county of Butte on the 2d day of August, 1921. The avowed purpose of said Ordinance No. 307 is the enforcement of the Eighteenth Amendment to the federal Constitution, prohibiting the sale, manufacture, transportation, etc., of alcoholic liquors within the limits of said county. Section 2 of said ordinance provides:

> "All acts or omissions prohibited or declared unlawful by said Eighteenth Amendment, or by the said Volstead Act, are hereby prohibited and declared unlawful; and any such act or omission is hereby declared to be a violation of this ordinance and is hereby made a misdemeanor. Any such violation of this ordinance is punishable by a fine of not more than $600, or imprisonment in the county jail for not more than seven months, or by both such fine and imprisonment. All fines collected under this ordinance shall be paid into the county treasury."

The specific charge against the defendant is that he sold intoxicating liquor within the limits of the county of Butte. It is admitted, however, that the offense of which the petitioner is accused was committed, if at all, within the limits of the city of Oroville, which is a municipal corporation organized as such under the municipal corporation act of 1883 (St. 1883, p. 93), and is of the fifth class. And it was also admitted that the city of Oroville had passed several ordinances regulating the traffic in intoxicating liquors. These ordinances were, at the oral argument, introduced as a part of the record in this proceeding. The first of said ordinances required the payment of a license of $50 per month for engaging in the sale of alcoholic liquors, and contained a number of provisions prescribing certain conditions upon which the license would be issued. The second ordinance merely restricted the business of retailing alcoholic liquors within a certain described district within the city of Oroville, making it unlawful for any person to engage in that business in any other portion of said city. The third was an initiative ordinance submitting to the electors of the city of Oroville the question whether it should become the local law of that municipality, and which limited the number of licenses to be granted for retail liquor establishments to not to exceed 3 until the population of said city should be at least 5,000 in number and an additional license to be allowed and issued for each 1,000 increase in population, etc. The last-mentioned ordinance, having been ratified by the electors, of course superseded the preceding ordinances referred to above.

[1] The petitioner contends that his restraint by the sheriff of Butte county is illegal, for the reason that the order of the magistrate upon the authority of which said sheriff claims the legal right to hold him was beyond the power or jurisdiction of the magistrate to make, and is therefore absolutely void. The basis of the contention is

that, a municipality and a county being separate and distinct governmental entities or agencies, and, within the scope of its powers, each being supreme within its own territorial limits, the operative force of an ordinance enacted by the governing board of the latter and which involves the exercise of any of the police powers directly granted to cities, towns, and counties by the Constitution (Const. art. 11, § 11), cannot be so extended as to affect or apply to persons violating within the limits of a municipality the provisions of such ordinance.

There can be no doubt that, under the decisions, the position of the petitioner is sound and must be sustained. A reference to some of the cases in which the precise question here was considered and decided and a quotation or two from the decisions therein will be sufficient to confirm this statement.

In Ex parte Roach, 104 Cal. 272, 37 Pac. 1044, the petitioner was held by the sheriff of Kings county under a warrant of arrest issued by a justice of the peace of said county charging him with having sold at his saloon in the city of Hanford intoxicating liquors, in violation of an ordinance of the board of supervisors of said county. The city of Hanford was then a municipal corporation of the sixth class, having been organized under the municipal government act of 1883, and had, prior to the time at which the petitioner was alleged to have violated the county ordinance, passed an ordinance providing for the issuance of licenses for the sale of intoxicating liquors. The petitioner had received from the city of Hanford a license to carry on the business of retailing liquors within that city, which license was in force at the time of his arrest. It was contended by the petitioner in that case, as it is contended by the petitioner here, that his arrest under the county ordinance was illegal because the supervisors of the county of Kings were without any police power within the city of Hanford; "that the ordinance passed by that body under which he was arrested is limited in its operation to those portions of the county not included within the boundaries of any municipality therein." After quoting in the opinion section 11 of article 11 of the Constitution and referring thereto, the court says:

> "The power to make these regulations is by this section conferred upon the city as well as upon the county, and must be held to be equally authoritative in each. It is a portion of the lawmaking power which the people through their Constitution have conferred upon these respective bodies, and its exercise is entitled to the same consideration and to receive the same obedience as that portion of the same power which by the same instrument has been conferred upon the Legislature. The regulations made under this authority are none the less a part of the law because the authority to make them is conferred immediately by the Constitution, than if it had been conferred mediately through an act of the Legislature. The only limitation upon the exercise of the power is that the regulations to be made under it shall not be 'in conflict with general laws.' As this limitation applies equally to regulations of the county and the city, it cannot be held by the terms of the limitation that the regulation of either of these bodies is a general law for the other, and it is held that an ordinance passed by a county is not a 'general law' within the meaning of this section of the Constitution. Ex parte Campbell, 74 Cal. 25, 5 Am. St. Rep. 418."

Again, in the same case, the court makes these further pertinent observations:

> "It is not to be supposed that it was the intention of the people through their Constitution to authorize a county to exercise the same power within the territory of the city as the city itself could exercise, or to confer upon the county the right to interfere with or impair the effect of similar legislation by the city itself. Mr. Dillon says (1 Dillon on Municipal Corporations, § 184): 'There cannot be at the same time within the same territory two distinct municipal corporations exercising the same powers, jurisdictions, and privileges.' *Full effect can be given to the section by holding that each has been given the exclusive right of legislation within its own particular boundaries. By the organization of a city within the boundaries of a county the territory thus organized is withdrawn from the legislative control of the county upon the designated subjects, and is placed under the legislative control of its own council; and the principle of local government which pervades the entire instrument is convincive of the intention to withdraw the city from the control of the county* [italics ours], and to deprive the county of any power to annul or supersede the regulations of the city upon the subjects which have been confided to its control."

Ex parte Mansfield, 106 Cal. 400,[1] and Ex parte Pfirrmann, 134 Cal. 143, 66 Pac. 205, refer to Ex parte Roach, supra, and expressly approve and affirm the doctrine of that case. In the Pfirrmann Case the petitioner was charged with violating an ordinance of the county of Los Angeles requiring a liquor license of $15 per month to be taken out by persons engaging in the retail liquor business. He was a resident of the city of Los Angeles, and his liquor business was conducted therein and he paid the license demanded by the ordinance of said city for carrying on such a business. The court in that case said:

> "Whether or not the license fee or tax demanded by the county of Los Angeles under its ordinance be considered a fee or tax for revenue or for regulation of the business, is an immaterial matter; for, by virtue of the provisions of an act of the Legislature (Stats. 1901, p. 635), a county has no power to demand a license fee or tax, either for purposes of revenue or regulation, from persons carrying

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[1] 39 Pac. 775.

on business within the limits of municipalities. Among other matters, that act provides: 'Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions.'

"Prior to the passage of the aforesaid act, it may be stated that the law was settled to the effect that within municipalities a board of supervisors had no power to enact police and sanitary measures, and therefore had no power therein to impose a license fee or tax for the purpose of regulating the liquor business, or any other business. In the absence of some direct and explicit constitutional provision, this court would not declare the existence of such a power; for difficulties and confusion arising from a clash of jurisdictions would be the only result to follow, if both the county and the municipality possessed the power of enacting police and sanitary measures within the confines of a municipality."

[2] It will be observed that in the cases to which we have just referred, and from which we have taken the above excerpts, there existed in the municipalities involved therein at the time of the proceedings against the petitioners ordinances regulating the retail liquor traffic within the limits of those municipalities. In the present case there were also municipal ordinances existing in the city of Oroville, purporting to regulate the business of selling intoxicating liquors by retail, which, however, were enacted long before the adoption into the federal Constitution of the Eighteenth Amendment. Whether the effect of the said amendment to the federal Constitution, as the same is interpreted by the Volstead Act (41 Stat. 305), was to nullify the force of these ordinances, is a question which it is not necessary for us to consider herein, for the reason that, as the decisions above referred to clearly show, when a municipality is organized within the boundaries of a county, the territory embraced within the limits of such municipal corporation is withdrawn from the legislative control of the county as to all the subjects which the charter of such municipality declares shall be cognizable by the governing board or other authorities of such municipal corporation. Since, therefore, a municipality is a distinct governmental entity, entirely independent of the county as such, and is, consequently, subject to no local legislation which it is within the power of the governing board of the county to enact, it is wholly immaterial whether or not the municipal authorities exercise or put into operative effect all the powers conferred upon it by its charter and the Constitution. The county, in brief, has no legal right to legislate for a municipality located within its limits upon any subject which is within the scope of the powers granted to the municipality, and particularly upon any matters involving the police power of the state.

[3] Counsel for respondent cites many authorities (28 Cyc. 696, and cases from other jurisdictions), which he insists support the theory, vigorously pressed in resistance to the position of the petitioner, that an ordinance by the supervisors of a county dealing with subjects as to which a municipality is empowered to enact prohibitory or regulatory ordinances cover and effect the entire county, and so may be enforced as against penal acts in violation thereof committed within the limits of such municipality. These cases need not be named herein. It is sufficient to say that they all agree that a municipal corporation has the power to make penal an act which has already been made so by a state law, so long as there is nothing in the ordinance making the act penal in conflict with a general law of the state, and that, when this is done, such act becomes a separate offense against the state and the municipality; and, "in that case, the penalty imposed by the municipality is superadded to that fixed by the general law on account of the additional wrong done to it, and the wrongdoer is not twice punished for the same offense." Van Buren v. Wells, etc., 53 Ark. 368, 14 S. W. 38, 22 Am. St. Rep. 214; City of Kansas City v. Grubel, 57 Kan. 436, 46 Pac. 714. We have no dissent from that rule to suggest; but it does not, in its application, involve an analogous situation to the one presented here. As is said in Ex parte Roach, supra, citing Ex parte Campbell, 74 Cal. 25, 15 Pac. 318, 5 Am. St. Rep. 418:

> "An ordinance passed by a county is not a 'general law' within the meaning of this section [section 11, art. 11] of the Constitution."

Moreover, as the cases above cited declare, when a municipal corporation is organized within the limits of a county, then so much of the territory of such county as is comprehended within the municipal limits of such corporation is, so far as local government is concerned, withdrawn from the county, and any ordinances passed by the latter can have no binding or any force upon the municipality as to any matters or subjects as to which the latter is vested with the power to enact prohibitory or regulatory local laws.

[4] Our conclusion is that the petitioner, having committed the act for which he is now being restrained of his liberty within the limits of the city of Oroville, is not subject to prosecution under Ordinance No. 307 of the county of Butte, and that his restraint is therefore illegal.

Accordingly, the writ is granted, and the petitioner is discharged from the custody of the sheriff of Butte county.

We concur: **BURNETT, J.; FINCH, P. J.**

55 Cal. App. 405

CONTINENTAL NAT. BANK OF LOS ANGELES v. DOYLE. (Civ. 4043.)

(District Court of Appeal, First District, Division 2, California. Nov. 28, 1921. Hearing Denied by Supreme Court Jan. 26, 1922.)

1. Parties 🔑7(2)—Plaintiff held proper party to maintain action on note.

Where stockholders of bank, in order to avoid an involuntary assessment, subscribed certain amounts to be paid trustees to purchase from the bank securities which bank examiner had directed it to dispose of, and where stockholder gave note for amount subscribed to the bank for which the bank gave trustees credit on price of securities which the bank thereafter delivered to the trustees, the bank was the legal holder of the note, and the only proper party to maintain an action thereon.

2. Appeal and error 🔑174 — Objection that plaintiff was not a proper party to sue on note must be first appeal raised in answer.

In action on note, defendant cannot claim on appeal that plaintiff was not a proper party to maintain the action, where such defense was not raised in the answer.

3. Bills and notes 🔑92(8)—Note held based on good consideration.

Where stockholders of a bank, to avoid an involuntary assessment, subscribed certain amounts to be paid trustees to enable them to purchase securities from the bank that bank examiner had directed the bank to dispose of, note for amount subscribed, executed by a stockholder to the bank, for which the bank gave the trustees credit on price of securities thereafter delivered to the trustees, *held* based on a good consideration.

4. Contracts 🔑227—Stockholder by payment of subscription after expiration of specified period waived condition requiring payment by other subscribers during such period.

Where stockholders of bank, to avoid involuntary assessment pursuant to agreement, subscribed certain amounts to trustees to enable them to purchase securities from bank which bank examiner had directed bank to dispose of, and such agreement provided that money paid was to be refunded unless holders of specified number of shares paid subscribed amounts within 10 days from date of agreement, a stockholder, who gave note for amount subscribed after 10 days to the bank, for which bank gave trustees credit on price of securities, thereafter delivered to trustees, waived condition requiring payments in cash rather than through notes of the other parties to the transaction.

5. Bills and notes 🔑98 — Beneficiary under trust could not avoid payment of note for which bank gave trustees credit on ground of failure of consideration.

Where stockholders of bank to avoid involuntary assessment subscribed certain amounts to be paid to trustees to enable trustees to purchase securities from bank which bank examiner had directed bank to dispose of, a stockholder could not set up failure of consideration to avoid payment of note to bank for amount subscribed, for which bank gave trustees credit on purchase price of securities thereafter delivered by bank to the trustees, since, being a beneficiary under the trust, he could not retain the full consideration for which the note was executed and at the same time say that there was a failure of consideration.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Continental National Bank of Los Angeles, a corporation, against Boyd W. Doyle. Judgment for plaintiff, and defendant appeals. Affirmed.

Ray E. Nimmo and M. M. Starr, of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued on a promissory note executed by defendant and delivered to the bank in payment of defendant's pro rata of a subscription agreement whereby defendant undertook to pay to trustees named therein a sum equal to the face of the note. The agreement was drawn at the instance of stockholders of the plaintiff bank. of which defendant was one, for the purpose of enabling the trustees to purchase from the bank certain collateral which the bank examiner had directed the bank to dispose of. A voluntary subscription was agreed to in order to avoid an involuntary assessment by the bank upon its stockholders. Among other things, the subscribers agreed to pay to the trustees therein named $30 per share on the stock owned by each for the purpose of enabling said trustees to purchase the assets and securities from said bank. The trustees were also authorized to collect said assets and securities as rapidly as possible, and reimburse the subscribers for the sums advanced by them for the purpose of said purchase. The money was to be immediately refunded unless the holders of at least 2,500 shares paid said amounts within 10 days from the date of the agreement, which was the 5th day of December, 1918. Two thousand five hundred and three shares subscribed to the agreement, and the subscriptions were paid in cash, checks, or notes. The cash and checks were thereupon turned over to the trustees, and the notes were taken up by the bank, which in turn credited the trustees therefor as so much cash and accepted them at their face value. Upon the full credit thus given to the trustees the assets and securities were delivered to them by the bank according to the arrangement made with the subscribers. Defendant was one of those who gave his note in payment of his subscription. The bank assumed the note, the trustees gave him credit for payment of his subscription in full, and the bank collected from him three regular interest payments in accordance with the terms of

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the note. This note was dated January 3, 1919, which was some 19 days after the expiration of the time set in the contract for the payment of the subscriptions. It is admitted that 2,500 shares had not paid in cash within the 10 days from the date of the agreement, but it is not disputed that at some time more than that number had paid in the manner herein outlined, and that the bank had actually transferred the assets and securities to the trustees, who held them for the benefit of the subscribers. From the fact that the defendant executed and delivered his note some time after the expiration of the period set in the subscription contract, it is argued that he waived that condition. In this connection it is argued that at the time of the execution and delivery of the note defendant was fully informed of all the circumstances, and knew that his note was being taken in lieu of a cash payment to the trustees, and the bank was giving him full credit therefor, and that a number of other subscribers were making payment in the same manner. It is also argued that he knew, or had every reason to know, that the full 2,500 shares had not paid their pro rata in cash within the 10-day period. The trial court found that all the allegations of the complaint were true, and that the allegations of the answer were untrue, and these findings are sustained by ample evidence.

[1, 2] The appeal is brought up under the new method without any assignment of error, and it is difficult to understand upon what grounds appellant relies for reversal. It is argued that the respondent is not a proper party to maintain this action, but the respondent is the payee named in the note. It was the present holder thereof, and gave the credit to the trustees whereby the appellant met his subscription and became a beneficiary under the trust agreement. From this transaction the respondent delivered the securities to the trustees, and thereby became both the legal and beneficial holder of the note. Respondent was therefore not only the proper party, but the only party, to maintain the action. Furthermore, if this was a defense to the action, it should have been raised in the answer, and this was not done.

[3-5] It is also argued that there was a failure of consideration for the note. In this connection it seems to be appellant's contention that the consideration failed because all subscriptions were not paid in cash to the trustees before December 15th. But it is admitted that, notwithstanding this condition of the agreement, the trustees obtained the securities for which the subscriptions were made, and held the same for the benefit of the subscribers, of which appellant is one. It is admitted that this was the consideration for which the note was executed. How, therefore, can there be a failure of consideration if the maker of the note obtains the full consideration which was agreed to? Furthermore, the subscription agreement having been made for the purpose of purchasing the securities, and this purpose having been effected by the transactions above outlined, it is apparent that when appellant executed his note after the 10-day period had expired, he either waived that condition in full or waived so much of it as required the payment in cash rather than through the note transactions in which he participated. In any event, being a beneficiary under the trust, he cannot retain the full consideration for which the note was executed and at the same time say that there is a failure of consideration for the note. Other points argued do not require consideration. There is no merit in the appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

55 Cal. App. 42

PEOPLE v. CLARK. (Cr. 978.)

(District Court of Appeal, First District, Division 2, California. Nov. 2, 1921. Rehearing Denied Nov. 26, 1921. Hearing Denied by Supreme Court Dec. 29, 1921.)

1. Criminal law 🔑520(2)—Statements by police held to amount to inducement making confession inadmissible.

Where a prisoner is denied the benefit of counsel, and is repeatedly assured by the police officers and matrons that they are her friends, and will do nothing to harm her, and is brought to a weak physical and mental condition by long-sustained examination, without food or other nourishment, the statement by one of those in authority that it is the best thing for her to tell the truth, must give the impression that, by telling the truth, those who professed to be her friends would aid her in getting lighter punishment, and the confession so obtained is inadmissible.

2. Criminal law 🔑406(3), 516—Evasive explanations held admissions, not confessions.

Evidence of statements of wife, accused of murder of husband, which were evasive explanations of how her husband met his death, is admissible without a showing that they were voluntary, because they are merely "admissions" and not "confessions."

3. Witnesses 🔑204(2)—Life history written by accused, confidentially delivered to counsel, held inadmissible.

In prosecution of wife for murder of husband, the state should not have been permitted to demand production of and introduce in evidence a life history of the accused, which was delivered as a confidential communication to her counsel, and used by a physician to make a professional examination of her, and to testify as to her sanity, being introduced for no other purpose than to show that accused had lived a life of depravity and immorality from early childhood, and not for the purpose of contradicting the witness.

4. Homicide ⚷163(1), 166(1)—Letters written to accused admissible to show motive, but not loose character of accused.

In a prosecution of a wife for murder of her husband, letters written by and addressed to the accused would be admissible if they showed a motive for the crime, but are not admissible where they merely tend to place accused before the jury as a woman of loose moral character, who has led an immoral life.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Virginia P. Clark was convicted of murder in the second degree, and appeals. Reversed, and new trial ordered in the District Court of Appeal, and hearing denied in Supreme Court.

C. A. A. McGee, of Oakland, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., Ezra W. Decoto, Dist. Atty., and Frank M. Shay, Deputy Dist. Atty., both of Oakland, for the People.

NOURSE, J. Defendant was convicted of murder in the second degree, and appeals from the judgment and from the order denying her motion for a new trial.

The defendant and deceased had intermarried on the 25th of March, 1920, through the aid of a matrimonial correspondence bureau. They lived together in apparent harmony until August 14, 1920, when they went with friends to a public dance, returning to their home at about 1 a. m. They retired to their bed, and at about 5 o'clock of the morning of the 15th several shots were heard by a neighbor, accompanied by the voice of defendant, crying, "Daddy, Daddy, what have you done?" The defendant went to the bedroom window and called her neighbor, Mrs. Brown, who immediately came to the apartment. She found defendant telephoning for a physician, and, in going to the bedroom, found deceased lying upon the bed, and close by him, also lying on the bed, was an automatic pistol. The deceased did not recover consciousness, and died while being taken to the hospital. Subsequent examination disclosed that he had been shot four times, once in the head, once in the chest, once in the abdomen, and once in the left hand. Defendant stoutly maintained that deceased had himself fired the shots, but on the same day she was placed under arrest, and, covering a period of two weeks, subjected to several severe and grueling examinations by the police culminating in a signed confession on the 1st of September. The autopsy surgeon testified that from his examination of the nature and location of the wounds he believed that they had not been self-inflicted, but defendant's answers to questions during these examinations and the signed confession of September 1st are the only evidence offered by the prosecution directly implicating her in the commission of the crime.

Her story of the shooting as given in the statement prepared by the police and signed by her is as follows:

> "On the evening of August 15, 1920, my husband, Chester J. Clark, and I came home at 1 a. m., and went to bed about 2 a. m. We laid in bed and talked until 3 a. m. * * * We had a long session of sexual intercourse, and he remained on top of me so long he wore me out, and I gently pushed him off. He resented it, and grabbed me and hugged me, and bit me on the lip and on the breast and on the side and on the thigh, and I got mad and tried to get away from him, but I could not, as he got uncontrollable."

She then stated that her husband attempted to commit the crime now denounced by section 288a of the Penal Code, as added by St. 1915, p. 1022; that she resisted, and finally called him a name which caused him to desist. Her statement follows:

> "I don't think I said another word, but reached under his pillow and got the gun, and I was on top of him and began to shoot. * * * He or I did not sleep that night at all. * * * I want to say, and it is God's truth, that I had no intention of harming my husband when we went to bed on the morning of August 15, 1920, in any manner, shape, or form, and I would not have harmed him if he did not do what he did. The thought of killing my husband never entered my mind, but I automatically shot him when I realized the nasty position he was in. * * * The whole thing happened so suddenly it is hard for me to describe it in detail."

Appellant makes several assignments of error, and these will be considered in the order assigned:

[1] (1) That the alleged admissions and confessions were improperly admitted because not free and voluntary, and because obtained by unlawful and improper methods. The showing made by appellant in support of her objection to the admission of this evidence was that for a period of more than two weeks the appellant was subjected to almost daily cross-examination by from two to four police officers, who, by "mental suggestion composed of cajolery, flattery, assurances of good will and friendship, interspersed with brutal browbeating accusations, indirect threats, and misrepresentation of facts," and without advising her of her constitutional rights or permitting her to have the benefit of counsel, were able to dominate and control the mind of appellant when she was in a state of physical and mental help-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

lessness. It is conceded by appellant that no specific promises of reward were made, but it is argued that the frequent assurances of the police matron that "she [the defendant] would feel better if she told the truth," and that "I said that was the best thing for her to do; to tell the truth," bring the case within the rule of People v. Barric, 49 Cal. 342, 345, People v. Gonzales, 136 Cal. 666, 668, 69 Pac. 487, and People v. Thompson, 84 Cal. 598, 606, 24 Pac. 384. When a prisoner is told by one in authority that it will be better for him to make a full disclosure, or that it will be better to tell the truth, the confession so obtained is not voluntary, and is inadmissible. Such assurances are not of the same class as mere exhortations to tell the truth, or the statement to the prisoner that the truth would not hurt him. These statements, unaccompanied by words of inducement, do not render the confession inadmissible. But where, in a case such as this, a prisoner is denied the benefit of counsel, and is repeatedly assured by the police officers and matrons that they are her friends, and will do nothing to harm her, and is brought to a weak physical and mental condition by long-sustained examination without food or other nourishment, the statement by one of those in authority that it is the best thing for her to tell the truth could not help but give her the impression that by telling the truth regarding the homicide those who professed to be her friends would aid her in getting a lighter punishment.

In addition to this, it is apparent from the testimony of the witnesses for the state that the relentless sweating process to which the appellant was subjected was such as to render her statements involuntary. She was put through a course of cross-examination continuing over a period of two weeks when she was in such a low physical and mental condition that she had to be assisted by matrons into the examination room, with her head covered with wet towels to keep her in a condition to answer the questions. These examinations lasted for hours, at a time during which time appellant was denied food or other nourishment. It is significant that throughout the hundreds of pages of testimony on this phase of the case there is no word suggesting that at any time she made any voluntary statement regarding the homicide. On the contrary, while a witness on the stand, she testified that the statements to the police were involuntary. She also retracted all admissions of guilt contained in those statements, and insisted that she was not responsible for the killing of her husband. The case comes squarely within the rule announced in People v. Loper, 159 Cal. 6, 17, 112 Pac. 720, Ann. Cas. 1912B, 1193; People v. Borello, 161 Cal. 367, 119 Pac. 500, 37 L. R. A. (N. S.) 434; People v. Quan Gim Gow, 23 Cal. App. 507, 512, 138 Pac. 918.

[2] In this phase of the case both appellant and respondent treat all the statements of the accused as confessions and as such subject to the same rule. In the early stages of her examination appellant denied the shooting, and gave evasive explanations of how her husband met his death. Evidence of statements of that character is admissible without showing they were voluntary because they are merely "admissions" and not "confessions." People v. Fowler, 178 Cal. 657, 664, 174 Pac. 892; People v. Clifton, 198 Pac. 1065; People v. Peete, 202 Pac. 51. What has been said in regard to appellant's first point is therefore to be limited to the evidence of her statements in which she acknowledged her guilt. These having been offered as confessions, the rule clearly applies. Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568.

[3] (2) That the trial court erred in requiring appellant's witness to deliver to the district attorney the written story of appellant's life, and in admitting the same in evidence. While appellant was confined in the county jail awaiting trial she wrote a detailed story of her life, from early childhood until the time of her arrest, and delivered it as a confidential communication to one of her counsel. He in turn handed it to Dr. Ball, who had been summoned by appellant to make a professional examination of her and to testify as to her sanity. When the doctor was called as a witness he testified that appellant was insane, and that in reaching such conclusion he had taken into consideration the life history of appellant, "beginning with her family history of heredity, which shows an alcoholic and degenerate father, and a history of insanity on her mother's side, her uncle and aunt being insane, * * * her father's mother having been evidently a degenerate type, and her father's brother an alcoholic and degenerate also, and the fact that her brothers and sisters gave evidence of a nervous condition and at least epileptic form convulsion from her description to me; * * * that subsequently in her life she developed a disease called syphilis * * * from her (former) husband." Upon cross-examination the district attorney demanded the production of the written life story, and thereafter, over the strenuous objection of appellant, offered it in evidence and read it in full to the jury. The demand was made on the theory that the document was necessary to enable the prosecution to cross-examine the witness, and the offer of the document in evidence was made, not for the purpose of contradicting the witness, but manifestly for the purpose of degrading the appellant, and of exhibiting her to the jury as a low, depraved and immoral person.

The introduction of this document cannot be defended upon any legal principle. The only defense attempted by respondent is that appellant herself was responsible for its introduction, but this finds no support in the record. As said in People v. Dye, 75 Cal. 108, 112, 16 Pac. 537, 540:

> "It is contrary to the first principles of justice to try a man for one crime and convict him of that, because he may be guilty of another, or because he may be a low speciman of humanity."

To the same effect are People v. Arlington, 123 Cal. 356, 357, 55 Pac. 1003; People v. Wallace, 89 Cal. 158, 162, 26 Pac. 650; People v. Mohr, 157 Cal. 732, 735, 109 Pac. 476; People v. Whiteman, 114 Cal. 338, 343, 46 Pac. 99.

It is hardly necessary to point out that the admission of this life story, depicting as it did a life of depravity and immorality from early childhood, was prejudicial to appellant's case. That it was introduced for that purpose is evidenced by the fact that the district attorney, in his address to the jury, referred to the facts therein related as evidence that appellant was a low and depraved character, and relied upon these facts as proving his theory of the case. To add to the injury, the trial court refused appellant's request to instruct the jury to disregard these statements of the district attorney, and also refused her requested instruction that this life history should be considered by the jury in so far only as it related to the question of the sanity or insanity of appellant.

[4] (3) That the court erred in permitting the introduction of postal cards and letters written by and addressed to appellant. In this connection it is argued that the correspondence between appellant and various men in the East did not tend to show any motive for the killing, but merely tended to place appellant before the jury as a woman of loose moral character. In many respects appellant is correct in this. It would serve no purpose to analyze this voluminous correspondence. Of course, it is the settled rule that a correspondence carried on between one accused and a third party is admissible when it tends to establish defendant's motive in taking the life of deceased. People v. Le Doux, 155 Cal. 535, 548, 102 Pac. 517; People v. Soeder, 150 Cal. 12, 15, 87 Pac. 1016. But, where the correspondence has no possible bearing on the question of motive, but is offered merely to show that the defendant has led an immoral life, the admission of such part of the correspondence is error.

It is also argued that this entire correspondence was inadmissible because it had been seized by the police officers by entering into the premises where appellant resided and taking them without a search warrant, in violation of the constitutional guaranty of the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Const. Cal. art. 1, § 19; Const. U. S. Amend. 4. It is also argued that in producing these private papers in evidence the state violated the guaranty of the Fifth Amendment to the federal Constitution that one accused of crime should not be compelled to be a witness against himself. In support of the argument, Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Weeks v. U. S. 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and similar federal authorities are cited. To these might be added the recent decision of Gouled v. U. S. (Feb. 28, 1921), 255 U. S. 298, 41 Sup. Ct. 261, 66 L. Ed. ——. In the recent case of People v. Mayen, 35 Cal. App. Dec. 442, the District Court of Appeal followed the rule of these cases. But the Supreme Court granted a hearing in that case and the matter is now pending before it for decision. For this reason the question should await the determination of the Supreme Court.

As the case must be reversed for the reasons given, it is unnecessary to discuss the other assignments made.

The judgment and order denying a new trial are reversed, and a new trial ordered.

We concur: LANGDON, P. J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition of the respondent for a rehearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 2, is denied.

We deem it necessary to say in explanation of this order that we do not understand the opinion of the District Court to hold that none of the postal cards and letters addressed to and written by the defendant, and which were introduced in evidence on the former trial, was admissible in evidence. On the contrary, we understand it to mean that no part of the correspondence is admissible in evidence except such letters written by or received by the defendant as may tend to prove that the defendant had some motive for the commission of the crime with which she is charged. The question whether such letters tend to prove motive depends, of course, on the contents thereof.

SHAW, C. J., SHURTLEFF, WASTE, SLOANE, and WILBUR, JJ., and RICHARDS, Justice pro tem., concur.

LENNON, J., deeming himself disqualified, does not participate herein.

55 Cal. App. 401

PORTER v. UNITED STATES FIDELITY & GUARANTY CO. et al. (Civ. 4046.)

(District Court of Appeal, First District, Division 2, California. Nov. 28, 1921. Hearing Denied by Supreme Court Jan. 26, 1922.)

Descent and distribution 🔑129—Mortgages 🔑309(3)—Quitclaim deeds erroneously releasing deeds of trust, held void; refusal to cancel deed of trust on application of heir held proper.

Where an appellant against whom a judgment had been rendered executed deed of trust to indemnify surety on appeal bond, and trustees named in deed of trust gave appellant's administrator a quitclaim deed to the land to enable administrator to execute a first mortgage in place of existing mortgage which had fallen due, and took a new deed of trust, approved by the probate court, and the trustees later executed another quitclaim deed to enable administrator to procure another loan, and took another deed of trust, also approved by the probate court, trial court's refusal to cancel the first deed of trust on application of appellant's heir *held* proper, since it was beyond the power of the probate court to authorize a trust deed; and the quitclaim deeds were so much a part of the transaction that the consideration thereof failed, leaving original trust deed good.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Gertrude Porter against the United States Fidelity & Guaranty Company, a corporation, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Robert J. Adcock, of Los Angeles, and C. S. Preston, of San Diego, for appellant.

Lawler & Degnan, of Los Angeles, for respondents.

NOURSE, J. Plaintiff commenced this suit in equity to quiet title to certain real property, to require defendants to give up a certain trust deed which they held upon said property, and to restrain them from asserting any claim thereto. The record is presented upon the judgment roll alone. It shows that findings of fact and conclusions of law were signed by the trial judge and filed on the 22d day of July, 1920, and that on the same day judgment in favor of defendants was duly entered. It also appears that on August 24, 1920, other findings were signed and filed by the same judge at the request of plaintiff, and that a judgment similar in effect to that already entered was then signed and filed. No proceedings had been taken to set aside the judgment of July 22, 1920, and what is said herein relating to the findings of the trial court refers to the findings of fact bearing date July 22, 1920.

It appears that a judgment in the sum of $10,000 and costs was entered against one William E. McPherson in his lifetime, and that to procure a stay of execution pending his appeal said McPherson induced the surety company to execute a surety bond. To indemnify the surety company against loss the said McPherson conveyed to the individual defendants in trust for the purposes of such indemnity the lot of land which is the subject of this suit. The title to the property was then vested in McPherson, free of all liens except a mortgage of $5,000. Pending the appeal to the Supreme Court from that judgment McPherson died, leaving as his heirs a daughter, the plaintiff in this case, and a son. The latter was appointed administrator of the estate, and in the course of his administration was met with a demand by the owner of the mortgage for the payment thereof. The estate was without funds sufficient to pay the mortgage, and, in order to save it from loss, the administrator arranged for a new mortgage for a like amount, but to accomplish this it was necessary to procure a release of the estate granted by the deed of trust in order that the new mortgage should be a prior lien. For this purpose the defendants were persuaded to execute a quitclaim deed, releasing their lien under their deed of trust, and, as a part of the same transaction, received from the administrator a new deed of trust, which he was authorized to execute by order of the probate court. Some time thereafter the estate became involved in further financial trouble, and desired to raise an additional sum of $3,000. The holder of the mortgage above mentioned expressed a willingness to advance such additional sum, provided that he be given a first lien for the full amount of his loan. For this purpose the administrator again approached the defendants, and requested them to reconvey the estate granted to them under the deed of trust, in order to enable him to raise the funds necessary for the protection of said estate. A quitclaim deed was again executed, a new mortgage for $3,000 was placed on record, and thereafter a new deed of trust was executed by the administrator for the benefit of these defendants. In both instances before the administrator executed these deeds of trust he obtained an order of the probate court authorizing him to do so. Such order was made on a petition filed for that purpose, of which presumably all interested parties had notice. Thereafter the judgment appealed from by McPherson was affirmed by the Supreme Court, and, the administrator of the estate and this plaintiff having refused defendants' demand for payment, the full amount of the judgment and costs was paid by the defendants. When the second deed of trust above referred to was executed this plaintiff and her brother, as the sole heirs of William E. McPherson, held the title to the premises in question. Prior to the execution and delivery of the third deed of trust the brother transferred his interest to plaintiff.

The trial court concluded that, while the proceedings directing the execution of the deeds of trust were regular and for the benefit of the estate, the orders of the probate court were ineffective, for the reason that that court was without authority to authorize the execution of a deed of trust or any form of security other than a mortgage; that the quitclaim deeds executed by defendants constituted a part of the same transaction through which the deeds of trust were executed, and that to hold such deeds of trust void and adjudge the quitclaim deeds enforceable would be inequitable and unjust, and contrary to the intent of the parties. For these reasons the court held that the consideration for the execution of the quitclaim deeds had wholly failed, and that the defendants accordingly held under the deed of trust first executed unimpaired except to the extent of the liens created by the two mortgages aggregating $8,000. Judgment was accordingly entered, decreeing that the deed of trust executed by William E. McPherson conveyed to the trustees for the purposes therein named the legal estate in the property in suit, and that such estate is, and at all the times mentioned, was, a valid and subsisting security for the repayment to the surety company of the sum of money paid by it for the benefit of said estate.

There is not a shadow of equity in appellant's case. As has been said, all the acts of the parties were done for the benefit of appellant, and she alone profited by them. It is hardly possible, under the circumstances, that they were not done with her full knowledge and consent. At least she is charged with such knowledge as to the one-half interest she acquired from her brother. It was proper, therefore, for the trial court to refuse to cancel the first deed of trust when it found that the new deeds and the quitclaim deeds were executed for the purpose of taking the place of the old and as a part of the same transaction. On the other hand, if the deeds executed by the administrator may be treated as valid to the extent of the lien created, as the parties certainly intended they should be, appellant was not entitled to a judgment while the lien remained unsatisfied. The trial court properly resolved the equities in favor of respondents.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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55 Cal. App. 231

LEMBERGER v. LEMBERGER. (Civ. 4024; S. F. 9832.)

(District Court of Appeal, First District, Division 2, California. Nov. 16, 1921. Hearing Denied by Supreme Court Jan. 11, 1922.)

1. Divorce 🔑133(1) — Finding of refusal to have matrimonial intercourse not sustained.

In an action wherein husband obtained divorce from wife on a cross-complaint, a finding that refusal of wife to have matrimonial intercourse occurred at a time when health and physical condition did not make such refusal reasonably necessary *held* not sustained by the evidence; husband's testimony as to health of wife not being sufficiently corroborated under Civ. Code, §§ 96 and 130.

On Hearing in Supreme Court.

2. Divorce 🔑127(4) — Corroboration by spouse, insufficient.

Under Civ. Code, § 130, providing that divorce cannot be granted upon uncorroborated testimony of the parties, the testimony of one spouse may not be accepted as sufficient corroboration of the testimony of the other.

In Bank.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Leonie Lemberger against Frank Lemberger. Judgment for defendant, and plaintiff appeals. Reversed in District Court of Appeals, and hearing denied in Supreme Court.

George D. Collins, Jr., of San Francisco, for appellant.

H. A. Stout, of Oakland, for respondent.

LANGDON, P. J. This is an appeal from an interlocutory decree of divorce granted to defendant upon a cross-complaint. Plaintiff filed suit for a divorce upon the ground of willful neglect. Defendant filed an answer and cross-complaint, denying the material allegations of the complaint, and asking for a divorce upon the ground of willful desertion.

Plaintiff failed to prove the allegations of her complaint and a nonsuit was granted. Appellant does not complain of this ruling, but contends that the evidence is insufficient to warrant the findings and judgment of the court that plaintiff willfully deserted the defendant, and granting to him an interlocutory decree of divorce. The desertion found by the court was the "plaintiff's refusal to have reasonable or any matrimonial intercourse with said defendant as husband and wife, and that health and physical condition did not make such refusal reasonably necessary."

Appellant attacks this finding as being unsupported by the evidence, asserting that in order to justify such a finding it is necessary that the record contain corroboration of the testimony of a party to the action. The defendant testified to repeated refusals of his wife to have reasonable or any matrimonial intercourse with him, and also testified that there existed no physical conditions justifying such refusal. The plaintiff denied these statements, and testified that she had refused but once to have intercourse with the defendant, and on that occasion she was very ill, and the defendant was well aware of the fact. She admitted that from June, 1917, to the date of the filing of the action (May, 1920), there had been no matrimonial intercourse between herself and her husband, but said there had never been a refusal on her part except on the one occasion when she had been ill.

Respondent relies upon this admission of plaintiff that there had been no physical relations between the parties from June, 1917, to the time of the filing of the action, a period of about three years, as corroboration of defendant's testimony concerning plaintiff's persistent refusals to have matrimonial relations with him. While there is some force in this contention, the corroborative force of the testimony of plaintiff is greatly weakened by her repeated insistence that the cessation of matrimonial relations was not due to her persistent refusals, but to the fact that the husband understood her physical condition and because of this fact did not seek relations with her.

Respondent also relies for corroboration of his testimony upon the fact that it appears from the testimony of the son of the parties that the husband and wife occupied separate beds in the same room, and that the son slept in the bed with his mother. It has been held in the case of Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234, that testimony of third parties that the husband and wife occupied separate rooms in the house was not the character and degree of evidence required by the Code with regard to corroboration in divorce cases. In the instant case such testimony is particularly valueless as corroborating evidence because of the fact that it appears that the situation of the parties with regard to their sleeping arrangements had continued for about six years and during a period when, according to defendant's testimony, he had no cause of complaint about the matter on which he now seeks a divorce, and that the arrangement had originally been made upon the suggestion of the defendant himself, because the child was delicate and had been ill, and the mother's bed was the most comfortable place for him to sleep.

However, even though we were to concede for the purposes of this appeal that there is sufficient corroboration of the husband's testimony regarding the wife's continued refusals to live with him as husband and wife nevertheless the defendant's case is not yet proven.

The Civil Code (section 96) requires proof that during the period of persistent refusal health and physical condition did not make such refusal reasonably necessary. The only evidence upon this matter was the uncorroborated testimony of the husband. While it is, no doubt, difficult to corroborate testimony of a party regarding these matters, such is the burden to be sustained when one relies upon this cause of divorce. Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Ingraham v. Ingraham, 40 Cal. App. 578, 580, 181 Pac. 234; Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19; Berry v. Berry, 145 Cal. 787, 79 Pac. 531. It appears to us that the stringency of the rule announced by the above cases regarding corroboration of testimony of a party, despite its seeming impracticability, is vindicated by a thoughtful consideration of the situation which is presented by an examination of the record in the present case. Here the wife was a woman of 51 years of age at the time of the trial. Her alleged refusals of defendant's marital rights had begun 3 years before. Up to that time, according to defendant's own testimony, he had had no cause to complain about this matter. The parties had lived together for nearly 30 years before the husband complained of this matter. They had had three children. The husband had been earning a small salary as a waiter in a restaurant. The record is undisputed tht the wife was a careful and economical housekeeper. After these many years of married life, during which time the husband admitted he had absolutely no cause of complaint, the wife, in the course of nature, reached a time in life and a physical condition which, according to her testimony, rendered her unable to endure matrimonial relations. She also testified that her husband was fully aware of this condition and of the treatments she was undergoing; that the husband realizing her suffering, said, "I will never come to you again." She also stated that during the period when relations had ceased between herself and husband she was going through physical changes which made it impossible for her to live with her husband as she had previously done. This testimony is corroborated by the testimony as to her age and by physiological facts of which this court will take judicial notice. Under such circumstances it should not be, and we think it is not, the law that a husband can come into court and by his uncorroborated testimony that his wife was well and healthy during this period secure a dissolution of the marriage ties and a release of his obligations, and cast his wife off without support or assistance from him at a period of her life when she most needs his assistance and when she is least able to earn her own living. And this after 30 years of faithful performance of her duties as a wife and mother!

[1] We are of the opinion that the finding that the refusal of the wife to have matrimonial intercourse occurred at a time when health and physical condition did not make such refusal reasonably necessary is unjustified. The defendant's uncorroborated testimony on this subject is insufficient to support it, and most especially so in the light of the other matters appearing in the record.

Respondent calls our attention to the fact that the plaintiff has made very clear by her own testimony that she prefers to live with her brother and her mother than to live with her husband, and that she has refused to separate herself from her family at the request of her husband. This evidence might be pertinent had the defendant sought his divorce upon other grounds; it has no relevancy in relation to the question of whether or not plaintiff has persistently refused to have reasonable matrimonial intercourse with the defendant when her health and physical condition did not make such refusal reasonably necessary. That question was the one issue between these parties under the pleadings upon which the action was tried. The burden of proving the affirmative of this issue was not sustained by introducing the uncorroborated testimony of the defendant. If the difficulties incident to a compliance with section 130 of our Civil Code seem insurmountable in some instances, the courts are nevertheless without power to abrogate the rule there laid down, and, as pointed out herein, that section vindicates itself in cases like the instant one, which, in the nature of things, will frequently arise.

The judgment and decree appealed from are reversed.

We concur: NOURSE, J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] The petition for a rehearing of this cause in the Supreme Court is denied. The opinion of the District Court of Appeal appears to assume that in an action for divorce the testimony of one spouse may be accepted as sufficient corroboration of the testimony of the other for the purpose of making a cause of divorce for either. We think this assumption is contrary to the rule laid down in section 130 of the Civil Code. That section declares that no divorce can be granted upon the uncorroborated testimony of the parties. We understand this to mean that there must be evidence in support of the cause of action upon which a divorce is granted, in addition to the evidence of either or both of the parties to the action, and that the testimony of one party cannot be taken in corroboration of that of the other for the purpose of proving a cause of divorce.

SHAW, C. J., and LENNON, WASTE, WILBUR, SHURTLEFF, SLOANE, and LAWLOR, JJ., concur.

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55 Cal. App. 397

FRIERSON v. PACIFIC GAS & ELECTRIC CO. et al. (Civ. 2377.)

(District Court of Appeal, Third District, California. Nov. 28, 1921.)

1. Master and servant ⚷330(1) — Driver of automobile stage presumed to be agent of owner.

The fact that one is the owner of the automobile stage raises the presumption that the driver was his agent.

2. Master and servant ⚷330(3) — Evidence held to show automobile stage driver was agent of owner and operator.

In an action for injuries received in a collision between the street car in which plaintiff was riding and an automobile stage, resulting from the negligence of the driver of the stage, the presumption that the driver was defendant's agent, arising from proof that defendant was the owner, supplemented by evidence that the driver had formerly driven a truck for defendant and had been transferred from driving the truck to driving the stage by defendant's bookkeeper, and after the accident was personally paid by defendant for his services, *held* to support a finding that the driver was defendant's employee and that the stage was being operated by defendant.

3. Associations ⚷19—Master and servant ⚷301(1)—Owner and operator of stage, and not co-operative association, held liable for negligence of driver.

Where defendant was a member of an auto stage association, a co-operative business association authorized by Civ. Code, §§ 653b–653*l*, under whose by-laws each member owned and operated his own stages along the prescribed routes and retained the profits derived therefrom, though the terminals and certain other facilities were managed by the association, the owner and operator of the stage, and not the association, is the master of the driver, and liable for his negligence.

4. Master and servant ⚷301(2)—Master liable for negligence of servant employed by agent.

The owner of an automobile stage who pays and discharges the driver and receives the profits from the operation of his machine is not relieved from liability for the driver's negligence by reason of the fact that the driver was employed by an agent of the owner.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Eleanor Frierson against the Pacific Gas & Electric Company and A. L.

Richardson. Judgment for the plaintiff against the defendant Richardson, and the latter appeals. Affirmed.

J. W. S. Butler and B. F. Van Dyke, both of Sacramento, for appellant.

Downey & Downey, of Sacramento, for respondent.

BURNETT, J. The action was for personal injuries received by plaintiff while a passenger on a street car in the city of Sacramento. Plaintiff's injuries resulted from a collision between said street car and a passenger automobile stage operating between Sacramento and Placerville and driven by one Balderson. The complaint alleged that the accident was caused by the joint negligence of the driver of the stage and the motorman in charge of the street car, and that the stage was being operated by defendant Richardson. The case was tried before the court without a jury, and the Pacific Gas & Electric Company was acquitted of all negligence, but it was found that the stage had been negligently operated by appellant, Richardson. Judgment followed against him in favor of plaintiff for $3,000.

Appellant does not contend that the stage was not negligently operated or that plaintiff's injuries were not caused by said negligent operation, but his sole contention is that said stage was being operated by the Star Auto Stage Association, a co-operative business association. Respondent contends that there are two conclusive answers to appellant's contention: First, the evidence is sufficient to sustain the finding that Richardson was operating the stage; and, second, if the stage was being operated by said association, it was operating it for the use and benefit of Richardson and as his agent, and therefore he is personally responsible for its negligent operation.

[1, 2] As to the first consideration, it may be stated that it was admitted at the trial that Richardson was the owner of the stage, and from this fact the presumption arises that the driver was the agent of the owner. McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417; Dierks v. Newsom, 194 Pac. 518; Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59. These authorities and others that might be cited are to the effect that evidence of ownership of the vehicle creates a presumption amounting to evidence of the fact that the person operating it is doing so as the agent of the owner. Since it established a prima facie case, it would be sufficient to support the finding of the court, although it may be opposed and contradicted by direct testimony. Moreover, the record furnishes additional evidence that the automobile was being operated at the time by Richardson. In this connection it is significant that in his original answer, which he personally verified, Mr. Richardson expressly admits that he was operating the stage in question. It was not until 15 months after the collision that Richardson, in his amended answer, verified by his attorney, denied that he was operating the stage at the time of the accident. Moreover, it is a fair inference from the testimony of Richardson and Balderson that the latter was an employee of the former at the time. It is not necessary to set out the evidence, but it appears that he had been in Richardson's employ for some 6 months prior to the accident driving a truck; just a day or two before he was transferred to driving the automobile stage by Miss Brown, a bookkeeper for Richardson. When paid after the accident he received one check on Richardson personally for his labor in both capacities as driver of the truck and automobile stage. It appears also that the business office at Placerville was not conducted under the name of the Star Auto Stage Association, but under a distinct name used by Richardson, and that he owned all the stages used upon said line and exercised various acts of authority over them, such as the repairing and discharging of the drivers. Another circumstance which may be mentioned in support of the finding of the court is that no evidence was offered of any written lease or contract of any kind or character for the use of the auto stage by said Star Auto Stage Association, and there was no evidence to show that said association ever assumed any control or management over Mr. Richardson's car. In fine, the evidence decidedly preponderates in favor of the claim of plaintiff that the auto stage was not only owned by appellant, but was being operated at the time of the accident by him through his agent, and he is therefore responsible for the consequence of the agent's negligence.

[3] As to the second ground, it appears that Mr. Richardson was a member of the Star Auto Stage Association. This was not a corporation, but a co-operative business association, and its organization is provided for by sections 653b–653*l*, Civil Code. It has no capital stock, but a membership certificate is issued to each member, and from its by-laws it is a fair inference that in certain respects it acted as the agent of the owner, but that the owner retained the control and management of his machine. Section 5 of article 2 of said by-laws provides that members of the association shall deliver to it, for the use and purposes for which it was organized, one or more automobiles or other motor conveyances—

"to be by said members placed in operation over a route to be fixed and released by said directors and subject to change; and during this said membership shall keep and operate such auto stage or conveyance with the rules of the association."

Section 8 provides:

> "Any member expelled and not reinstated as herein provided shall be paid whatever amount of money may be due him out of the profits *earned by the stage or conveyance operated by him*, and on hand, free from any claim, charge, or assessment at the time of his expulsion."

Article 10 is as follows:

> "Each member of the association shall daily file with the secretary, or with such other officer or employee as may be designated by the directors, a statement *showing* his receipts for such day. The directors shall meet monthly for the purpose of determining and dividing the profits, if any of such association, and such profits shall be distributed among the members in the following manner: *Each member shall receive as his share of the profits for such month such sum as the amount collected by him bears to the total receipts collected by all the members of the association during said month, after deducting from such proportionate share the amount of any unpaid dues and charges against such member for such period of time.*"

The portions of the foregoing which we have italicized show that the proceeds from the operation of each stage, after the deduction of certain expenses, belong to the owner thereof, and that he is "to keep and operate" his own machine.

[4] Through such co-operation the owners of the machines can, of course, reduce expenses and increase the profits of the business, and for certain purposes, such as furnishing depot facilities and selling tickets, the organization acts for the members jointly, but the individual machine does not lose its identity, but it remains subject to the control and management of its owner, who obligates himself, however, to abide by the rules and regulations of the association. He is no less responsible for its operation than if he were conducting the business alone. While it may be said that for certain purposes, then, the association is the agent of the owner, and to that extent it is the instrumentality through which he conducts the business, yet as to the operation of the machine, it could hardly be said that the organization is his agent, since he retains its control. However, it would seem to be unimportant whether the agency extends to the operation of the machine or not, as the owner's liability would not be changed. Assuredly, where the owner pays and discharges the driver and receives the profits of the operation of his machine, he would not be relieved of responsibility for its negligent operation by reason of the fact that the driver may have been employed by an agent of the owner.

We think there is no merit in the appeal, and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

55 Cal. App. 450

GAUME v. SHEETS et al. (Civ. 4036.)

(District Court of Appeal, First District, Division 2, California. Nov. 30, 1921.)

Quieting title 🔑49—Judgment settling claims of parties on mutual rescission held proper.

Where plaintiff and defendant contributed $^{56}/_{76}$ and $^{20}/_{76}$ respectively to the purchase price of a ranch, and defendants contracted to purchase plaintiff's interest from him, judgment in plaintiff's action to quiet title after mutual rescission of the contract *held* to correctly settle the rights of the parties, in view of Civ. Code, § 1688.

Appeal from Superior Court, San Bernardino County; Edgar A. Luce, Judge.

Action to quiet title by Joseph Gaume against William P. Sheets and others. From judgment for defendants, plaintiff appeals. Affirmed.

See, also, 181 Cal. 119, 183 Pac. 535.

Earl D. Finch, of Redlands, for appellant.

Burton E. Hales, of Redlands, and Leonard, Surr & Hellyer, of San Bernardino, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment rendered in an action in which he sought to quiet title to certain property in San Bernardino county, against his vendees under a contract to purchase.

Briefly, the facts found by the court and amply supported by the evidence are: That on or about August 10, 1915, and for some time prior thereto, Karl C. Wells was the owner of the real property in controversy, about 10 acres of land planted with fruit trees, and certain shares of stock in a water company; that said property was subject to a mortgage in favor of plaintiff; that at the time of the transfer of said property by Wells to plaintiff, hereinafter mentioned, the mortgage upon said property so held by plaintiff amounted to the sum of $5,600; that on or about August 10, 1915, the said Wells conveyed the said real property to plaintiff; that a consideration was rendered and paid to Wells for said conveyance to plaintiff, and that consideration was in part rendered and paid by plaintiff and was in part paid by the defendants in this action, and was as follows: Plaintiff surrendered up to said Wells, as paid, the note secured by said mortgage, and satisfied and discharged said mortgage, and defendants conveyed to said Wells two houses and lots situated in the city of San Diego, Cal., specifically described in the findings, which said property was subject to a mortgage of $600, and defendants also paid Wells the sum of $750 by the execution and delivery of their note for said amount, which note was intended by the parties to cover the amount of the mortgage on the San Diego property and the amount of street assessments against the same. Thus defendants, in effect, conveyed to Wells the San Diego property free of incumbrances. The court found that the reasonable market value of said San Diego property, free of incumbrance, was $2,000; that the total consideration paid to Wells for the conveyance of the San Bernardino ranch was equivalent to the sum of $7,600, of which consideration the amount rendered and furnished by plaintiff was equivalent to the sum of $5,500, and that rendered and furnished by defendants was equivalent to the sum of $2,000.

It is practically conceded by the appellant that the evidence sustains the above findings; but it is urged that the further finding of the trial court, to the effect that said consideration was so rendered and paid said Wells by plaintiff and defendants pursuant to understandings and agreements had and made between said Wells, plaintiff, and defendants, to the effect that each of said persons would do the act or thing which it is found he did do, is not supported by the evidence. This contention is without merit, as the finding of which complaint is made is amply sustained by the testimony of the defendant Clyde M. Sheets and by the testimony of Karl Wells, and it is not necessary to set out such testimony here.

The court further found that, on or about the same time at which said Wells transferred and conveyed said San Bernardino property to plaintiff, plaintiff and defendant entered into an agreement in writing for the sale of plaintiff's interest in the San Bernardino ranch, and under this agreement the defendants entered into possession of the ranch and made the payments of $50 a month called for by said agreement up until April 10, 1916, at which time they defaulted in their payments; that on May 10, 1916, said agreement was mutually rescinded and abandoned by plaintiff and defendants, and defendants surrendered and yielded up the possession of all of said San Bernardino ranch to plaintiffs.

It is unnecessary for us to discuss the questions of the rescission of the contract between plaintiff and the defendants and of the right of the defendants to have it declared that a resulting trust for their benefit attached to the property for the proportion thereof which the amount paid by them bears to the entire amount of the purchase price paid to Wells for the property. This is because these matters, between these same parties, under the precise facts presented by the present record, were submitted to our Supreme Court upon a former appeal in this action. A careful discussion of the rules of law applicable under the facts as found by the trial court was entered into by Justice Wilbur in the opinion filed in Gaume v. Sheets, reported in 181 Cal. 119, 183 Pac. 535. The questions of the effectiveness of the actions of the parties to accomplish a mutual rescission of the contract, and of the defendants' right to recover the payments made by them under the same, are therefore authoritatively settled, and require no further discussion by us.

The trial court found that the defendants were the equitable owners of a $^{20}/_{76}$ interest in the San Bernardino ranch, and decreed that they were entitled to have the legal title to the same conveyed to them by the plaintiff; also that the defendants recover $350 paid by them to plaintiff as installment payments under their contract of purchase, but allowed to the plaintiff the sum of $265.27 as rental value of his $^{56}/_{76}$ interest in the ranch during the period it was occupied by the defendants. It was specifically found by the court that the parties had stipulated that they would withdraw from consideration by the court the adjustment of rentals and profits for the period between the time when the contract was rescinded and the plaintiff took possession of the entire ranch, and the period when the defendants should again be restored to the possession of their $^{20}/_{76}$ interest therein. The judgment of the court merely attempted to settle the claims of the parties up to the date of the rescission of the contract between them.

The judgment rendered appears to us to be good sense, exact justice, and good law under the findings of fact. There is nothing inequitable about it, appellant's contention to the contrary notwithstanding. This is apparent from the fact that the record contains the testimony of the plaintiff himself that he had at a previous time accepted a mortgage upon the property for $7,500. It is a clear inference from this fact that the value of the property is sufficient to reimburse the plaintiff and the defendants for the amounts contributed by them towards its acquisition.

There is only one other point raised by the appellant that merits discussion, and that is his insistence that the plaintiff should have been allowed, in addition to the rental value, the amount of the taxes due upon the property which became a lien in March, 1916, and which, under the contract between the parties, the defendants were to pay, but did not pay. The answer to this contention is an obvious one. The adjustment made by the trial court is not under the terms of the contract; it is an adjustment upon a rescission of the contract. The theory is to restore to the plaintiff, as nearly as possible, what he parted with under the contract, and to do the same by the defendants. Under the contract the defendants were not to be charged with the reasonable rental of the land, but, under the judgment of the court, this was taken as the most accurate method of restoring to plaintiff that of which he had been deprived during the existence of the contract, i. e., the possession of his share of the ranch. The defendants, on the other hand, were permitted to recover what they had paid plaintiff under the contract. Had they paid the taxes or any other charges under the contract, which charges would not have been proper had defendants been merely tenants renting the land by the year, such items should have been restored to them by the judgment of the court. The adjustment between the parties is not on the basis of the contract obligations, but was an attempt to settle their claims as though the contract had not existed, it having been rescinded and such rescission having effected a complete extinguishment of the contract. Civ. Code, § 1688.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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55 Cal. App. 355

KERRIGAN et al. v. ANDERSON.
(Civ. 4007.)

(District Court of Appeal, First District, Division 1, California. Nov. 25, 1921. Hearing Denied by Supreme Court Jan. 23, 1922.)

Exceptions, bill of 🔑43(1)—Time to seek relief from default in filing runs from date of default.

The six months' period allowed by Code of Civil Procedure within which to file a motion to be relieved from default begins to run against a motion to be relieved from default in serving and filing a bill of exceptions on the date when the bill of exceptions was due, and not on the date when the tendered bill of exceptions was refused by the court because it was filed too late.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Mary A. Kerrigan and others against Deborah Anderson. Judgment for defendant, and from an order denying plaintiffs' motion to be relieved from their default in failing within the time allowed to serve and file their proposed bill of exceptions, the plaintiffs appeal. Affirmed.

Thomas W. Forsyth, of San Francisco, for appellants.

Franklin Swart, of Redwood City (John H. Machado, Dep. Dist. Atty., of Redwood City, of counsel), for respondent.

RICHARDS, J. This is an appeal from an order of the superior court of the county of San Mateo denying a motion of the plaintiffs herein to be relieved from their default in failing within the time allowed by law to serve and file their proposed bill of exceptions in the case.

The action was one brought to set aside a deed given to the defendant by her mother conveying certain real estate. Judgment was therein entered in favor of the defendant on March 9, 1920. Notice of the entry of such judgment was served on the plaintiffs' attorneys on March 25, 1920, and was filed on April 1, 1920. A motion for a new trial was made by the plaintiffs and denied on May 13, 1920. On June 10, 1920, notice of appeal from the judgment was duly served and filed. On June 11, 1920, a written stipulation signed by the attorneys for both parties was filed extending the plaintiffs' time to prepare and serve a bill of exceptions to July 1, 1920. Thereafter certain correspondence, and also certain conferences, occurred between respective counsel, having reference in part to the preparation of the bill of exceptions and in part to the settlement of the case. On September 20, 1920, counsel for the defendant wrote a letter to one of the plaintiffs' counsel stating that he saw no chance of the settlement of the case, and suggesting that steps be taken to bring the matter to a conclusion. Up to this time no proposed bill of exceptions had been served, although at some earlier date plaintiffs' counsel had sent to the defendant's counsel a rough draft of a statement of the testimony, which was to be incorporated in a bill of exceptions to be thereafter prepared. On September 24, 1920, plaintiffs' counsel, replying to the foregoing letter, referred to this incomplete draft of the testimony, required its return, and inclosed a proposed stipulation extending the time for the preparation and filing of the bill of exceptions to October 15, 1920. To this letter defendant's counsel made no written response, nor did he sign said stipulation. During the following two months or thereabouts it is claimed by plaintiffs' counsel and denied by counsel for the defendant that in certain conferences between respective counsel oral stipulations and understandings were had, the effect of which, according to appellants' claim, was to extend the time for the service and filing of the bill of exceptions. In the early part of December, 1920, one of plaintiffs' counsel went to the office of defendant's counsel and procured the incomplete draft of the testimony above referred to. At or about the same date a letter was written by counsel for the plaintiffs to defendant's counsel referring in detail to the foregoing matters, and again requesting the latter's signature to a written stipulation extending plaintiffs' time to prepare and serve their bill of exceptions. To this letter defendant's counsel replied on or about December 15, 1920, refusing to sign said or any stipulation with relation to said bill of exceptions. Thereafter, and on or about January 4, 1921, plaintiffs' proposed bill of exceptions was served on defendant's counsel and delivered to the clerk of the court, with instructions to hand the same to the judge.

The hearing upon the matter of the settlement of said bill of exceptions and upon the defendant's objection to the settlement of the same was had before the trial court on February 7, 1921, whereupon the court made the following order:

> "The proposed bill of exceptions in the above matter was handed to this court on January 6, 1921, for settlement, more than six months after the time allowed by law for its presentation. The objection to the settlement of the same is hereby sustained, and the court refuses to settle said bill of exceptions."

Thereafter, and on February 17, 1921, plaintiffs' counsel gave notice of a motion to relieve said plaintiffs from the effect of said last-named order and from their default in not having served and filed their bill of exceptions within the time allowed by law upon the ground of mistake, inadvertence, surprise, and excusable neglect. The notice of said motion was accompanied by two affidavits of plaintiffs' counsel setting forth at length the several letters which had passed between themselves and defendant's counsel, and also purporting to set forth the substance of several interviews between respective counsel, wherein it was asserted certain assurances had been given and oral understandings had the effect of which was to extend plaintiffs' time for the service and filing of their said bill of exceptions. Said motion was also predicated upon all of the papers, records, and files in the case. To these affidavits the defendant's counsel responded with a counteraffidavit, denying said alleged oral stipulations and understandings, and denying that any extensions had been granted save only that covered by the original stipulation between counsel. This motion came on for hearing on February 24, 1921, whereupon the court made and entered its order denying the same. It is from this last-named order that this appeal has been taken.

The respondents herein make an objection which stands upon the threshold of the consideration of this appeal upon its merits. This objection is that the plaintiffs' motion to be relieved from their default in failing to present, serve, and file their bill of exceptions within the time allowed by law and by the written stipulation of the parties, being based upon the ground of mistake, inadvertence, surprise, and excusable neglect, is to be treated as—although not expressly stated as being—a motion made under the provisions of section 473 of the Code of Civil Procedure. It was not made within the six months' period prescribed by said section of the Code, and was therefore properly denied.

This objection, we think, must be sustained. The judgment herein was entered upon March 9, 1920; notice of the entry thereof was duly given and filed on April 1, 1920; plaintiffs' motion for a new trial was denied on May 13, 1920; notice of appeal was filed June 11, 1920, and on that date the written stipulation of the parties was filed wherein the time of plaintiffs within which to prepare and serve their bill of exceptions was extended to July 1, 1920. No other or further extension by either written stipulation of the parties or order of the court was given, and it inevitably follows that, upon the expiration of such extension of time on July 1, 1920, no bill of exceptions having been served or filed, the plaintiffs were in default unless their time to so file the same had been extended by oral agreement between the counsel for the respective parties. The trial court resolved the conflict in the affidavits of said counsel in that regard against the plaintiffs by its first order refusing to settle the bill of exceptions upon the ground that it had not been presented in time, the same facts having also appeared upon the hearing preceding the making of said order. No appeal having been taken therefrom, said order became final. The application for relief from the default which led to the making of said order was not made until February 18, 1921, more than seven months after the time provided in the written stipulation of the parties for the making, service, and filing of said bill of exceptions had expired. That the date of such default, and not the date on which the court made its order refusing to settle the bill of exceptions, is the date when the time within which relief must be sought, under section 473, Code of Civil Procedure, begins to run has been settled in several recent cases. Cox v. Palos Verdes Co., 172 Cal. 702, 158 Pac. 332; Moultrie v. Tarpio, 147 Cal. 377, 81 Pac. 1112; Rath v. Vaughan, 187 Pac. 44. It follows that plaintiffs' motion for relief from their default came too late, and hence the court had no other alternative but to deny the same.

Order affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

55 Cal. App. 559

PEOPLE v. FALLON. (Cr. 576.)

(District Court of Appeal, Third District, California. Dec. 7, 1921.)

Criminal law 🔑1182—Where appellant neither files brief nor appears for oral argument and the evidence sustains conviction and instructions show no error, the case will be affirmed.

Where defendant, appealing from a conviction of embezzlement under Pen. Code, § 954, has neither filed brief nor appeared for oral argument, and the record evidence is conclusive of guilt and the instructions show no error, the conviction must be affirmed.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

Jean Fallon was convicted of embezzlement, and she appeals. Affirmed.

Martin I. Welsh and R. T. Coughlin, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted by a jury in the superior court of the county of Sacramento of the crime of embezzlement. The prosecution was under two different indictments found by the grand jury of Sacramento county, in one of which she was charged with having fraudulently embezzled and converted to her own use the sum of $115.41, being the property of one F. E. Butler, of whom she was the agent, and in the other the amount charged to have been embezzled, and also the property of said Butler, was the sum of $308.08. The defendant was tried upon the two indictments at the same time, the same having been consolidated by an order of the court under the authority of section 954 of the Penal Code.

The case was duly put upon the calendar of this court for the December term thereof, and counsel of record for the defendant duly notified of that fact. No brief has been filed by the defendant in support of her appeal, nor was there any appearance before the court in her behalf when the cause was regularly called for oral argument. In view of this situation of the cause before this court, the Attorney General, when the case came on regularly for oral argument, submitted the case upon the record.

We have carefully read the testimony, and have thus arrived at the conclusion that the evidence, as it appears in the record here, is conclusive of the defendant's guilt. In fact, there was no testimony offered by the defendant in her own behalf or in opposition to that presented by the people. The instructions have also been examined, and found to involve a correct statement of the law applicable to the case. There is no necessity, under the circumstances of this case, to enter into a detailed or any statement of the evidence. It is sufficient to say that the defendant, as an agent of said F. E. Butler, was charged with the duty of making deposits of money in a certain bank in the city of Sacramento for said Butler; that in the month of January, 1921, said Butler turned over to her on one day the sum of $115.41 and on another day the sum of $308.08, with instructions to deposit the same in the bank with which said Butler was transacting business; that the defendant did not deposit said sums as instructed, but converted the same to her own use. The testimony shows that she admitted having converted said moneys to her own use, and, as above suggested, there was no contradiction of that statement by her at the trial.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

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55 Cal. App. 299

UNITED STATES FARM LAND CO. v. BENNETT. (Civ. 2374.)

(District Court of Appeal, Third District, California. Nov. 22, 1921. Rehearing Denied Dec. 22, 1921. Hearing Denied by Supreme Court Jan. 19, 1922.)

1. Limitation of actions 🔑127(4)—Amendment held not to change cause of action.

A cause of action in a complaint alleging that a corporation and an individual incurred indebtedness sued for was not changed by the filing of an amended complaint alleging that the indebtedness was incurred by the individual defendant alone.

2. Names 🔑10—Individual may do business under trade name.

There is no law preventing the use of a trade-name by an individual, and in the absence of such prohibition an individual may conduct business under any designation he sees fit.

3. Corporations 🔑328—President and director of corporation issuing no stock liable for its debts.

The president and director of a corporation issuing no stock is liable for obligations incurred by it under Civ. Code, § 309, providing directors must not create debts beyond the subscribed stock and making them liable, if they do, to the amount of the debt contracted.

4. Corporations 🔑361—Evidence in action against one assuming to act as president and director of a corporation held to show that he ran the corporate business for his sole use and benefit and used the corporate name to conduct a private business.

In an action against one assuming to act as president and director of a corporation for goods sold and delivered, evidence *held* to show that the corporate business was wholly controlled and run by and under the direction and for the sole use, benefit, and behoof of defendant, and that the corporate name and style was employed by him to conveniently conduct his business, and that defendant was in fact conducting his own personal and private business under the corporate name.

5. Assignments 🔑41—Held to sufficiently identify claims.

Assignments to plaintiff, "I hereby assign to U. S. F. L. Company * * * all my claims against C. C. Company. Amount $17.29"—*held* to sufficiently identify the subject-matter.

6. Corporations 🔑330—User of corporate name cannot complain of its use in assignments to plaintiff.

Where plaintiff claimed that defendant was using a corporate name for transacting his individual business, defendant could not complain that such name was used in assignments of claims to plaintiff on which defendant was sued individually; he being liable individually, under Civ. Code, § 309, if acting as an officer of a corporation as he contended.

On Petition for Rehearing.

7. Corporations 🔑351—Suit in equity against director personally unnecessary, in absence of issue of stock.

Where no capital stock has been subscribed and a director of the corporation is liable for the entire indebtedness of the corporation, under Civ. Code, § 309, there is no necessity of resorting to an action in equity for the purpose of taking an accounting and apportioning any recovery which might be had among the creditors, and each creditor may bring a direct action against the director.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by the United States Farm Land Company against R. F. Bennett. Judgment for plaintiff, and defendant appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Ford & Bodkin and Leon R. Yankwich, all of Los Angeles, for appellant.

Butler & Van Dike, of Sacramento, for respondent.

FINCH, P. J. This appeal is from the judgment herein in favor of the plaintiff for $7,780.94 on account of goods, wares, and merchandise alleged to have been sold and delivered to defendant by the plaintiff and its assignors. The original and the second amended complaints were against the Chowchilla Creamery Company and R. F. Bennett and A. L. Gambrill. The original complaint does not appear in the record. The second amended complaint alleges that the "Chowchilla Creamery Company is, and at all times herein mentioned was, a corporation." There is no allegation that Bennett and Gambrill held any official position in the creamery company. By the third amended complaint, which makes Bennett the sole defendant, it is alleged:

> That Bennett "caused to be prepared and filed in the office of the county clerk of Madera county, Cal., articles of incorporation of what was designated as Chowchilla Creamery Company, and thereafter caused such further proceedings to be had to that end that on the 9th day of June, 1916, a certificate of incorporation" was issued by the secretary of state; that the articles of incorporation named three persons as directors and subscribers to one share each of the capital stock; that the authorized capital stock was 2,000 shares of the par value of $10 per share; that no shares of stock were ever issued and no meeting of the stockholders was ever held; that the persons named as directors in the articles of incorporation never met or organized; that no other directors were ever elected, "but that shortly after the issuance of said certificate of incorporation, defendant, R. L. (F.) Bennett, and one A. L. Gambrill assumed to act as directors of said corporation, said Bennett assuming the title of 'president' and said Gambrill assuming the title of 'secretary treasurer'; that from the date of the issuance of said certificate of incorporation * * * up to about a month prior to the commencement of this action, the defendant, Bennett, carried on the usual business of a creamery at Chowchilla * * * under the name and style of Chowchilla Creamery Company; that defendant * * * furnished all the money used in running said business and said business was wholly controlled and run by and under the direction and for the sole use, benefit, and behoof of the defendant; * * * that * * * this plaintiff and its assignors hereinafter mentioned extended credit to said Bennett, and furnished the goods, wares, and merchandise to him as hereinafter set forth, in total ignorance of the fact that said so-called Chowchilla Creamery Company was not in law or fact a corporation."

The complaint further alleges that the defendant used the corporate name with intent to defraud the plaintiff and its assignors and for the purpose of inducing them "to give credit to said pretended corporation"; but the court found that the defendant did not so use such corporate name with the intent to defraud and the allegations of fraudulent intent need not be further noticed. The court found the other facts substantially as alleged in the complaint, and:

> "That said corporate name and style was employed by said defendant for the purpose of conveniently conducting his said business at said place, and that said defendant was never an officer of said pretended corporation nor a stockholder thereof nor authorized in any manner to conduct business for said pretended corporation, all of which defendant well knew, and that in fact defendant was conducting his own personal and private business under the name and style of Chowchilla Creamery Company," and that "said A. L. Gambrill assumed to act as a director and as secretary treasurer of said pretended corporation at the request of defendant, and that said Gambrill was not a di-

rector and was not secretary treasurer and was not a stockholder."

[1, 2] There was no error in permitting the plaintiff to file the third amended complaint. The cause of action was not changed thereby. In the second amended complaint the plaintiff mistakenly alleged that the indebtedness was incurred by the corporation and the defendant. The third amended complaint alleges that the same indebtedness was incurred by the defendant alone. In Walsh v. Decoto, 194 Pac. 298, the original complaint was against the Blue Taxicab Corporation as sole defendant. The complaint alleged that such defendant was a corporation. About two years after the commencement of the action the court permitted the plaintiff to file an amended complaint substituting Decoto as defendant in place of the Blue Taxicab Corporation. In affirming the judgment the court said:

> "The only question involved in the appeal is whether or not the trial court had authority to substitute Mr. Decoto personally for the Blue Taxicab Corporation in the action. The substitution was made admittedly long after the statute of limitations would have run against Decoto had no action been commenced thereon. * * * The substance of the matter is the real thing to be considered; and we do not think that a defendant who does business under a trade-name by which, although no deceit is necessarily intended thereby, a party injured is misled to the loss of his cause of action, should be heard to say after service upon him personally and with full notice of the situation, that the action had been begun in the wrong name, and should therefore be abated."

A hearing in the Supreme Court was denied. See, also, Thompson v. Southern Pacific Co., 180 Cal. 730, 183 Pac. 153.

> "There is no law of this state which prevents the use of a trade-name by an individual, and in the absence of any such prohibition, an individual may conduct business under any designation he sees fit." Willey v. Crocker-Woolworth National Bank, 141 Cal. 513, 75 Pac. 106.

[3] If it be conceded, as contended by the defendant, that the Chowchilla Creamery Company was a corporation, de jure or de facto, and that the defendant was a director and president thereof, the defendant would still be liable. Section 309 of the Civil Code provides that the directors of a corporation must not "create any debts beyond their subscribed capital stock," and that when they do so they "are, in their individual or private capacity, jointly and severally liable * * * to the creditors thereof, to the full amount of the * * * debt contracted." Since there was no capital stock subscribed in this case, the liability imposed by section 309 would extend to the whole indebtedness. The evidence shows without conflict that the defendant acted as director and president without any authority from the corporation, whatever its character, and, having contracted debts in the name of the corporation in his assumed official capacity, the defendant cannot be heard to deny, and does not deny, that he so acted as director and president; but he maintained at the trial, and now contends, that the corporation had at least a de facto existence, and that his acts are binding upon the corporation. If the corporation is so bound, then the defendant is liable, under the provisions of section 309, for the debts contracted in violation of that section. The complaint contains all the allegations necessary to state a cause of action against the defendant as director under the section cited. That section was evidently enacted for the protection of persons entering into contracts with corporations. It would not be practicable for every such person to make investigation to ascertain what amount of capital stock had been subscribed before extending credit in ordinary business transactions.

> "The capital stock constitutes the basis of credit of the corporation, and persons dealing with the corporation have a right to assume that the stock has been actually paid in, or that it may be reached for corporate debts." 7 R. C. L. 198.

[4] Appellant attacks, as unsupported by the evidence, the finding that—

> "Said business was wholly controlled and run by and under the direction and for the sole use, benefit, and behoof of the defendant, * * * and that said corporate name and style was employed by said defendant for the purpose of conveniently conducting his said business, * * * and that in fact defendant was conducting his own personal and private business under the name and style of Chowchilla Creamery Company."

The evidence was conflicting on the issue so found, and it is sufficient to ascertain whether there is substantial support for the finding. A. L. Gambrill, called by the plaintiff, testified that he acted as secretary of the corporation, at the request of defendant, from the time when the creamery was under construction; that he did not know that he had ever been elected secretary by any board of directors; that the defendant arranged for the payment of the secretary's salary; that no shares of capital stock were ever issued; that no meeting of the board of directors was ever held, but that defendant and the witness talked matters over; that what purports to be the minutes of a meeting of the board of directors was made up and signed by defendant and the witness, as president and secretary, respectively, but that no directors were present at such meeting; that the defendant suggested that the witness and a Mr. Young each take a one-third interest in the creamery with him; that the defendant said he had invested $12,000 in the business; that witness did not know whether any other person ever invested any money in it. It appears that the persons named in the articles of incorporation as directors resigned before any business was transacted and no other directors were ever elected. The creamery first constructed was destroyed by fire, and a new one was built. Thereafter financial difficulties were experienced, and on November 28, 1917, the defendant wrote O. A. Robertson, president of plaintiff corporation, who had induced the defendant to organize the creamery in the first place, as follows:

"Los Angeles, Cal., Nov. 28, 1917.

"Mr. O. A. Robertson—Dear Sir: Probably your Mr. Kildahl has explained to you the trouble of the creamery. Now, when the place burned down there was plenty of money and resources left to pay everything in full; and about $3,000 surplus, as part of my investment. I was not intended (intending?) to build, as I know positively that Chowchilla should have cold storage and ice plants, as it is essential to the life of that town, and would be the best-paying business that could be started there. It should be a large concern; but when I went up to Chowchilla I was met by Mr. Gambrill and Mr. Young. They said they would take one-third each if I would build. I was to allow the assets then on the ground, amounting to about $3,000; Mr. Gambrill to put in $2,000 cash, Mr. Young to put in $2,000 in building material, as he said he had no ready cash at that time. So I turned over the management of the creamery to them. It was agreed, as Mr. Gambrill was secretary, that he would fix up the stock, as it was all in his possession. Now, as soon as the creamery was built, Young came and put an attachment on creamery for his bill. Gambrill don't put any money. That is just what they have done. I kept writing Gambrill to divide the stock, but he kept putting it off until the whole thing fell through. Those goods could be furnished from other sources without any trouble, but for the above agreement.

"Now, Mr. Robertson, I have put in about $9,000 there. I am willing to drop that. Your company takes that plant over, enlarges as I have outlined, and it will be one of the best-paying businesses in the country. If you send me a paper by your attorney through Mr. Kildahl I will sign over any claims I have.

"[Signed] R. F. Bennett."

A fair inference from the foregoing letter, together with the other evidence before the court, is that the defendant owned and controlled the business conducted and the property held in the name of the corporation, and that "he was virtually the corporation itself, or, as the cases put it, the corporation was his 'corporate double.' " Deming v. Maas, 18 Cal. App. 337, 123 Pac. 204. While the defendant gave testimony which would have supported a contrary finding, it cannot be said that the finding made is not supported by the evidence.

[5, 6] Objection was made to the introduction in evidence of the assignments to the plaintiff of the many claims of creditors against the defendant. They were all in the same form except as to the names of claimants and amounts. One of them, Plaintiff's Exhibit No. 1, is as follows:

"Chowchilla, Cal., Nov. 16, 1917. I hereby assign to United States Farm Land Company, a corporation, all my claims against Chowchilla Creamery Company. Amount $17.29. R. B. Woodward."

Appellant contends that the subject-matter of the assignment is not "described with such particularity as to identify it." The only objection made at the trial, however, was that "there is nothing there to indicate that is an assigned claim against the defendant, R. F. Bennett." The assignment sufficiently identifies the subject-matter. Thomas v. Fursman, 39 Cal. App. 281, 178 Pac. 870. It was stipulated that the amounts claimed were due the respective claimants; the only question being that such amounts were not due from the defendant. The assignments were made prior to the discovery by the plaintiff and its assignors that the appellant was liable for the indebtedness. If the defendant conducted his private business under the corporate name, he is in no position to object that such name was used in the assignments. If, as defendant contends, he was acting only as an officer of the corporation, then the use of the corporate name in the assignments was proper, and he is liable under the provisions of section 309 of the Civil Code.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

On Petition for Rehearing.

PER CURIAM. Appellant asks for a rehearing on the ground that the opinion filed herein erroneously holds that the defendant is liable in an action at law under the provisions of section 309 of the Civil Code.

[7] The trial court found that the defendant owned and controlled the business conducted under the name of the Chowchilla Creamery Company, and that the same was his own personal and private business. This court held that such finding is supported by the evidence, and therefore affirmed the judgment. The opinion further states that, if it be conceded that the Chowchilla Creamery Company was a corporation and that the appellant was a director and president thereof, he would still be liable under the provisions of section 309 of the Civil Code. This statement was made in view of the particular facts of this case. Since there was no subscribed capital stock, the liability of the directors would extend to the whole indebtedness, and there would be no necessity of resorting to an action in equity for the purpose of taking an accounting and apportioning any recovery which might be had among the creditors.

"Where the statute imposes upon a stockholder or director a liability for all the debts of the company, * * * then each creditor has his remedy against the corporation and the director, and there is no more reason for allowing him to come into equity to enforce it against the director than for allowing him to enforce it in equity against the corporation." Bauer v. Parker, 82 App. Div. 289, 81 N. Y. Supp. 995.

"Unless a particular remedy is prescribed by statute, the form of the remedy, whether by action at law by each creditor against one or more stockholders or officers, or by bill in equity in which all persons in interest or to be affected are made parties, is made to depend upon the character of the liability. If its object is to create a common fund, limited in amount, for the benefit of all creditors of a particular class, so that if one were allowed to proceed alone he might exhaust the fund or get more than his share; or if the liability was only for the deficiency of corporate assets, or only for the excess of debts contracted over the amount permitted by the charter, so that an accounting is necessary; or if for any similar reason an action at law would be inadequate to furnish a complete remedy or protect the rights of all persons interested—the courts have generally held, in the absence of any express statutory provision, that a suit in the nature of a bill in equity, bringing in all interested parties, must be resorted to. * * * But no such reason obtains here. The liability of each director is unlimited, except by the amount of the corporate debts which fall within the terms of the statute. What one creditor may collect will not reduce the amount which another may recover. No accounting is necessary in order to ascertain the amount of the deficiency of corporate assets, for the creditor is not bound to resort to them first, nor is his recovery limited to the extent of such deficiency. In fact, a direct action by any creditor against any director not only furnishes an adequate remedy, but it interferes with the rights of no one else." Patterson v. Stewart, 41 Minn. 84, 42 N. W. 926, 4 L. R. A. 745, 16 Am. St. Rep. 671.

See, also, Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; 27 L. Ed. 966; Nuckels v. Robinson-Pettett Co., 159 Ky. 214, 166 S. W. 972; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962; Flour City Nat. Bank v. Wechselberg (C. C.) 45 Fed. 547. Of course, in a case where capital stock has been subscribed, resort must be had to an action in equity to enforce the liability of directors under the provisions of section 309.

Rehearing denied.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a rehearing of this case in the Supreme Court is denied.

The last sentence of the opinion of the District Court of Appeal, to the effect that the defendant Bennett "is liable under the provisions of section 309 of the Civil Code," should not be understood to mean that a single creditor can sue a director in a simple action for a money judgment, but merely to mean that the director is liable under that section, without attempting to state the form of action by which his liability can be enforced. There are decisions indicating that a single creditor cannot proceed except by a bill in equity on behalf of himself and all the other creditors of the corporation. The question as to the form of action is, as we understand the opinion, left open and undecided.

SHAW, C. J., and LAWLOR, SLOANE, WILBUR, LENNON, SHURTLEFF, and WASTE, JJ., concur.

55 Cal. App. 336

HENIKA et al. v. LANGE. (Civ. 4045.)

(District Court of Appeal, First District, Division 2, California. Nov. 25, 1921. Hearing Denied by Supreme Court Jan. 23, 1922.)

1. Evidence 🔑13—Matter of common knowledge that different crops require very different amounts of water.

In action involving question of whether lessor complied with provision of lease requiring him to install a pumping plant of sufficient size to irrigate the land, *held*, that it is a matter of common knowledge that different crops require very different amounts of water.

2. Evidence 🔑441(4) — Parol evidence held admissible to show parties' understanding as to character of land and crop to be raised.

Where farm lease required lessor to install a pumping plant of sufficient size to irrigate the land, and to purchase the seed for the first crop without specifying the kind of crop to be raised, parol evidence was admissible to show the character of the land and the understanding of the parties as to the crop to be raised, under Code Civ. Proc. § 1860, such evidence being necessary to ascertain the kind of seed to be furnished and the capacity of the pumping plant to be installed.

3. Evidence 🔑442(1)—Parol evidence admissible to show portion of agreement not reduced to writing.

Where a portion only of the contract between the parties has been reduced to writing, parol evidence is admissible as to the portion not included in the writing.

4. Evidence 🔑461(1)—Parol testimony admissible to show circumstances surrounding making of contract when necessary to ascertain intent of parties.

Under Code Civ. Proc. § 1860, oral testimony with reference to the circumstances surrounding the making of a written contract is admissible when an understanding of such surrounding circumstances is necessary to ascertain the intent and meaning of the parties.

5. Appeal and error 🔑1002—Finding on conflicting evidence not reviewable.

Finding made on conflicting evidence is not subject to review on appeal.

6. Landlord and tenant 🔑123—Lease held to require lessor to furnish water for irrigation.

Where premises were leased "together with a pumping plant of sufficient size to irrigate the land properly," and providing that lessees should run the "pumping plant continuously during the growing season," and lessor reserved right to "put down wells" during the term of the lease, and on supply proving insufficient lessor proceeded to deepen wells, and did not deny that she was under obligation to furnish water to irrigate, on lessees' complaints, lessor was required under such lease not only to furnish a pumping plant, but to furnish sufficient water.

7. Evidence 🔑457—Parol evidence admissible to show meaning of "pumping plant."

Where lessor leased described premises "together with a pumping plant of sufficient size to irrigate the above-described land properly," and where lease provided that lessees should run the "pumping plant continuously during the growing season of the crop," and that lessor reserve the right to "put down wells" during the term of the lease, parol evidence was admissible to show that, by use of the term "pumping plant," it was intended that the lessor should furnish wells and pumping machinery sufficient to irrigate the land.

8. Contracts 🔑170(1) — Contemporaneous construction strong evidence of meaning of equivocal terms.

The contemporaneous and practical construction of a contract by the parties is strong evidence of the meaning of equivocal terms.

9. Landlord and tenant 🔑136—Extension of time to lessor to furnish irrigation entitled lessees to corresponding increase in time to level the land.

Lessees' extension of time within which lessor was required to furnish irrigation system entitled lessees to a corresponding increase in the time allowed them to level and check the land.

10. Landlord and tenant 🔑136—Lessees, required to check and level land, could use any system customarily used for the particular crop.

Under lease requiring lessees to check and level the land, the lessees were not required to use any particular system, but could use any system which was proper and customary in raising the crop they had undertaken to plant.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Consolidated actions by Robert P. Henika and another against Anna A. Lange, and by Anna A. Lange against Robert P. Henika and another. Judgment for Henika and another, and Lange appeals. Affirmed.

L. M. Chapman and Ward Chapman, both of Los Angeles, for appellant.

F. E. Borton, of Bakersfield, and H. E. Schmidt, of Wasco, for respondents.

LANGDON, P. J. This action was commenced by the plaintiffs, who were lessees of the defendant, to recover damages in the sum of $4,800, alleged to have been sustained by them because of the failure of the defendant to perform the covenants of a lease upon her part to be performed. Thereafter an action was commenced by the defendant against the plaintiffs, in which she alleged that the plaintiffs had failed to comply with the terms of the lease on their part to be performed, and had abandoned the property, by reason of which facts defendant had suffered damage in the sum of $6,250.

In the first action demurrer was interposed to the complaint and overruled, and an answer was filed denying the material allegations of the complaint. In the second action defendants in that action filed an answer and cross-complaint, in which they alleged a rescission of the contract by them, and sought to recover $4,800 as the reasonable value of their services performed under the lease. Upon motion, the two actions were consolidated, and the case was tried upon a stipulation that the amended complaint of Anna Lange in the second action be construed as a cross-complaint in the first action, and said cross-complaint be deemed denied.

The action involves the construction of a lease entered into between the parties. One of the objections made by appellant is that the court erred in admitting parol evidence upon which it based its finding that the land described in the lease at the time of making said lease was heavily impregnated with alkali, and unsuitable for raising any crop other than rice, and it was contemplated, understood, and agreed between the parties that said lands were to be planted to rice for such successive years as should prove necessary in order to leach and purify the land and permit the successful planting of other crops.

[1] Without setting out here the full text of the lease, it will be sufficient to say that it provides that a pumping plant was to be installed by the lessor of sufficient size to irrigate the land demised, and it, together with the land, was the subject of the lease. The size of a plant sufficient to irrigate this land would depend somewhat upon the nature of the crop to be grown thereon, as it is a matter of common knowledge that different crops require very different amounts of water. The contract also provides that the lessees were to run the pumping plant continuously during the growing season of the crop. It provides, further, that the lessor was to purchase the seed for the first crop, and that such seed was to be paid for by the lessees out of the proceeds of the first crop. As rental for the land and pumping plant, the lessor was to receive a percentage of the crop raised.

[2-4] It became necessary for the trial court to ascertain by parol evidence what

kind of seed was to be furnished by the lessor, what capacity of pumping plant was to be installed and furnished by her, and in what manner it was to be operated—all of these things depending upon the nature of the crop to be raised upon the land. The kind of crop to be raised was a matter not touched upon in the lease. The evidence regarding the character of the land and the crop to be raised was admissible under two well-established exceptions to the rule that, where a contract is reduced to writing there can be, as between the parties, no evidence of the terms of the agreement other than the contents of the writing. The first exception is that, where a portion only of the contract between the parties has been reduced to writing, it is proper to allow parol evidence as to the portion of the agreement not included in the writing. Johnson v. Bibb Lumber Co., 140 Cal. 95, 98, 73 Pac. 730; Williams v. Ashurst, 144 Cal. 619, 78 Pac. 28. The portion of the contract between the parties which was not reduced to writing in the instant case was the portion regarding the kind of crop to be grown upon the land.

The second exception warranting the admission of this evidence is that contained in section 1860, Code of Civil Procedure, i. e., that oral testimony with reference to the circumstances surrounding the making of a written contract is admissible when an understanding of such surrounding circumstances is necessary in order to ascertain the intent and meaning of the parties. Morffew v. S. F. & S. R. R. Co., 107 Cal. 587, 600, 40 Pac. 810; Balfour v. Fresno Canal Co., 109 Cal. 221, 225, 41 Pac. 876; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 417, 129 Pac. 593; Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 273, 86 Pac. 509, 691. The testimony introduced under this exception was as to the character of the land, which was one of the surrounding circumstances of the parties in making their agreement. Such testimony, together with the testimony as to the understanding of the parties upon a matter not mentioned in the lease, i. e., the nature of the crop to be planted on the land, was clearly admissible under the two rules of law just discussed, and such testimony abundantly sustains the finding made upon the subject.

[5] Objection is also made to the finding as to the period of the year at which rice should be planted in order to secure the best results. There is evidence in the record to support this finding, and, it having been made upon conflicting evidence, it is not subject to review here.

Appellant complains of the finding that the clause in the lease requiring the defendant to furnish a pumping plant of sufficient size to irrigate the land was understood by the parties to mean that the said defendant would have completed and equipped with the necessary engine, pump, and appliances a well or wells on said premises of sufficient size, capacity, and equipment to deliver upon the surface of the ground sufficient water to irrigate all the land described in the lease, and that said well would be so completed by defendant in time to permit of the successful planting of rice in the year 1919.

[6-8] The contract itself states:

> "That the said party of the first part (Lange) does by these presents lease and demise unto the said party of the second part, all of the southeast quarter (describing the land), together with a pumping plant of sufficient size to irrigate the above described land properly."

It further provides:

> "The party of the second part is to run this said pumping plant continuously during the growing season of the crop."

It is clear that pumping machinery without a water supply would be useless to irrigate the land, and plaintiffs, assuredly, were not expected to run pumping machinery without water to pump. The contract itself meets the situation by providing that—

> "The party of the first part reserves all the right to put down wells or any other improvements she wishes to make during the term of this lease."

Thus the plaintiffs were precluded by the terms of the lease from drilling wells on the premises, as that privilege was reserved by the defendant. The oral testimony received by the court to make clear what the parties contemplated by the term "pumping plant" as used in the contract was clearly admissible, and fully establishes the fact that the parties intended that the defendant was to furnish wells and pumping machinery sufficient to irrigate the land. At the time the lease was made there were two wells of a depth of about 100 feet which had just been drilled upon the land, and the defendant installed a pump which was tried out after the plaintiffs took possession of the land. It was found that the wells furnished a very small quantity of water, and the defendant then had the pump removed and set to work to deepen the wells. The contemporaneous and practical construction of a contract by the parties is strong evidence of the meaning of equivocal terms. Keith v. Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598; Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257. The testimony is uncontradicted that the plaintiffs continually complained to the defendant that the wells she had furnished were inadequate, and the defendant never asserted that she was not under obligation to furnish wells supplying adequate water to irrigate the land; that the defendant engaged men to work upon the wells to deepen them and increase the water supply and to pump the sand therefrom. In fact, defendant's testimony at the trial was largely devoted to explaining her efforts to improve the wells by pumping sand from them, connecting them, and otherwise attempting to increase the water supply. We think there can be no doubt about her obligation in this respect under the lease.

Appellant makes the point that the defendant was not bound to furnish wells located upon the leased land, but that her obligation in that matter was fully met if she furnished wells on adjoining land from which water could be carried to the leased land. It is unnecessary for us to discuss this question; it is immaterial here, for the reason that the record contains testimony to the effect that the defendant did not furnish sufficient water from any source to irrigate the land properly for the growing of rice. This point is made because the record contains some testimony to the effect that the defendant was the owner of a one-quarter interest in a well upon the land adjoining the land leased to the plaintiffs, and that the plaintiffs might have used the water from that well. This testimony, however, is of no value to the appellant, because it is contradicted flatly by the testimony of the plaintiffs that Mrs. Lange told them that she had sold her interest in that well, and that the plaintiffs were not at liberty to use the water therefrom, and, further, that the plaintiffs were denied the use of the water from this well by the man in possession of the land upon which it was located. The conflict in the evidence upon this question was resolved in favor of the plaintiffs by the trial court, which found, as stated heretofore, that no sufficient amount of water was furnished by the defendant, and further found that, on or about the 15th day of May, 1919, the said defendant notified the plaintiffs that she was unable to furnish water sufficient to irrigate said lands, and directed said plaintiffs to cease planting rice therein. This finding is supported by testimony in the record.

[9] Under the findings, then, this court must conclude that the defendant did fail to comply with her contract. This leaves for our consideration the other objection made by appellant that the plaintiffs did not comply with their obligations under the contract in that they did not properly level and check the land, and that the checking which was done by them was not completed within the time allowed therefor. The contract provided that the land should be leveled and checked by April 1, 1919, and that the water should be furnished by May 1, 1919. The court found that the provision in the contract that the plaintiffs should level and check the land by April 1, 1919, was designed and intended by the parties to require the land to be leveled and checked in sufficient time to permit of the planting of same and the same being in readiness to receive the water so to be furnished by the defendant. The record contains testimony to the effect that several times the plaintiffs extended the time in which the defendant was to furnish the irrigation system. Assuredly, such extensions would, in equity, allow plaintiffs a corresponding increase in the time allowed them to complete their work of preparation for use of the water. At most, the dates for checking the land and for supplying the water were relative dates. The defendant's time to meet her obligation under the lease had been extended by the plaintiffs for a month and a half, and one of the plaintiffs testified that their work of checking and leveling had been done prior to May 1, except for a "little reinforcing here and there." It appears, therefore, that the plaintiffs' work had been done within the additional amount of time allowed the defendant to perform her part of the contract. There is absolutely nothing in the record to indicate that defendant was damaged or prejudiced in any way by the fact that the plaintiffs took this additional time in which to complete their work, and it clearly appears that the checking and leveling served no purpose and were not at all material until there was water to be used upon the land. We think, therefore, that there is no merit in this contention of the appellant.

[10] The testimony as to the character of the work done by the plaintiffs upon the land was in sharp conflict. Much of the record is devoted to this question, and it would serve no useful purpose to discuss the evidence. It is sufficient to say that the court found that the plaintiffs had gone upon the land, and in reliance upon the contract between them and the defendant had checked and leveled the whole thereof, and cultivated 100 acres thereof with what are known as disc cultivators, and drilled and seeded 60 acres thereof to rice. Appellant relies upon certain testimony in the record to the effect that what is known as the "square" checking system was more effective in irrigating than the "contour" system used by the plaintiffs. We think this becomes immaterial, because the plaintiffs were under no obligation to use any particular system, but only a system which was proper and customary in raising the crop they had undertaken to plant. There is testimony in the record by the witness Wiley, who had grown rice himself, and had had experience in this industry other than his own ranching, that the "contour" system of checking was used almost entirely for growing rice, and there is, in the record, the testimony of the witness Clegg, who stated that, although he considered the "square" check system better than the "contour" system, nevertheless, there was more rice planted by farmers in the "contour" system than in the "square" system, and that the checking

done by the plaintiffs was a good job of "contour" checking.

Furthermore, one of the plaintiffs testified that the work which had actually been done upon the land, and for which recovery was sought, actually cost about $30 an acre, or a total of $4,800. There was other testimony in the record that this work would cost about $40 an acre. The plaintiffs recovered only $3,200, or the sum of $20 an acre, so it is apparent that, even though there may have been some defects in the work of checking and leveling done by the plaintiffs, the defendant was required to pay only the reasonable value of the work actually done.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

55 Cal. App. 416

MURPHY v. DAVIDS et al. (SAN BERNARDINO NAT. BANK, Intervener).

(Civ. 3736.)

(District Court of Appeal, Second District, Division 1, California. Nov. 29, 1921. Hearing Denied by Supreme Court Jan. 26, 1922.)

1. Judgment 🔑855(1) — Statute providing procedure for enforcement of judgment after five years construed; "action"; "special proceeding."

A procedure under Code Civ. Proc. § 685, providing for enforcement of judgment after five years by leave of court, or by judgment founded on supplemental pleadings, constitutes neither an "action" nor a "special proceeding" of a civil nature, within the meaning of those terms, nor is it in the nature of either, but is a mere subsequent step in an action or special proceeding already commenced, which is governed entirely, so far as to the time within which it may be taken, by the statute specially relating thereto.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action; Special Proceeding.]

2. Judgment 🔑883(11)—Motion to offset outlawed judgments held not within scope of statute for enforcement of such judgments.

A motion to offset outlawed judgments against plaintiff's judgment, after having execution issued on such judgment by leave of court, *held* to call for an exercise of judicial power of the court where the motion is made, and not of the court from which execution issues, and is, in effect, an attempt to have it declared that the principal judgment against which the offset has been claimed has been satisfied, or to cause it to be satisfied, by means of the judgment sought to be offset, and is therefore not within the scope of proceedings authorized by Code Civ. Proc. § 685, allowing enforcement of judgment after lapse of five years.

3. Judgment 🔑883(11) — Power to set off judgments exists independent of statute.

The power to offset judgments exists independent of statute, and rests upon the general jurisdiction of courts over their suitors and processes.

4. Judgment 🔑883(12)—Set-off and counterclaim 🔑1 — Outlawed judgment cannot be used as set-off against claim.

The plea of set-off is in character a cross-action, and rests on a claim upon which the action could be maintained, and therefore a defendant who has acquired an outlawed judgment during the pendency of the action against him will not be permitted to set off that judgment against plaintiff's demand.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by M. A. Murphy against E. M. Davids and another, wherein the San Bernardino National Bank intervened. Judgment for plaintiff, and from an order denying defendants' motion to offset certain judgments against plaintiff's judgment, defendants appeal. Affirmed.

See, also, 181 Cal. 706, 186 Pac. 143.

A. L. Abrahams, P. B. D'Orr, and Paul W. Schenck, all of Los Angeles, for appellants.

Byron Waters, of San Bernardino, Anderson & Anderson and Victor T. Watkins, all of Los Angeles, and Ralph E. Swing, of San Bernardino, for respondents.

CONREY, P. J. This is an appeal by the defendants from an order denying their motion to offset, against the plaintiff's judgment herein, certain judgments now owned by the defendants against the plaintiff. The judgment in this action recovered by the plaintiff against the defendants in the sum of $15,000 was entered on the 17th day of November, 1916. Thereafter the plaintiff assigned this judgment, one-fourth to Anderson & Anderson, one-third to the San Bernardino National Bank, and the balance to Elizabeth A. Murphy. This assignment was filed with the clerk of the superior court of Los Angeles county on November 29, 1916, and notation thereof was made in the register of actions in this case. On December 5th following, notation of the assignment was made in the judgment book, at the place of entry of the judgment. By subsequent assignment the interests of Anderson & Anderson and of Elizabeth A. Murphy passed to the San Bernardino National Bank. Notice that this judgment had been assigned and transferred to the San Bernardino National Bank was served on the defendant Davids on the 21st day of January, 1920, and on defendant Lindsay the next day thereafter. It is also claimed by the plaintiff and by the bank that the defendants, prior to May

14, 1917, had notice of the assignment of the judgment as made by Murphy, in this, that one Joseph Citron, an attorney of the defendants, was and became familiar with that assignment as shown through the aforesaid filing and notations thereof, and by reason of the further fact that he communicated this information to Paul W. Schenck, who also was an attorney of the defendants in this action. But the defendants, in reply to this claim of respondents, contended that Citron was not an attorney of the defendants and that he did not communicate to Schenck any information concerning said assignments.

The defendants appealed from the judgment. The judgment having been affirmed by the Supreme Court, remittitur thereon was issued on January 19, 1920. On that day four judgments against the plaintiff, Murphy, duly rendered and entered in the superior court of the city and county of San Francisco, were assigned and transferred to the defendants. Three of these judgments were entered in May, 1913, in favor of the Equitable Protection Company, plaintiff in those actions. The fourth judgment was entered October 23, 1914, in favor of the Western Pacific Railroad Company, plaintiff therein. The aggregate amount of these four judgments, exclusive of the interest thereon, was $11,466.55. At the time of the assignment of those judgments to the defendants, and at the time of the motion to offset those judgments against the judgment in this action, the said four judgments were wholly unpaid. On the 21st day of January, 1920, in each of said four actions in the superior court of the city and county of San Francisco, an order was made that execution issue "and that the plaintiff or its assign or assigns may proceed to enforce said judgment in the manner provided by law." On the same day, and in accordance with said orders, executions issued in said several actions. Thereafter, upon notice duly given, defendants presented their motion in this action for an order offsetting, against the judgment herein, the said judgments held by them. Opposition to the motion was duly made by the plaintiff and by the San Bernardino National Bank, which was allowed to intervene for that purpose. By order made August 14, 1920, the motion was denied.

The plaintiff and the bank set up in opposition to the motion that each of the said four judgments was barred by the provisions of subdivision 1 of section 336, of subdivision 1 of section 337, of subdivision 1 of section 338, of subdivision 1 of section 339, and by the provisions of section 343, all of the Code of Civil Procedure; that each and all of the claims based upon or arising out of said judgments and each of them, and any and all right to offset the same, or either or any of them, was barred by the provisions of said sections of the Code of Civil Procedure. The principal question of law raised by the record and discussed by counsel herein may be stated as follows: When a judgment in this state was rendered more than five years prior to the date of the motion for an order of the court in which such judgment was rendered, directing that execution issue thereon, and such order has been made, is such judgment the subject of offset against a judgment rendered within the five-year period? Maintaining that this question should be answered in the affirmative, appellants rely upon section 685 of the Code of Civil Procedure, which provides that—

> "In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings. * * *"

Appellants contend that the foregoing section, by force of its provisions, keeps alive all judgments to such extent as to make them enforceable in every way except by new suit based thereon; that all that was lost by lapse of the five-year period of time was the right to enforce said judgments without an empowering order from the court. They contend that therefore the right of set-off survived. In this connection they point to the fact that the court in San Francisco not only directed that the executions issue, but further ordered, in each case, that the plaintiff or its assigns "may proceed to enforce said judgment in the manner provided by law." From this they insist that it logically follows that the right to offset exists because that is a manner of enforcement provided by law. Respondents, on the other hand, contend that section 685 merely provides a means of enforcing a judgment for the purposes of execution in the action itself; that it does not create or authorize any new action or proceeding by which a new or independent judgment can be procured; that it does not affect the running of the statute of limitations against any action or proceeding to revive it or give it a new or different effect; that it relates to or is confined to execution exclusively. They contend, further, that a motion to set off is a new and independent proceeding in another action than that in which the judgment sought to be set off was rendered, and is not merely in the nature of proceedings under an execution. From these premises they argue that any such action or motion is barred by the statute of limitations if not commenced within the period of limitation. The limitation particularly in point is the five-year limitation prescribed by subdivision 1 of section 336, Code of Civil Procedure, for the commencement of an action upon a judgment.

The proposition is not questioned that a judgment debtor has the right to acquire an existing judgment against his judgment creditor and to present it by motion in reduction or extinguishment of the judgment debt owed by him. The contention of respondents is that this right cannot be enforced in favor of the owner of an outlawed judgment debt.

[1] It must be conceded that, without the aid of the procedure authorized by section 685 of the Code of Civil Procedure, the judgments acquired by appellants herein could not be enforced against the judgment debtor. No execution could have been issued. An action on them could not have been successfully maintained. A procedure under section 685 constitutes neither an "action" nor a "special proceeding of a civil nature" within the meaning of those terms, nor is it in the nature of either.

> "It is a mere subsequent step in an action or special proceeding already commenced, which is governed entirely, so far as the time within which the same may be taken is concerned, by the provisions of the statute specially relating thereto." Doehla v. Phillips, 151 Cal. 488, 493, 91 Pac. 330.

[2] The answer which must be made to the concrete problem here presented depends upon the nature of the proceeding to offset a judgment. If that is an independent proceeding, extraneous to any exercise of power of the court which rendered the judgment sought to be enforced and out of which the process for enforcement has issued, then the motion to offset is not within the scope of such proceedings as are authorized by section 685 of the Code of Civil Procedure. We are of the opinion that a motion of this kind calls for an exercise of judicial power of the court where the motion is made, and not of the court from which the execution process issued. In effect it is an attempt to have it declared that the principal judgment (against which offset is claimed) has been satisfied, or to cause it to be satisfied, by means of the judgment sought to be offset. As illustrated in this case, it is an attempt to pay and satisfy a judgment by offsetting against it an outlawed judgment debt.

[3] Where such equitable relief is necessary, an action may be maintained to compel a set-off of mutual demands. This right exists, even though one of the opposing demands has not been reduced to judgment. Machado v. Borges, 170 Cal. 501, 150 Pac. 351. And, of course, the same kind of action would lie where both demands have been reduced to judgment. As to such judgments, the distinction between the powers of courts of equity and courts of law has ceased to be important. In every case the suitor has the right to ask for the set-off, and in every proper case as of right the motion should be granted. This is a power which exists independent of statute, and rests upon the general jurisdiction of courts over their suitors and processes. Haskins v. Jordan, 123 Cal. 157, 160, 55 Pac. 786. But the fact that this power may be invoked by motion, instead of by a separate action, does not change the nature of the proceeding, which, in any event, is one whereby the judgment debtor seeks to have the judgment against him satisfied by crediting to him an outstanding debt owned by him, against his judgment creditor.

Counsel for appellants have referred to Saunders v. Simms, 190 Pac. 806, as supporting their contention that their motion to set off judgments is not a special proceeding in the nature of an action, and that it comes within the scope of the proceedings allowed by section 685, Code of Civil Procedure. In that case Mrs. Saunders was the owner of a judgment against Albert S. Collins, of whose estate Simms was administrator. At the time of the death of Collins, more than five years had expired since the entry of the judgment. The plaintiff obtained from the superior court of San Bernardino county, where that judgment had been entered, an order granting permission to enforce the judgment "as provided by law against the estate of Albert S. Collins, deceased." A claim on the judgment was thereupon presented to the administrator. This claim having been rejected by the administrator, Mrs. Saunders instituted an action in the superior court of the county of Orange, where the probate proceedings were pending, to have the judgment adjudged to be a valid claim against the estate, to be paid in due course of administration. Judgment having been so made and entered, the administrator appealed, and this judgment was affirmed. In its decision the Supreme Court took into consideration the proceedings authorized by law for the collection of claims against estates. Section 1505, Code of Civil Procedure, directs that where a judgment debtor has died no execution shall issue on the judgment, but that it shall be presented to the executor or administrator like any other claim. Section 1498 provides that where a claim is rejected the holder may bring suit. Section 1504 declares that a judgment rendered against an executor or administrator upon any claim for money against the estate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due.

> "This is the method for enforcing a judgment after the death of a judgment debtor substituted by law in place of enforcement by writ of execution. It is the same procedure that would have been required after the death of the judgment debtor if the statute of limitations

had not run on the demand. We see no reason why this sort of relief may not be granted under section 685, as well as that by issuance and levy of a writ of execution."

In answer to the contention that the action and judgment there in question were not authorized by the provisions of section 685, the court held that the word "execution," as contained in that section, is used in the broad sense of execution or carrying into effect by such means as are provided by law for the enforcement of various classes of judgments.

> "The suit to obtain judgment for payment of a claim in due course of administration is not, as appellant seems to think, an action to establish a new judgment liability, based upon the old, but, as set forth in section 1504 of the Code of Civil Procedure, only establishes the validity of the claim in the same manner as if it had been allowed by the administrator and approved by the court. Hall v. Cayot, 141 Cal. 13, 74 Pac. 299; Estate of More, 121 Cal. 638, 54 Pac. 148. And it is held that the allowance of a claim is not in any true sense a judgment. Morton v. Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53. There is nothing in Doehla v. Phillips, 151 Cal. 489, 91 Pac. 330, and other decisions cited by appellant, contrary to the view expressed. In the cases cited executions were issued because they happened to afford appropriate and adequate relief, but there is nothing to indicate that some other appropriate means for collecting the judgment could not be resorted to in a proper case. Section 685 is a limitation upon the operation of the statute of limitations under section 336 of the Code of Civil Procedure to the extent that it places within the discretion of the courts the power to authorize the enforcement by the ordinary processes provided by law of a judgment otherwise barred by the statute. That is what was done in this instance." Saunders v. Simms, 190 Pac. 806.

It may be conceded that some of the language used in Saunders v. Simms, if received without limitation to the facts of that case, and without respect to the controlling Code provisions relating to the enforcement of claims against estates, would tend to support the argument of appellants here; but, undoubtedly, the views there expressed had regard particularly to the fact that an action to enforce a judgment by establishing a claim thereon against a decedent's estate is merely the statutory method "substituted by law in place of enforcement by writ of execution." Viewed in that light, and considered as merely the allowance of a claim, and "not in any true sense a judgment," the so-called judgment was affirmed as constituting a valid method of enforcing the judgment and within the scope of the authority conferred by section 685. Nevertheless, we think that section 685 was never intended to serve any purpose other than as an aid to the enforcement of a judgment coming within its provisions by some procedure having its authorized source in the court which rendered the judgment. The power conferred by the section must be exercised either by means of an execution or "by judgment for that purpose founded upon supplemental pleadings." The case illustrated by Saunders v. Simms is an exception authorized by statute as a substitute for the execution authorized by section 685.

[4] The general rule remains unchanged that an action may not be maintained as against the plea of the statute of limitations upon a judgment against which that statute has run. Neither can a proceeding be maintained which has substantially the nature and effect of an action to obtain such judgment. The plea of set-off is in character a cross-action. It must rest upon a claim upon which an action could be maintained. A defendant who acquires an outlawed judgment during the pendency of an action against him would not be permitted to offset that judgment against the plaintiff's demand. This would be so because the allowance of such plea would, in effect, permit recovery upon a barred claim. We perceive no reason why such a defendant is entitled to obtain, by motion after judgment, relief which he could not obtain before judgment by pleading the same matter as a cross-demand in the action. Therefore we conclude that the order denying the motion of appellants herein should be sustained.

The views heretofore expressed render it unnecessary to make any statement of the evidence bearing upon the contention of respondents that Joseph Citron was an attorney of appellants in this action and that, through knowledge obtained by Citron in the course of his services rendered on their behalf in this case, appellants had notice of the assignment by Murphy of the judgment in this action, and that for that reason any rights which they may have against the plaintiff are subject to the rights of the San Bernardino National Bank as owner of the judgment in this action.

The order is affirmed.

We concur: SHAW, J.; JAMES, J.

55 Cal. App. 374

MINAKER v. ADAMS et al., Members of the Board of Medical Examiners.
(Civ. 3850.)

(District Court of Appeal, First District, Division 2. California. Nov. 26, 1921.)

1. **Physicians and surgeons 🔑11(3) — Sole function of writ of review is to determine jurisdiction of Board.**

Where the State Board of Medical Examiners has revoked a license to practice medicine and the practitioner has brought a writ of review, the only function of the writ is to determine whether the board exceeded its jurisdiction.

2. **Physicians and surgeons 🔑11(3)—License to practice properly revoked for performance of criminal operation.**

On review of action of the State Board of Medical Examiners revoking petitioner's license to practice on the ground that petitioner had procured an abortion upon a pregnant woman, evidence *held* to sustain a finding that the woman operated upon was in fact pregnant notwithstanding the admission of improper evidence upon such point.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Writ of review by May R. Minaker against Lemuel P. Adams and others. From a judgment of the superior court dismissing the writ and affirming proceedings of the Board of Medical Examiners in revoking petitioner's license to practice medicine, petitioner appeals. Affirmed.

Frank J. Hennessy, of San Francisco, for petitioner.

Harry A. Encell, of San Francisco, and Frank M. Smith, of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal from a judgment of the superior court dismissing a writ of review and affirming all the proceedings of the Board of Medical Examiners of the state of California in revoking appellant's license to practice medicine and surgery in the state of California.

The action of the Medical Board was taken after a hearing duly and regularly had upon a complaint charging appellant "with having been guilty of unprofessional conduct under the first subdivision of section 14 of the Medical Practice Act of the state of California, St. 1917, p. 93, by * * * procuring, aiding and abetting and attempting, agreeing and offering to procure a criminal abortion upon a pregnant woman * * * on or about the 28th day of May, 1919, in the city and county of San Francisco, state of California."

Appellant's contention is that the Medical Board received at the hearing considerable hearsay testimony and other evidence not admissible. Reliance is placed upon the case of Thrasher v. Board of Medical Examiners, 185 Pac. 1006, because of its holding that hearsay evidence is inadmissible in a proceeding such as this one. In the last-mentioned case, the appellate court annulled an order of the Medical Board revoking a license to practice medicine, which order was based solely upon improperly admitted evidence as to one essential element of the charge. That case involved the same charge as the instant case, and the opinion filed therein states that there was no sufficient evidence in the record before the Board of Medical Examiners upon an essential feature of the charge, i. e., the pregnancy of the woman upon whom the illegal operation was alleged to have been performed, and that the only evidence upon that question was evidence which should have been excluded under the "hearsay evidence" rule.

It is contended by the appellant here that because the Medical Board received some evidence upon the question of the pregnancy of the deceased, which evidence was inadmissible under the holding of the Thrasher Case, supra, that its order revoking appellant's license should be annulled.

[1] The only function of the writ of review in this case was to determine whether the board exceeded its jurisdiction, and the sole question reviewable by the superior court upon the proceedings before it and by this court upon this appeal is whether the Medical Board exceeded its jurisdiction, in making the order complained of. White v. Superior Court, 110 Cal. 60, 42 Pac. 480; Los Angeles v. Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234; Hitchcock v. Superior Court, 73 Cal. 295, 14 Pac. 872; Karry v. Superior Court, 162 Cal. 281, 122 Pac. 475, 128 Pac. 760; Fickert v. Zemansky, 176 Cal. 443, 168 Pac. 891; Camm v. Justice's Court, 35 Cal. App. 293, 170 Pac. 409. Respondents do not question the right of this court to review the evidence to ascertain whether there is in the record any legal evidence to sustain the findings of the board, and this is not a case presenting the exception suggested in the case of Lanterman v. Anderson, 36 Cal. App. 472, 172 Pac. 625, where the record of the proceedings before the board shows an entire absence of proper evidence, amounting in effect to a want of jurisdiction in the board to make the order. On the contrary, conceding the fullest possible force and effect to the language of the Thrasher decision, and the consequent inadmissibility of some of the evidence received by the board in the instant case upon the question of the pregnancy of the deceased at the time of her treatment by the appellant, there is, nevertheless, abundant proper evidence in the record that this condition existed.

This is to be found in the testimony of Dr. John R. Clark, autopsy surgeon in the coroner's office for the city and county of San Francisco, and in the testimony of Dr. Janus, who examined deceased when she was brought to St. Joseph's Hospital in a precarious condition. Dr. Clark testified that he had performed an autopsy upon the body of deceased on May 29, 1919. After a recital of the symptoms of peritoneal infection which his examination revealed, the doctor stated:

> "That he found that the uterus and appendages and the upper portion of the vagina had been removed. It didn't have the appearance of being the result of a typical surgical operation; these organs had been taken out evidently in a hasty, unskillful manner,—that is, they had been slashed out and partly torn out; no sutures were employed; no suture material was found. There was also a ragged perforation or slit in the bowel in the upper portion of the rectum, the large intestine or sigmoid."

A detective connected with the police department of San Francisco testified that he had called upon Dr. Minaker at her office with relation to this case, and that the doctor had handed him a specimen which was proven by other evidence to have been the uterus, tubes, and an ovary from the body of deceased, and that the doctor had told him that she thought this specimen was a tumor, and that it had been passed by deceased in the doctor's office while deceased was upon the operating table for an examination, and without anything having been done by the doctor. This specimen was brought from Dr. Minaker's office by the detective to Dr. Janus at St. Joseph's Hospital, where Dr. Minaker had caused the deceased to be sent after her collapse. Dr. Janus testified before the Medical Board, and stated in detail the condition of deceased at the time she was brought to the hospital; that the specimen from Dr. Minaker had been handed to him, and that he had examined it and had found that it consisted of uterus, tubes, ovary, and part of the vaginal wall. He stated positively that the uterus was a pregnant uterus. This specimen was later sent to Dr. Clark at the morgue, after he had performed an autopsy upon deceased. He examined it and stated before the board that the uterus "contained fœtal products; that fœtal products—that is, it contained a portion of the placental tissue." There was some other evidence properly admitted relevant upon this question, and it all stands uncontradicted in the record, for the appellant, although served with citation and a copy of the complaint, did not appear either in person or by counsel at the hearing.

[2] The above quoted testimony eliminates any question that might arise were there an entire absence of legal evidence in the record, as in the Thrasher Case, and it conclusively establishes the jurisdiction of the board to make the order complained of. Under such circumstances, any irregularity in the method of procedure in the matter of the admission of improper evidence will not be reviewed upon a writ of review. Lanterman v. Anderson, 36 Cal. App. 472, 172 Pac. 625; Jordan v. Alderson, 192 Pac. 170.

The judgment appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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55 Cal. App. 565

CAIN v. DAVIS. (Civ. 4023.)

(District Court of Appeal, First District, Division 2, California. Dec. 7, 1921. Hearing Denied by Supreme Court Feb. 2, 1922.)

1. Railroads 🔑350(22)—Contributory negligence of automobile driver held for jury.

Where the electric signal at a crossing did not indicate approach of a train, and trainmen did not ring bell or blow whistle, an automobile driver who looked and listened before driving upon track, but whose view in direction from which train was approaching was obstructed, *held* not negligent, as a matter of law, in attempting to cross.

2. Railroads 🔑324(1)—Automobile driver required to exercise ordinary care.

Automobile driver, before crossing track at crossing, was required to exercise merely ordinary care, and not the utmost care.

3. Negligence 🔑136(26)—Contributory negligence question for jury.

It is only where no fact is left in doubt, and no deduction other than negligence can be drawn by the jury from the evidence, that the court may say as a matter of law that contributory negligence is established.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by Robert Cain against James C. Davis, substituted in place and stead of W. D. Hines, Director General of the Northwestern Pacific Railroad Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanley Moore, of San Francisco, and Thomas J. Geary, of Santa Rosa, for appellant.

R. M. Barrett, of Santa Rosa, for respondent.

STURTEVANT, J. [1] The plaintiff commenced an action against the defendant to recover damages which he sustained by reason of being hit by one of the defendant's trains. The defendant answered, and a trial was had in the trial court by the court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and the defendant has appealed from the judgment, bringing up the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

judgment roll and a bill of exceptions. On this appeal the defendant contends that the evidence showed that the plaintiff was at the time of the accident, as a matter of law, guilty of contributory negligence, and that the judgment should be reversed. The accident occurred at the crossing of College avenue and the defendant's right of way in the city of Santa Rosa. The plaintiff was, at the time of the accident, on his way to his residence, and was entirely familiar with the route he was traveling, including the dangers, the signals, and the topographical conditions. College avenue intersects the defendant's right of way at an angle of about 45 degrees therewith. Buildings, fences, and trees on the plaintiff's left greatly obscured, if they did not wholly obscure, the plaintiff's view of the defendant's right of way. On plaintiff's right, and approximately on the eastern line of the defendant's right of way, the defendant had maintained a signal device, which consisted of an arm attached to a standing pole, capable of being dropped to a position at right angles to the pole supporting it, and which arm was lettered "Stop." As a part of this apparatus there was attached a wigwag. The apparatus was so constructed that when a train was approaching the crossing the arm could be dropped to a position horizontal with the road and the wigwag could be set in motion and kept in motion until the train had passed by. At the point of crossing there are three tracks, a side track, a main track, and then another side track.

When the plaintiff had driven his automobile to the railroad premises, another automobile was at a standstill in College avenue, and a freight train was moving to the south over the intersecting ways. The plaintiff stopped his car 65 feet east of the first track. The freight train passed down the track until the end of the last car, a caboose, was, according to some of the testimony, near the center line of College avenue. As the freight train came to a standstill the engine was making considerable noise discharging steam. The children riding with the plaintiff were making more or less noise talking among themselves. The plaintiff caused the children to be quiet that he might listen for the sound of trains. He listened for moving trains and heard no such sound. He looked to the right and looked to the left, and could see no approaching train, and, indeed, on the south he could see nothing because of the obstructions. When the freight train had come to a stop the automobile in front started up and moved rapidly across the tracks. Before the plaintiff proceeded he looked at the wigwag signal and it was still. He looked to his right and the way was clear. He looked to his left; his view was obstructed and he could see nothing; and he did not see anything till he passed the corner of the caboose, and then he saw the passenger train 20 feet away. No bell was rung, and no whistle was blown by a train approaching from the south. The plaintiff thereupon proceeded, and when he got onto the main track the collision occurred.

The defendant claims that these facts, as a matter of law, constituted contributory negligence on the part of the plaintiff. To support his contention he cites Young v. Southern Pacific Co., 182 Cal. 369, 190 Pac. 36, and earlier decisions of that court. Of all of those cases it may be truly said that the facts were somewhat similar to those in the case at bar. But they were by no means identical. The appellant would have us disregard the nonaction of the wigwag in considering the question of contributory negligence of the plaintiff. Headley v. Denver & R. G. R. Co., 60 Colo. 500, 154 Pac. 731; Jacobs v. Atchison, T. & S. F. Ry. Co., 97 Kan. 247, 154 Pac. 1023, L. R. A. 1916D, 783, Ann. Cas. 1918D, 384. Those cases are to the effect that the nonaction of the electrical device is to be classed with the failure to ring a locomotive bell and the failure to blow a locomotive whistle. They are to the effect that the nonaction of such a device would not excuse such a person as this plaintiff from performing the duty to stop, look, and listen when he is about to cross the track of a steam railroad.

[2, 3] However, an examination of the testimony above quoted will show at once that the record in this case does not show that the plaintiff neglected to perform that duty. The plaintiff was called upon to exercise ordinary care, and not the utmost care, and it is only where no fact is left in doubt, and no deduction other than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Zibbell v. Southern Pacific Co., 160 Cal. 237, 241, 116 Pac. 513. We think that under the facts shown by the record in this case we are not at liberty to say the plaintiff was guilty of contributory negligence.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

55 Cal. App. 527

SHOULTS v. ALDERSON et al., Board of Medical Examiners. (Civ. 3924.)

(District Court of Appeal, First District, Division 2, California. Dec. 5, 1921. Rehearing Denied Jan. 4, 1922. Hearing Denied by Supreme Court Feb. 2, 1922.)

1. Parliamentary law 🔑5—Chairman's inaccuracy held not affecting mover's motion.

Where a motion that judgment be deferred 13 months, seconded and heard by all members of the Medical Board, was inaccurately stated by the chairman "to put on probation for 13 months," the mover's motion was the one voted on and carried.

2. Physicians and surgeons 🔑10 — Medical Board may continue its hearings.

Under Medical Practice Act, § 14, subd. 11, where the board of Medical Examiners acquires jurisdiction, it has power to continue its hearings from time to time, and under such authority might defer for months its judgment on charges against a petitioner of unprofessional conduct in unauthorizedly using degree letters and terms indicating license to practice systems for which he was not licensed.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Robert G. Shoults against Harry E. Alderson and others, members of the State Board of Medical Examiners. From judgment of the Superior Court refusing to review an order of the Board, petitioner appeals. Affirmed.

Frank M. Carr, of Oakland, and H. W. Brunk, of Berkeley, for petitioner.

Harry A. Encell, of San Francisco, and Frank M. Smith, of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal by the petitioner from a judgment of the superior court upon proceedings upon a writ of review, which judgment affirmed the proceedings of the respondents acting as the Board of Medical Examiners of the state of California.

The only question before this court upon this appeal is: Did the Board of Medical Examiners exceed its jurisdiction in making the order complained of? Section 1068, Code Civ. Proc.; Jordan v. Board of Medical Examiners, 192 Pac. 170. The facts pertinent to a determination of that question are:

Petitioner was duly and regularly licensed to practice as a "doctor of naturopathy" in the state of California on March 1, 1909, and continued to practice his profession until the action of the Board of Medical Examiners of which he complains. In May 1918, complaint and citation were served upon appellant under the provisions of the Medical Practice Act (St. 1917, p. 93). The complaint charged that appellant had been guilty of unprofessional conduct under the eleventh subdivision of section 14 of the Medical Practice Act of the state of California on or about the 11th day of May, 1918, in the county of Marin, state of California, by then and there using certain letters, terms, and abbreviations or words as affix and suffix to his said name, indicating that said Shoults was then and there entitled to practice the system or mode of treating the sick or afflicted in the state of California for which he was not licensed in the state of California. The citation required appellant to appear before the Board for a hearing on June 25, 1918. An answer was filed by appellant in which he denied being guilty of unprofessional conduct, but admitted having used the abbreviations "M. D." attached to his name upon his professional cards and stationery and upon a sign in front of his office, but alleged that such action on his part was not for the purpose of holding himself out to the public as entitled to practice a system of medicine which he was not licensed to practice, but that it was used because appellant had received the degree of medicinæ doctor from a legally chartered medical college of the state of Illinois and believed he had a right to use this degree after his name; that he had never practiced or held himself out as practicing any art of healing other than "naturopathy."

At the hearing appellant appeared by counsel and in person and admitted the use of the suffix complained of by the Board, whereupon he was found guilty of unprofessional conduct as charged in the complaint.

The attorney for Dr. Shoults stated that the doctor was willing to discontinue the use of the suffix to his name and asked that the Board consider that fact and dismiss the proceedings. The following then occurred:

"Dr. Smith: There is no desire on the part of the Board of hurting Dr. Shoults in any way, and if there is any way of his retaining his license, and confining his practice to the license which he has, I think there would be no intention or desire on the part of the board to interfere with him further.

"Mr. Jackson: He does consent to dropping the letters 'M. D.'

"President Phillips: All right, and defer judgment?

"Mr. Ward (attorney for Medical Board): Yes.

"Dr. Pinkham: I move that the judgment be deferred in the case of Dr. Shoults.

"President Phillips: Until when?

"Dr. Smith: I will make it 13 months that he be put on probation.

"Dr. Tasker: Second the motion.

"Mr. Ward: Do you consent to that? Do you understand that?

"Mr. Jackson: Yes; if he has not used the suffix 'M. D.' during that time it is all right, and if he does his license will be revoked.

"Mr. Ward: Yes.

"Dr. Smith: As covered by his naturopathic license, and he is supposed to conform to the limits of that license.

"Mr. Jackson: It is admitted that he does, and there is no evidence to the contrary. He simply used those letters believing he had a right to use them. He at no time operated as a doctor of medicine, and he simply used the initials, 'M. D.' after his name.

"President Phillips: Why would you object to this being deferred on condition that he conform in every way to the provisions of the Medical Practice Act?

"Mr. Jackson: It is rather a long-time sentence. I am satisfied he has never violated the law in regard to his mode of practicing, and there is no evidence that he has.

"Mr. Ward: I wouldn't go into that very much, Mr. Jackson.

"Mr. Jackson: All right, if the Board wants him to be put on probation, so to speak, for that period of time, we will agree to that.

"President Phillips: Any further remarks?

"Mr. Ward: Has the motion been put?

"President Phillips: No; it has not been put. The motion is then that the respondent be put on probation for 13 months. You have heard the motion, duly seconded. Are you ready for the question? All in favor will say 'Aye.'"

The motion was carried, unanimously, by the Board.

[1, 2] Appellant contends that because the chairman, in stating the motion, did so inaccurately, his language is to be looked to for the sense of the motion carried by the Board, and not the language of the mover and the intention of the member who seconded the motion as it was actually made. Starting from this premise, appellant argues that the motion carried by the Board is a judgment placing appellant upon probation for 13 months, which would be a penalty unauthorized by the Medical Practice Act, the source of respondent's power.

The power of the Board to inflict such a penalty upon one found guilty of unprofessional conduct is not a question presented to us upon this appeal, as we view the portion of the record hereinbefore set forth. We think the motion carried by the Board was that the judgment be deferred for 13 months. This was the motion seconded by Dr. Tasker and heard by all members of the Board who were present, and it is plain from the entire discussion that such was the motion intended to be carried and that was carried by the Board. This motion was not a final order or judgment; it was merely an order deferring the final judgment for a specified time. Assuredly, under the general powers given to the Board by the Medical Practice Act, it would have implied power to continue its hearings from day to day or for any other longer period which seemed to it convenient or desirable under the circumstances. Such power would be indispensable to the successful functioning of the Board in the method provided in the act, and would, consequently, be implied, if not expressed therein. Furthermore, the appellant expressly consented to such continuance.

When later it was brought to the attention of the Board that the appellant had violated his promise and was using the suffix "M. D." on his stationery, prescriptions, and labels for bottles, the secretary of the Board wrote to him stating that further hearing in the matter of the revocation of his license would be placed on the calendar for June 24, 1919. On that date appellant appeared before the Board in person and represented by an attorney. He was examined and admitted that since the prior hearing he had used stationery on which was printed his name with the suffix "M. D." Testimony was also given by another witness of further violations by appellant, in this particular, of the Medical Practice Act.

Upon such a showing the Board voted, unanimously, to revoke appellant's license. In inflicting this penalty the Board was merely pronouncing the deferred judgment which it was empowered to render at the first hearing.

We find no grounds for a reversal of the judgment of the superior court. The Board of Medical Examiners acquired jurisdiction of the appellant and of the subject-matter by the procedure prescribed in the Medical Practice Act, and it had power to continue its hearing, and to finally inflict the penalty which it did.

The judgment appealed from is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

55 Cal. App. 568

HIBBERD v. McCOSKER. (Civ. 4009, 4010.)

(District Court of Appeal, First District, Division 1, California. Dec. 7, 1921.)

1. Adverse possession ⟹31—Record owner must have notice, actual or constructive, of hostile claim.

The record owner must have notice, actual or constructive, that claimant's possession is hostile.

2. Adverse possession ⟹31—Possession of tract as lessee of larger inclosed tract including the smaller one insuffiicent notice of claim.

Under Code Civ. Proc. § 325, as to inclosure, possession of a tract of land, not separately entirely fenced, by lessee of a larger inclosed tract including the smaller tract, does not operate as notice to the true owner that claimant holds possession of the smaller parcel under claim of right.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Actions by Alice H. Hibberd against James McCosker. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry E. Leach, of Oakland, for appellant.
Fred L. Button, of Oakland, for respondent.

TYLER, P. J. These actions, which were consolidated and tried together upon the same evidence, were brought to determine ownership and possession of a certain tract of land consisting of 80 acres. The first action was one to quiet title; plaintiff alleging ownership and possession in herself and a wrongful claim to the same by defendant. The second action was a suit for possession of the land, wherein title was claimed by plaintiff and alleged wrongful possession by defendant.

At the trial plaintiff proved title by record based upon a United States patent. Defendant's claim of ownership and right to possession was based upon a possessory title. The trial court rendered judgment in favor of plaintiff, and defendant McCosker appeals.

The principal question involved is whether or not there was a substantial inclosure of the land by defendant as required by section 325, Code of Civil Procedure, sufficient to support his claimed title by adverse possession.

There is no conflict in the evidence upon this subject, and no question is raised as to the payment of taxes or the duration of the adverse holding. The evidence upon this subject shows that the land in dispute formed a portion of a thousand or more acre inclosure held by defendant from different owners under a lease. The 80-acre parcel in controversy, independent of the fencing of the entire tract, was not separately inclosed, and there were no fences thereon except on the south side, where natural barriers and a fence constituted a portion of the southern exterior boundary of the entire tract. Under these conditions it is the claim of appellant that the trial court was in error in holding that the fence around the larger leased field did not constitute an inclosure of the disputed parcel within the meaning of the statute. The character of the inclosure, therefore, is the main question involved.

[1] The adverse character of the possession necessary to bar the claim of one holding the record title must in every case be manifested to the owner. He must be notified in some way that the possession is hostile to his claim, or the statute does not operate against his rights. Mattes v. Hall, 28 Cal. App. 362, 152 Pac. 436. The notice of the hostile claim may be actual or constructive, but without it a true owner's title may not be tolled away by the possession of the adverse claimant.

[2] Ordinarily an inclosure gives notice of a hostile claim of ownership, but a different situation is presented where the holding, as here, is not of such an independent nature as would give the same degree of notice of a hostile claim.

It has been held in this state, following the doctrine laid down in Hall v. Gittings, 2 Har. & J. (Md.) 380, where possession was taken under a claim of title founded upon a written instrument, that where the inclosure relied upon was not separately entirely fenced, but was contained in an inclosure with other lands held under claim of title, there could be no good reason for requiring the claimant to subdivide the land claimed and make subinclosures therein as no such duty is evidenced by the statute. Botsford v. Eyraud, 148 Cal. 431, 434, 83 Pac. 1008. See, also, Urquide v. Flanagan, 7 Idaho, 163, 61 Pac. 514; Sanders v. Riedinger, 30 App. Div. 277, 51 N. Y. Supp. 937; Church v. Waggoner, 78 Tex. 200, 14 S. W. 581; 2 Corp. Jur. p. 64.

In the Botsford Case, however, the inclosure was much more extensive than the one here involved and included other lands of the occupant held under claim of title. It is conceded that, if appellant held possession of the larger tract as owner or under claim of title, and not as lessee, the rule there announced might apply, but it is insisted that the nature of appellant's holding did not in any manner indicate that defendant's possession was of such a character as to give notice to the world of his adverse claim thereto as evidenced by an inclosure sufficient to satisfy the statute.

Counsel have cited us to no case, and we have found none, where a tenant of a larger tract has been permitted to thus acquire a possessory title to a smaller parcel lying within his leased inclosure. Cases may be found in harmony with Botsford v. Eyraud, supra, holding that, where the claimant is the owner of the inclosed lands, he may maintain possessory rights to other lands within his inclosure, but some of these cases strongly indicate that his holding must be exclusive.

In Hamilton v. Fluornoy, 44 Or. 97, 74 Pac. 483, the inclosure relied upon was common to the claimant and others owning lands within its limits, and the use of the land, which consisted wholly in pasture of stock, was common as well to all; and it was held that, claimant's possession being neither actual or exclusive, it was therefore wanting in those essential elements of an adverse possession as would ripen into a full title.

So also in Walsh v. Hill, 41 Cal. 571, 582, where the general inclosure included not only the land in controversy, but other land not claimed exclusively by plaintiff, it was said:

> "It would be the extreme of assumption to maintain that this sufficed to subject the premises in controversy to the will and dominion of the then claimants of a portion thereof, to the exclusion of others, or to constitute an actual,

exclusive possession of any claimant of a specific parcel within this general inclosure."

As indicating what is meant by an inclosure within the meaning of the statute the case of Doolittle v. Tice, 41 Barb. (N. Y.) 181, is illuminating. In referring to the subject it is said:

> "The provision of the Code referred to was intended to provide that a party claiming to hold adversely, where his claim was not founded upon a written instrument, or a judgment or decree, should protect his claim by the erection of a substantial inclosure. I think the language employed means that he shall provide the inclosure around the land, without relying upon a distant and remote fence of a neighbor, inclosing that neighbor's land also. And, although he may avail himself of a fence upon the line, yet it was not designed that a fence located far away from the premises and including other lands should be used as a means of protection to a claim of this character. It was also intended that the inclosure should provide fixed, certain and definite boundaries of the claim made, by which it might be designated, marked and known. It must be an inclosure lot alone, upon the lines claimed by the party, and not embracing premises adjoining, extending in part a great distance from the lines."

In keeping with this view we do not think that the possession of appellant as lessee of the larger tract was of such a character as to operate as notice to the true owner that he held possession of the smaller parcel under claim of right. Acts of one in possession should indicate clearly that he holds, not for the true owner, but for himself and in opposition to such owner. An owner has the right to be informed of the claim set up against him, either by acts or words, before the statute will run; and if the acts of the party in possession are of such a character as reasonably to indicate to the owner that the holding is not adverse, but in subordination to his title, the statute will not run. De Frieze v. Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151; Mauldin v. Cox, 67 Cal. 387, 7 Pac. 804.

Here the holding under a lease by claimant of the larger tract upon which was maintained the fence relied upon to support appellant's claim might well have lulled plaintiff into the belief that appellant's possession as a mere lessee of the larger tract was the extent of his holding, and we do not consider that the holding here involved was sufficiently open and notorious to notify a prudent owner of its existence and of its hostile character so as to put him upon inquiry as to the title of the occupant.

While in a strict sense the land here involved might be said to be "inclosed," we do not think that it is such an inclosure as is contemplated by the statute, and that it does not meet the requirement of the statute, which contemplates an open, hostile possession.

We conclude, therefore, that the inclosure of the locus in quo was insufficient to put plaintiff upon inquiry as to the nature of appellant's alleged holding. Payne v. Gould, 74 Vt. 208, 52 Atl. 421.

Little stress is laid by counsel for the appellant upon the question of improvement and cultivation as affecting the necessity for inclosure, it being conceded by him that the real question involved and the one relied upon for reversal is the one here discussed, and the case was tried upon that theory.

The findings fully support the judgment.

For the reasons given, the judgment in each appeal is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

(55 Cal. App. 561)

LUGO v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 3772.)

(District Court of Appeal, Second District, Division 1, California. Dec. 7, 1921.)

Justices of the peace ⟹184—On appeal to the superior court from a default judgment in the justice's court questions of fact cannot be determined.

There can be no appeal on fact questions from a default judgment entered in a justice's court, and appellant cannot extend its scope by designating it as an appeal on questions of both law and fact, and the authority conferred upon the superior court by Code Civ. Proc. § 980, authorizes only a review of the justice's court's ruling and a remanding of the cause with directions to proceed in accordance with the superior court's decision.

Action by M. Lugo against George W. Hood and others in a justice's court. Defendants appealed to the Superior Court from a default judgment. Application by M. Lugo for a writ of certiorari to the Superior Court of Los Angeles County and Charles S. Burnell, Judge thereof, to review the judgment for defendants in said Superior Court. Judgment annulled, with instructions to the Superior Court to proceed in accordance with decision.

Robert F. Shippee, of Los Angeles, for petitioner.

Ralph C. Homan, of Chino, and Isaac Jones and Benjamin F. Warmer, both of Ontario, for respondents.

CONREY, P. J. In an action of M. Lugo, Plaintiff, v. Geo. W. Hood et al., Defendants, in the justice's court of Venice township, in the county of Los Angeles, a judgment by default was entered against the defendants on the 2d day of February, 1921. Thereafter, and within due time, the defendants gave notice of appeal on questions of both law and fact, which appeal was duly perfected. Thereafter the case came on for hearing before the superior court. This is a proceeding to review a judgment entered by the superior court as the result of that hearing. The judgment recites that the parties appeared before the court by their attorneys, "and no testimony having been given on the part of either plaintiff or defendant, and defendants' Exhibit A having been filed, and the cause having been argued," the court ordered judgment for the defendants. Thereupon judgment was entered against the plaintiff and in favor of defendants for their costs.

Where a judgment upon default has been entered in a justice's court, there can be no appeal on questions of fact. The party appealing cannot extend the scope of his appeal beyond questions of law by designating the appeal as one upon questions of both law and fact. People v. County Court, 10 Cal. 19. The Supreme Court has held many times:

> "That, a new trial being a re-examination of an issue of fact, there can be no new trial of the cause in the superior court on appeal, unless there has been a trial of issue of fact in the justice's court. * * * We think it clear, therefore, that upon an appeal on questions of law alone, like the one here under review, the superior court can merely pass upon the questions brought before it on the appeal, and has no jurisdiction to try and determine the whole cause as if it had been transferred to that court upon an appeal upon questions of both law and fact." Maxson v. Superior Court, 124 Cal. 468, 57 Pac. 379, 471.

The authority conferred upon the superior court, as set forth in section 980 of the Code of Civil Procedure, authorizes the superior court, on an appeal of this kind, to review the rulings of a justice's court and to remand the cause, with directions to the lower court to proceed in accordance with the decision of the superior court. Maxson v. Superior Court, supra.

The judgment is annulled, with instructions to the superior court to proceed in the case in accordance with this decision.

We concur: SHAW, J.; JAMES, J.

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55 Cal. App. 492

RUSSELL v. PENNISTON et al. (Civ. 3913.)

(District Court of Appeal, First District, Division 2, California. Dec. 2, 1921.)

1. Sales 🔑429—No action can be based on an implied warranty where plaintiff was in default.

Plaintiff, buyer of automobile truck and trailer, claiming defendant seller's title was defective, could not recover for breach of implied warranty of title under Civ. Code, § 1765, where he failed to allege and prove performance on his part.

2. Sales 🔑123—Plaintiff not entitled to judgment in rescission when he was in default and had not tendered restoration.

In action by buyer of an automobile truck and trailer where plaintiff, claiming defendant seller's title was defective, was in default at the time of his attempt to rescind and had not complied with Civ. Code, § 1691, providing that a rescinding party must, if able to do so, restore or offer to restore everything of value received he was not entitled to a judgment in rescission.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by L. S. Russell against T. H. Penniston and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Collins & Collins and Savage & Lovejoy, all of Fresno, for appellant.

Frank Kauke, of Fresno, for respondent Fresno Inv. Co.

Frank L. Simons, of Fresno, for respondent Penniston.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover damages for alleged fraud. The Fresno Investment Company appeared and answered and filed a cross-complaint. The parties stipulated that the answer of the Fresno Investment Company stand as the answer of the defendant Penniston, and that the allegations of the cross-complaint be considered as denied. A trial was had by the court sitting without a jury, judgment went for the defendants, and the plaintiff has appealed. The appellant claims that the findings made by the trial court are not supported by the evidence. In this contention we think that the appellant is entirely in error. To make that remark clear it becomes necessary to state the issues and the findings made thereon. In his complaint the appellant inserted two counts. The first count has reference to an automobile truck, and the second count has reference to an automobile trailer. The allegations of the second count are parallel with the allegations in the first count. The allegations of the first count are, among other things, that on the 25th day of August, 1919, the defendant Penniston represented that he was the owner of the truck; that, relying upon such representation, the plaintiff purchased the truck under a conditional sales contract which is attached as an exhibit, and which appears on its face to be a contract to buy and sell, which provides for certain deferred payments, including $200 for the month of November, and $200 for the month of December, and which provides that the title is to remain in the seller until the truck is fully paid for; that the plaintiff believed, relied on, and acted on said representations; that Penniston was not at said time the owner, but that George B. Henderson was such owner; that plaintiff made installment payments aggregating $381.79; that on the 26th day of August, 1919, the defendant Penniston assigned the contract to the defendant Fresno Investment Company; that to secure an installment falling due in October, 1919, the plaintiff executed to the Fresno Investment Company his note in the sum of $198.93, and a mortgage to secure the same; that on the 3d day of January, 1920, the said George B. Henderson asserted his title to the truck, and that the plaintiff called upon the defendant Penniston to defend the plaintiff's title, and that Penniston has refused and neglected to do so; that the plaintiff has done and performed all things, etc.; that on or about the 12th day of January, 1920, the plaintiff rescinded the contract of purchase and demanded his moneys back and the cancellation of the note and mortgage. Similar allegations are in the complaint as to the trailer. The complaint prays that the contract to purchase be canceled, that the plaintiff recover $381.79 moneys paid, and that his note and mortgage for $198.93 be surrendered and canceled. The cross-complaint by appropriate allegations, among other things, sets forth the nonpayment of certain installments and asks judgment for the amount of the unpaid installments. The trial court made findings in defendants' favor. It found:

> "That neither at nor prior to the execution of said contracts were there any express representations, promises, or statements by the said T. H. Penniston relative to said truck and trailer or either thereof, or relative to the ownership thereof."

As to what transpired when Henderson made his claim, the court found:

> "That the plaintiff thereupon informed the said Fresno Investment Company that the said demand had been made by the said George B. Henderson, and that the said plaintiff had delivered the said truck and trailer to the said George B. Henderson, but said plaintiff did not demand of the said T. H. Penniston, nor of the said Fresno Investment Company, that he, it, or they defend the title to said truck or trailer, but the said Fresno Investment Company did thereupon begin proceedings to recover for the plaintiff the said truck and trailer and the said Fresno Investment Company did recover same from the said George B. Henderson and, without delay after regaining possession of said truck and trailer, to wit, on or about the 3d day of February, 1920, the said Fresno Investment Company requested the plaintiff to take and receive said truck and trailer and to pay the amounts then due and unpaid as installments on the aforesaid contracts so made by the plaintiff and which had been so assigned to and were held and owned by said Fresno Investment Company."

The court also found:

> "On November 25. 1919. other installments of principal, amounting to $240 became due to the said Fresno Investment Company on said contract, and on December 25, 1919, other and further installments amounting to $240 became due to the said Fresno Investment Company on said contract," and that they have not been paid.

Again it found:

> "That the plaintiff never rescinded said contracts or either thereof, nor did he notify the Fresno Investment Company of any rescission or claim of rescission on his part."

As to the above finding on fraud the evidence is all in favor of the defendants. The same remark is true as to the finding as to plaintiff's default regarding payments. As to the finding regarding rescission it may be said that the evidence is conflicting, but there is substantial evidence in the record to support that finding and each and every other finding made by the trial court.

[1] The appellant now asserts that in drawing his pleading he was relying upon the benefit of an implied warranty. Civ. Code, § 1765. If we view his pleading from that angle, he is not entitled to recover. Standing on his contract together with the implied warranty read into it, he was not entitled to maintain an action upon the contract except that he alleged in his complaint and proved at the trial that he had performed on his part. As shown above, he was decidedly in default in November and December of 1919, and remained in default down to the time that he commenced this action.

[2] Neither was the plaintiff entitled to a judgment in rescission because he was in default at the time he claimed he attempted to rescind. Fairchild, etc., Co. v. Southern, etc., Co., 158 Cal. 264, 273, 110 Pac. 951. Furthermore, he was not entitled to rescind except that he complied with the provisions of section 1691 of the Civil Code, and the findings are to the effect that he did not do so.

By reason of the conclusions which we have reached, and which we have stated above, it is not necessary to touch on many of the other matters contained in the briefs.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(55 Cal. App. 496)

FRESNO INV. CO. v. RUSSELL. (Civ. 3913.)

(District Court of Appeal, First District, Division 2, California. Dec. 2, 1921.)

Abatement and revival ⚷8(4), 9—Suit to foreclose mortgage not abated by suit to cancel mortgage, and in which parties were different.

Under Code Civ. Proc. § 430, providing that a defendant may demur when there is another action pending between the parties "for the same cause," and section 433, providing that, when any objections enumerated in section 430 do not appear on the face of the complaint, they may be taken by answer, a plea in abatement to an action to foreclose a mortgage because the present plaintiff is one of the defendants in a pending action brought by the present defendant to cancel the mortgage will not be sustained.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Suit by the Fresno Investment Company against L. S. Russell. From judgment for plaintiff, defendant appeals. Affirmed.

Collins & Collins and Savage & Lovejoy, all of Fresno, for appellant.

Frank Kauke, of Fresno, for respondent Fresno Inv. Co.

STURTEVANT, J. This is an action brought to foreclose a mortgage; the plaintiff had judgment, and the defendant appealed. The plaintiff's complaint is in the ordinary form to foreclose a mortgage. The note and mortgage therein set forth are the note for $198.93 and the mortgage securing the same, which are referred to in the opinion this day filed, Russell v. Penniston et al., 203 Pac. 813. In his answer the defendant, Russell, set forth certain denials. Then, as his first affirmative defense, he alleged, in slightly different language and in a consolidated form, the allegations set forth in the first count and the second count of the complaint in Russell v. Penniston, supra, and added the further averments that the note and mortgage were given to secure the payment falling due on October, 1919, and not otherwise. The defendant then pleaded in abatement the pendency of that case, Russell v. Penniston. The trial court tried the instant case at the same time with the case entitled Russell v. Penniston, supra. Thereafter it made findings in which all of the material allegations were found in favor of the plaintiff, and judgment was entered accordingly. At this time the appellant specially presents his plea in abatement based on another action pending. It will be noted that the plaintiff in this action was one, and only one, of the defendants in the other case. It wil be noted also that this case is an action to foreclose a mortgage, and that the other case, Russell v. Penniston, is not an action to foreclose a mortgage, but that it is an action sounding in fraud and to cancel the note and mortgage which this action is brought to foreclose. Section 430, Code of Civil Procedure, provides that a defendant may demur:

> "* * * 3. That there is another action pending between the same parties for the same cause. * * *"

Section 433 of the Code of Civil Procedure provides:

> "When any of the matters enumerated in section 430 do not appear upon the face of the complaint, the objection may be taken by answer."

Such is the language of the Code concerning this plea in abatement. The principle on which the plea is sustained is that the law will not permit a defendant to be harassed and oppressed by two actions for the same cause where the plaintiff has a complete remedy by one action. But in the instant case one of the harassing actions complained of was commenced by the appellant. In the case of Smith v. Smith, 134 Cal. 117, at page 119, 66 Pac. 81, at page 82, the court said:

> "The plea of another suit pending will be sustained only when the plaintiffs are the same (Felch v. Beaudry, 40 Cal. 439), and when the cause of action is the same in each suit—when, in fact, the same evidence would support the judgment in each case."

See, also, Vance v. Olinger, 27 Cal. 358, 359; Montgomery v. Harrington, 58 Cal. 270, 274; Martin v. Splivalo, 69 Cal. 611, 615, 11 Pac. 484; Hall v. Susskind, 109 Cal. 203, 205, 41 Pac. 1012.

It is clear that the defendant's plea was not well founded.

The other points pertinent to any issue made on this appeal have been disposed of in the opinion Russell v. Penniston, supra.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(55 Cal. App. 324)

PEOPLE v. SMITH. (Cr. 822.)

(District Court of Appeal, Second District, Division 2, California. Nov. 25, 1921.)

1. Homicide 🔑338(1)—Admission of evidence of poison in stomach not identified as that of deceased held prejudicial error.

In a prosecution for murder, the admission of evidence of finding poison in a stomach which was not identified as belonging to the deceased was prejudicial error.

2. Criminal law 🔑469—Question to physician whether he performed an autopsy of deceased objectionable as involving conclusion.

In a prosecution for murder, question to a physician as to whether he had performed an autopsy on the deceased was objectionable on the ground that it involved a conclusion, since the doctor was not shown to have been acquainted with the deceased, and there was no evidence to show that the body was that of deceased.

3. Criminal law 🔑404(2), 419, 420(10)—Evidence that body on which physician performed autopsy was that of deceased held hearsay and insufficient for introduction of results.

In prosecution for murder, testimony of a physician who had performed an autopsy on a body that he had been told by the undertaker's attendant was the body of S., the deceased, was hearsay and insufficient to lay a foundation for the introduction of the contents of the stomach taken from the body, for the purpose of showing that deceased died of cyanide poisoning.

4. Criminal law 🔑419, 420(1)—"Hearsay evidence" defined.

"Hearsay evidence" is evidence which does not derive its force solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hearsay Evidence.]

5. Criminal law 🔑404(2)—Evidence held insufficient to establish that a stomach of the body on which an autopsy was performed was that of deceased.

In prosecution for murder, where an autopsy was performed on a body, the stomach of which contained poison, together with pieces of potato and bread, pickles, and tomato seeds, the fact that vegetables corresponding to those were found in the cooler of deceased's home shortly after her death does not furnish a reasonable basis of the identification of the stomach as that of deceased.

6. Criminal law 🔑404(2)—Names 🔑18—Rule that from identity of names identity of person may be presumed held not applicable to identify stomach as that of deceased.

In prosecution for murder, where an autopsy was performed on a body reported by an undertaker's attendant to the physician to be that of the deceased, the rule that from identity of names the identity of person may be presumed is not applicable so as to identify the stomach of the body on which the autopsy was performed as that of the deceased.

7. Criminal law 🔑404(3)—Admission of can of cyanide as circumstantial evidence of poisoning held erroneous.

In prosecution for murder by poisoning, evidence that the defendant had access to a room, together with other employees, in which was situated a can of cyanide, which was found a few days after the death of deceased with the top covered with a heavy coating of dust, and without evidence that the defendant ever saw the can or had knowledge of its presence, was an insufficient foundation for the introduction of the can of cyanide in evidence, and its introduction was prejudicial error.

8. Criminal law 🔑338(4, 5)—If circumstantial evidence is introduced the facts therein must be connected with the defendant.

If circumstantial evidence is introduced to connect defendant with a criminal act, circumstantial facts themselves must be connected with the defendant.

9. Criminal law 🔑344, 552(2)—Opportunity to commit crime merely a circumstance from which guilt may be conjectured.

The fact that an accused person had an opportunity to commit the crime with which he is charged is of itself only a circumstance from which, with other circumstances, guilt may be conjectured or inferred, and an incriminating circumstance from which guilt may be inferred must not rest on conjecture.

10. Homicide 🔑169(7)—Admission of letter of letter of accused in evidence held proper.

In a prosecution of a husband for the murder of his wife, a letter written over a year before the wife's death, in which the accused stated that he did not love his wife as a husband should and that he had had illicit relations with other women, regardless of a subsequent cohabitation of the accused and his wife, was properly admitted in evidence as showing that the accused would be more likely to commit the crime than if he had been a loyal husband.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Raymond W. Smith was convicted of murder in the first degree, and he appeals. Reversed.

Anderson & Anderson, of Sacramento, and E. S. Patterson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant, who was charged with the murder of his wife, Mary Edla Smith, was convicted of murder in the first degree, was sentenced to life imprisonment, and now appeals from the judgment and from an order denying his motion for a new trial.

The evidence is entirely circumstantial. The theory adopted by the prosecution at the trial was that the alleged homicide was perpetrated by means of cyanide administered by defendant to his wife on or about March 14, 1921, at their home at Bell Station, a suburb of Los Angeles. The principal points made for a reversal are that the court erred (1) in permitting the prosecution to give evidence of the contents of a certain stomach, in the absence of legal evidence to identify it as the stomach of defendant's deceased wife, and (2) in permitting the people to put in evidence a certain can of cyanide found in a part of the establishment where defendant was employed.

On the afternoon of Monday, March 14, 1921, the body of defendant's wife was found in a sitting position in a chair in the living room of her home at Bell Station. The remains were immediately removed to an undertaking establishment conducted by one G. G. Wheat at Huntington Park, a small town near Los Angeles, where the body was embalmed and prepared for burial. The following day defendant and the mother of the deceased requested that the body be taken to an undertaking establishment in Los Angeles conducted by a man of the name of Brown. Wheat testified that the body was "removed by Mr. Brown," supposedly the Los Angeles undertaker. What became of it after it was "removed by Mr. Brown" is a matter that is left by the evidence in the airy regions of speculation. Dr. Wagner, the county autopsy surgeon, who had not known Mrs. Smith in her lifetime and probably had never heard of her before her death, called as a witness for the prosecution, was permitted to testify, over defendant's strenuous objection, that he had performed an autopsy "upon the body of Mary Edla Smith" at "the morgue of W. A. Brown, Los Angeles," on March 15, 1921. This witness further testified that, from the body of the person whom he referred to as "Mary Edla Smith," he had removed the stomach, a part of the liver, the spleen, and the left kidney. The doctor testified that he placed these organs, unwrapped, in a pasteboard box. and delivered the box and its contents to Professor Arthur R. Maas, a chemist and toxicologist, who, for five years or more, had been doing work for the county coroner's office. Professor Maas testified that he received from Dr. Wagner, on March 15, 1921, a pasteboard box which Dr. Wagner told him contained the stomach of Mary Edla Smith, which name the witness wrote upon the box. Professor Maas then took the box to his office, where he subsequently opened it, discovering therein a stomach only, wrapped in paper. The contents of this stomach he subsequently analyzed, finding in it a mixture of sodium cyanide with possibly some potassium cyanide, together with pieces of potato and bread, some vegetable matter which the witness decided was pickle, and some seeds which he decided were tomato seeds.

[1] It was upon the contents of this stomach that the entire case for the prosecution rested. It was the sole basis for Dr. Wagner's opinion that the person from whose body it was taken had died of cyanide poisoning. It was the sole basis for the evidence given by Professor Maas and the other experts who testified as to the character of the stomach contents. Defendant's counsel repeatedly, but ineffectively, objected to the introduction of any evidence respecting the contents of this stomach upon the ground that no evidence had been introduced to identify it as that of Mary Edla Smith, of whose murder defendant was accused. If there was no legal evidence to identify it as the stomach of defendant's deceased wife, then, manifestly, to permit the prosecution, over defendant's timely objections, to introduce evidence of its contents was not only error but highly prejudicial error. That there was no such identifying evidence is made clear by the testimony given by Dr. Wagner and others, as the following will show.

[2] There was no direct evidence that the body of defendant's wife ever reached Brown's undertaking establishment. Wheat testified, as we have seen, that the body was removed "by Mr. Brown." That is the sole evidence as to what became of the body after it was taken by Wheat to his establishment. But, aside from this manifest hiatus in the identifying testimony, there is no legal evidence that the body upon which Dr. Wagner performed the autopsy was that which had been removed from Wheat's place. Though Dr. Wagner had not known Mrs. Smith in her lifetime, the only evidence as to the identity of the body from which he removed the stomach, spleen, a part of the liver, and the left kidney is that given by Dr. Wagner himself, to whom, on direct examination, this question was propounded by the district attorney: "I will ask you whether you performed an autopsy upon the body of Mary Edla Smith?" Counsel for defendant immediately objected to the question upon the ground that it called for the conclusion of the witness, in that there was no evidence that the witness ever knew Mary Edla Smith. The objection should have been sustained. At the time when the question was propounded to Dr. Wagner, no evidence whatever, hearsay or otherwise, had been adduced to show that the body was in fact that of Mary Edla Smith. In the course of the doctor's cross-examination, that witness, as we presently shall show, did give hearsay evidence to the effect that the person from whose body he removed the stomach was Mary Edla Smith. But, as we have just stated, at the time when the district

attorney propounded to Dr. Wagner, on his direct examination, the question to which defendant's counsel made the objection last noted, no evidence of any kind whatever had been given or suggested to show that the witness had any knowledge of the identity of the person concerning whose stomach he was asked to testify. This notwithstanding, defendant's objection was overruled, and the witness answered the question in the affirmative, saying, in effect, that he had performed an autopsy on the body of Mary Edla Smith at the morgue of W. A. Brown on March 15, 1921.

[3, 4] On his cross-examination Dr. Wagner testified as follows:

> "Q. Now, all you know as to this being the body of Mrs. Smith was what somebody told you, was it? A. Certainly.
> "Q. Who told you? A. The undertaker—yes; the undertaker.
> "Q. The undertaker? A. Yes.
> "Q. You have no knowledge on earth except what was told you by the undertaker? A. No, sir.
> "Q. Which undertaker told you? A. It was not the undertaker himself either. It was one of the attendants.
> "Q. Who was he? A. Mr. Taylor, I think it was, at the time.
> "Q. And so far as you know, that is, you never had seen her before? A. I had not.
> "Q. And you have never seen the body since? A. No, sir.
> "Q. And never talked with any other person, except this undertaker, who knew the identity of that particular body? A. I did not."

Neither the "Mr. Brown" nor the "Mr. Taylor" referred to by the witness was called to the stand. The sole evidence, therefore, tending to identify the stomach whose contents were examined by the experts was this testimony of Dr. Wagner that one Taylor, an attendant in Brown's undertaking establishment, had told him that the body upon which he operated was that of Mrs. Smith. This testimony was hearsay—that and nothing more; and was manifestly insufficient to lay the foundation for the introduction over defendant's objection, of the contents of the stomach regarding which Dr. Wagner and Professor Maas testified.

Dr. Wagner, who did not personally know the deceased, in the nature of things could not personally know that the body was that of Mary Edla Smith. Consequently, his testimony that an attendant in Brown's undertaking establishment had told him that the body was that of Mrs. Smith could only place before the jury the statement of one, not under oath, who, being absent, could not be subjected to the ordeal of cross-examination. There is no evidence whatever that Taylor, the attendant from whom the doctor received the hearsay, ever knew the deceased, or that he had any means for knowing that the body which he pointed out to Dr. Wagner as that of Mary Edla Smith was in fact the body of that person. That the question propounded to Dr. Wagner asking him whether he had "performed an autopsy upon the body of Mary Edla Smith" called for hearsay evidence, that is, evidence "which does not derive its force solely from the credit to be given to the witness himself, but rests, also, in part, on the veracity and competency of some other person" (1 Greenleaf. Ev. par. 99; 1 Phil. Ev. 169), is as self-evident as any truism. The general rule, subject to certain well-established exceptions as old as the rule itself—applicable in civil cases, and therefore to be rigidly enforced where life or liberty is at stake—was stated in Queen v. Hepburn, 7 Cranch, 290, 295 (3 L. Ed. 348), to be:

> "That hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge."

The facts of the present case, in so far as the identification of the body rests upon hearsay, bear a striking analogy to those presented in Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262. What was said by Mr. Justice Harlan in that case is equally applicable here, and for the reasons there so lucidly stated, the identification of the stomach concerning which Dr. Wagner and Professor Maas were allowed to testify must be held to be incomplete, and the evidence as to its contents must be held to have been erroneously admitted.

[5] The fact that the mother of the deceased found in the "cooler," shortly after the death of her daughter, certain vegetables which corresponded with those which Professor Maas testified to having found in the stomach that he examined, does not rise to the dignity of a circumstance from which it may reasonably be inferred that the stomach was indeed that of Mrs. Smith. These vegetables are very common articles of diet, and doubtless could be found in the stomachs of a large percentage of persons in every community. There is nothing so peculiar about this fare that it should furnish any reasonable basis for the identification of this "hearsay stomach"—if we may borrow the felicitous phrase employed by counsel for appellant to characterize that portion of the human anatomy concerning which Dr. Wagner and Professor Maas were permitted to testify.

[6] It is falteringly suggested by the Attorney General, but, to his credit be it said, not insistently urged, that, peradventure, the case falls within the rule that identity of person may be presumed, prima facie, from identity of name. That is, it is suggested that, in some vague way not made clear to us, the identity of this stomach is established, prima facie, by the application of the

rule that a presumption of identity of person arises from an identity of name. It is too clear for argument that this rule of evidence can find no room for application here. The rule would have been applicable if, for example, Dr. Wagner had testified that he knew a woman of the name of Mary Edla Smith, and that he had removed the stomach from the body of that person; for, under such a supposititious state of facts, there would be a prima facie presumption that the person whom Dr. Wagner had known as Mary Edla Smith, and from whose body he removed the stomach after death, was the same Mary Edla Smith who, in her lifetime, was the wife of this defendant. But Dr. Wagner did not know Mary Edla Smith. He made no pretense of ever having known or seen a person reputed to bear that name. Nor is there any evidence that Taylor, the attendant at Brown's undertaking establishment and Dr. Wagner's sole informant, ever knew any person of the name of Mary Edla Smith. There is no evidence that Taylor possessed any knowledge whatever that might tend to identify the body which he pointed out to Dr. Wagner as that of Mrs. Smith. It follows, therefore, that the testimony of Dr. Wagner that it was Mrs. Smith's body from which he took the stomach is based on rank hearsay, and clearly was inadmissible.

[7] It was error to permit the state to introduce, over defendant's objection, the can of cyanide. For some months prior to the date of the alleged homicide, a can of cyanide had been in the filing room of the company for which defendant was working as a truck driver. This room was used by the company as a place for the filing and grinding of saws and other tools. The mill foreman, called as a witness for the prosecution, testified that the can of cyanide was kept in a corner of the filing room, and that it was put there a little over a year before by one C. A. Ward, the company's filer. The witness further testified that he saw the can in its place in the corner of the filing room four or five days after the alleged homicide; that he then removed it and gave it to the detectives working on the case; that at that time there was dust—lumber dust and dirt dust—a sixteenth of an inch thick covering the top of the can; that a workbench runs up to within 2 or 3 feet of the corner where the can was kept; that the can sat on a shaft bearing, 12 inches from the floor; and that the bench is considerably higher than the can's resting place. The witness testified that he had seen defendant come in and go out of the filing room at a time when the latter was repairing trucks, but would not say when it was that he thus saw the accused go in and come out of the room, stating that he could not fix the time within six months. Upon this showing the trial court, over defendant's vigorous objection, admitted the can of cyanide in evidence as an exhibit for the prosecution.

[8] Without doubt, it is the general rule that evidence that the accused had in his possession the means to commit the crime, or had an opportunity to do so, is ordinarily admissible when the evidence against him is entirely circumstantial. In applying this rule, however, caution should be exercised to avoid giving any undue significance to circumstances that are but the ordinary incidents of everyday life. The fact that the very existence of a prosecution tends to throw suspicion upon every act of the accused and to cause "trifles light as air" to assume the appearance of "confirmations strong as proofs of Holy Writ" should give pause to any heedless imprudence in the admission in evidence of circumstances that are barren of incriminating significance. As is well said by the learned author of Wharton's Criminal Evidence (volume 2, § 915):

> "Circumstances, trivial in themselves, take on an exaggerated character the moment that suspicion is directed toward a person accused of a crime; and, because of this tendency, no circumstances should be admitted that cannot be shown to have a direct and obvious relevancy to the crime charged."

That the introduction of the can of cyanide as an exhibit for the prosecution was highly prejudicial cannot be gainsaid for a moment; but that it in any appreciable degree tended to show that the defendant used any of its poisonous contents to do away with his wife must be denied. The attenuated circumstance that a can such as this, behind concealing obstructions, was in the corner of a room used by defendant's employer as a filing room, and to which the company's employees, including defendant, had access, with no evidence whatever that defendant ever saw the can or had any knowledge that it was in the room, is not sufficient to justify the inference that he availed himself of this possible means for administering poison to his wife, particularly when we consider that the top of the can, at the time when the mill foreman saw it some four or five days after the supposed homicide, was covered with dust to a depth of one-sixteenth of an inch. It was not shown that the defendant had any more connection with this can of cyanide than he would have had with a similar can sitting on a drug store shelf. If circumstantial evidence is introduced in a criminal case to connect the defendant with the criminal act, the circumstantial facts themselves must be connected with the defendant, or they will be incompetent as evidence. People v. Kennedy, 32 N. Y. 141. There was nothing that connected this defendant with the can that did not equally connect all of his coemployees therewith;

and if the presence of the can in the corner of the filing room attached any suspicion to defendant, it equally implicated all the other employees who had access to the room.

[9] Unless it be shown that defendant had knowledge of the presence of the can in the filing room, its existence there is a circumstance of no evidentiary value whatever. That defendant, at any time, had knowledge of the existence of the can is a matter of pure conjecture. But the fact that an accused person had an opportunity to commit the crime with which he is charged is of itself only a circumstance from which, with other circumstances, guilt may be conjectured or inferred; and it is the established rule that an incriminating circumstance from which guilt may be inferred must not rest on conjecture. It is not permissible to pile conjecture upon conjecture. We cannot build one inference upon another. U. S. Cement Co. v. Whitted, 46 Ind. App. 105, 90 N. E. 481. "* * * One conjecture cannot be treated as a proved fact in order to reach another conjecture." Cohn v. Saidel, 71 N. H. 558, 53 Atl. 800. "An inference of fact," says the author of the article on evidence in Corpus Juris, "should not be drawn from premises which are uncertain, but the facts upon which an inference may legitimately rest must, it is said, be established by direct evidence as if they were the very facts in issue." 22 C. J. p. 84. See, also, United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; Thayer v. Smoky Hollow Coal Co., 121 Iowa, 121, 96 N. W. 718; and Chamberlayne on the Modern Law of Evidence, vol. 2, § 1029. In Thayer v. Smoky Hollow Coal Co., supra, the court, employing the word "presumption" in the sense of an inference of fact, said:

> "But it is said that from the evidence to which we have referred it should be inferred that defendant had knowledge of the defect. This it seems to us is pushing the doctrine of presumption at least one step too far. * * * A presumption can arise only from facts actually proven by direct evidence. A presumption is not a legitimate foundation for a presumption. If this were not true, there would be no limit to conjecture."

Were the rule otherwise, the very defect of proof which renders it necessary to call in the aid of one collateral circumstance would equally inhere in the other collateral circumstance, and the infirmity which attached to the one would attach to the other. It would, said Chief Justice Denio, in People v. Kennedy, supra, be "like the blind leading the blind." The rule, as stated by the New York court in the Kennedy Case, is that—

> Circumstantial evidence "consists in reasoning from facts which are known or proved, to establish such as are conjectures to exist; but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture."

For these reasons we are of the opinion that the evidence of the presence of the can of cyanide in the filing room was too remote from the point in issue to have any probative force, and that its admission in evidence was prejudicially erroneous.

For the foregoing reasons, the judgment and order denying defendant's motion for a new trial must be reversed. The assignments of error, however, present at least one other question of importance, which, as it is likely to arise upon another trial, we deem it proper to examine.

[10] The court overruled defendant's objection to the introduction of a letter written by him and mailed to his wife about August 1, 1919, a little more than a year and a half prior to the latter's death. This letter, after relating how the defendant, faithless to his marriage vows, had had adulterous intercourse with a number of women during the years of his married life, continues as follows:

> "I haven't the heart to talk any more about it. Enough to say I hope you hate me so bad by now that you will be glad you found out before your whole life is gone and it is too late. You can still enjoy life by forgetting me entirely, as I don't think you will ever see me again. I hope not. * * * I will try and send you some money as soon as I can pay off the bank. In the meantime get a good job and forget me forever. I don't love you as a husband ought to and I don't think you can love me after reading this far. Don't try to find me as you can't do it for any benefit to either of us."

It seems that defendant and his wife had separated three or four times prior to the alleged homicide; the last separation taking place about a year before that event and continuing for about three months. Thereafter they became reconciled, and, for some months immediately prior to the wife's death, apparently were living together in peaceful and harmonious relations.

Appellant's objection to the introduction of the letter is based upon the ground that, because it was written somewhat more than a year and a half prior to the alleged homicide, and because, some time subsequent to its writing, a reconciliation had ensued, the letter was too remote, in point of time, to have any legal bearing upon the issues. We think that this ground of objection goes to the weight rather than to the admissibility of the evidence. See People v. Brown, 76 Cal. 573, 18 Pac. 678; and People v. Wilson, 23 Cal. App. 513, 521, 138 Pac. 971. Moreover, the letter was not introduced to show that the couple had previously quarreled. The purpose of its introduction doubtless was to show that, according to its admissions, defendant's whole nature and make-up is such that he probably did not bear toward his wife that love and affection which ordinarily may be looked for in a true and steadfast husband. Indeed, in the letter defendant directly and explicitly confesses that he does not love his wife as a husband should. No rule is more firmly established than that, upon the trial for murder of husband or wife, evidence tending to show illicit relations of the accused with another is admissible to show lack of love and affection for the defendant's lawful spouse. Porter v. State, 173 Ind. 694, 91 N. E. 340; 21 Cyc. 918. Even though a reconciliation between defendant and his wife may have been effected some time prior to the wife's death, the fact that the letter, though written by defendant on August 1, 1919, contains a confession of his adulterous disposition, and a lack of love for his wife, has some legitimate bearing upon the case, in that, in some degree, however slight, it is a circumstance going to show that defendant would have been more likely to commit the crime than if he were a loyal and loving husband. See Porter v. State, supra. For these reasons we think the letter was admissible.

There are other questions discussed in appellant's brief, but, as they probably will not present themselves upon a retrial of the case, we deem it unnecessary to comment upon them.

For the reasons given, the judgment and order denying defendant's motion for a new trial are reversed.

We concur: WORKS, J.; CRAIG, J.

(55 Cal. App. 377)

AMERICAN FRUIT DISTRIBUTORS OF CALIFORNIA v. HINES, Director General of Railroads, et al. (two cases). (Civ. 3738, 3739.)

(District Court of Appeal, Second District, Division 1, California. Nov. 26, 1921.)

1. Railroads 🔑5½, New, Vol. 6A Key-No. Series—Owner of road under federal control not suable as "carrier."

A suit for loss caused by a "carrier" under federal control, under Act Cong. Aug. 1916, and executive proclamation (U. S. Comp. St. § 1974a), supplemented by Act Cong. March, 1918, § 10 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¾j), and Gen. Order No. 50 of the Director General of Railroads, must be against the Director General, and the owning company is not a proper party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carrier.]

2. Carriers 🔑108—In general the obligation of a carrier of goods is that of insurer.

In general the obligation assumed by a common carrier of goods is that of an insurer, except that the carrier is not liable where extraordinary occurrences not within its control produce damage.

3. Carriers 🔑150—Carrier may not contract for relief from its own negligence.

A carrier may not contract to free itself from damages caused by its own negligence.

4. Carriers 🔑180(1)—Initial interstate carrier may contract for exemption from liability where there is no negligence.

Though, under the Carmack Amendment of 1906 and Cummins Amendment of 1915 (U. S. Comp. St. § 8604a), a carrier engaged in interstate commerce is liable for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, etc., an initial interstate carrier may by contract relieve itself from liability for damages where there is no negligence either on the part of the initial or connecting carrier.

5. Carriers 🔑149½—Provision in bill of lading against liability for loss from strikes held binding on shipper.

A provision in a bill of lading that the carrier should not be liable for loss occurring from strikes and riots is binding on the shipper.

6. Carriers 🔑156(1)—Notwithstanding limitation, carrier is liable for loss from strikes unless it uses reasonable efforts to procure men and avoid delay.

Irrespective of a provision in the bill of lading that the carrier should not be liable for loss occurring from strikes, it is liable for delay on account of a strike unless it uses all reasonable efforts to procure men to run the trains and avoid delay and consequent damage.

7. Carriers 🔑163—To make prima facie case only delivery to carrier and failure to deliver at destination must be shown, and burden of showing exemption from liability is on carrier.

Though a bill of lading provided the carrier should not be liable for loss caused by strikes, to make out a prima facie case the shipper is only required to show delivery to the carrier and failure to deliver at destination, and the burden of showing the facts necessary to exempt it from liability is on the carrier.

8. Carriers 🔑156(1) — Where carrier uses every reasonable effort to replace striking workmen it is not liable for failure to deliver.

If a carrier, after a strike not brought about through its fault, uses every reasonable effort to fill the places of the strikers, and every reasonable effort to obtain men and means to care for property intrusted to it for shipment, which property is lost or destroyed while in its charge, the exceptional conditions operate as a release of the carrier from liability under a bill of lading exempting it from liability for loss caused by strikes.

9. Carriers 🔑163—Evidence held to sustain finding against carrier notwithstanding claimed exemption from liability for loss by strike pleaded as a defense.

Evidence *held* to justify a finding that failure to transport and deliver or preserve a shipment while awaiting or in the course of transportation was caused by the negligent and wrongful conduct of carrier's servants in abandoning the performance of their duties, justifying an inference of negligence, for which it would be liable notwithstanding a contract exempting it from loss from a strike pleaded as a defense.

Appeals from Superior Court, Los Angeles County; J. P. Wood, Judge.

Two actions by the American Fruit Distributors of California against Walker D. Hines, Director General of Railroads, the United States Railroad Administration, and the Southern Pacific Company. From a judgment in each case for plaintiff, defendants appeal. The two appeals were considered together. Judgments as against defendant Director General of Railroads affirmed. Judgments as against Southern Pacific Company reversed.

W. I. Gilbert, of Los Angeles, for appellants.

James E. Kelby and Frederick R. Levee, both of Los Angeles, for respondent.

JAMES, J. The causes above entitled were brought in the superior court, and by agreement of the parties the evidence heard and stipulations made were deemed to apply in both. Judgments were rendered in favor of the plaintiff, from which judgments defendants have appealed. The questions presented on appeal are the same in both cases; hence the two appeals will be considered together.

The actions were to recover from the defendants the value of certain shipments of cantaloupes, amounting in all to about 12 carloads. Each carload was billed as a separate shipment, and bills of lading were issued to the consignor. The cantaloupes were received by the carrier at Chatsworth in the county of Los Angeles, but were not transported to their destination; in fact, none proceeded farther on their way than to reach the yards of the carrier at Los Angeles. It was pleaded in defense that a strike occurred in the Los Angeles yards, which prevented the cantaloupes from being transported in accordance with the shipper's directions. A term of the bill of lading was relied upon and pleaded, which purported to exempt the carrier from responsibility where a strike intervened to obstruct its functions. The contract being for interstate shipment, there is no dispute but that the Interstate Commerce Act (U. S. Comp. St. § 8563 et seq.), in so far as its provisions affect the rights and obligations of the respective shipper and carrier, will control. At the commencement of the trial stipulations were made as to certain facts. It was agreed that on the 20th, 21st, and 22d days of August, 1919, there were delivered to the carrier for shipment cantaloupes in the quantity alleged, and that the same were received for transportation to points outside of the state of California, and that bills of lading were issued to the shipper covering the twelve cars which contained the shipment. It was further stipulated that the cantaloupes were never delivered at their destination and a stipulation was also made covering the value thereof, in the event judgment should be rendered for the plaintiff. Plaintiff thereupon rested its case, and the defendant proceeded in the effort to establish its defense of nonliability.

The assistant superintendent of the carrier's lines at Los Angeles testified that on the evening of the 21st day of August, 1919, switchmen doing service in the freight yards of the Southern Pacific Company at Los Angeles went on strike; that the men walked out at 6 o'clock on that day, and that the official had no information prior to that time that the strike was to occur; that when he received notification of the happening he was at some distance from Los Angeles, and that he returned at once, arriving at 2 o'clock in the morning, when he found officers of the division, 8 or 10 in number, engaged in endeavoring to get out passenger trains; that several sections of passenger trains were gotten out, when train and engine men began to refuse to respond to call for service. The witness stated that there were no freight trains run after 6 o'clock in the evening of August 21st, as the trainmen refused to accept call, "claiming that they were endangering their lives by going out on the road under the existing conditions"; that on the day following he talked with several train and engine men and was told by them that they did not consider it safe to go out on the road; that at that time there were employed on the Los Angeles division 225 engineers, and that all of them refused to work; that it was necessary to have engines to handle the yard work, make up the trains, and carry the latter out on the road; that within the 48 hours ensuing after the strike was called by the switchmen all of the engineers refused to continue work; that the firemen followed suit; that railway officials took the list of firemen and engineers and called them all and failed to get a response from one willing to work from the entire list. The witness stated that the same situation existed with respect to brakemen, all of whom failed to respond when called to take their trains. By the evening of August 22d the officials were unable to get any men to take trains out. The witness stated further:

> "I do not know personally of any action that was taken by the company employees with reference to threats of violence; only what I was told. I didn't see any of it myself. There were no men obtainable here to take the places of the men on strike. To have gotten men here from other places, we would have had to go east, and it would have taken at least one

week to get men here. * * * The reason I knew that there were not men available for the performance of those duties in Los Angeles was that we are guided largely by the applications that are received. In making my answer to that former question I had that in mind. That, and the fact that the labor trouble had been in existence for several days, and we knew that any available supply was absorbed by them. That was my conclusion. I spoke from past experience."

The trainmaster who was in charge at the Los Angeles terminal testified that the morning after the strike there were 2.807 cars of freight in the Los Angeles yards; one train was made up and departed at 6:30 p. m., and that no other freight trains went out, as there was no one to make the trains up. This witness testified that at some point in the city a switchman named Day had been killed on the night of the 21st. Witness stated that he had assisted in making up passenger trains, being protected by a police officer meanwhile. He stated that, after the strike was called, and after the main tracks had been cleared, and some live stock unloaded on the 22d, the last remaining yardmaster joined the strike, and left the witness entirely alone at the work.

> "I was not interfered with except a committee appointed by the strikers to come out to my residence and use their endeavors to persuade me to join the ranks of the strikers," he said. "There was no violence offered me. But I was afraid to go down from the feeling of the men at that particular moment."

He testified that a striking switchman was shot, but that he did not learn who did the shooting nor pay any attention to it. From the further statement of the witness it appeared that that shooting of the switchman did not happen about the freight yard, but near the Pacific Electric line, an independent carrier. Other officials testified that the trainmen had objected to taking trains out, on the ground that they were afraid their lives were in danger, although there was no direct evidence of any threats of violence offered by the strikers. In an endeavor to show that the refrigerating of the cars containing the cantaloupes was attempted to be done, a witness, whose duty it was to supervise the icing of the cars, testified that, failing to secure switch engines with which to move cars to the ice plant, an attempt was made to haul ice by trucks, but that the icemen finally stopped work at the instance of some man who was evidently associated with the striking switchmen. There was testimony of another man, whose position was that of an inspector:

> That the icemen were accosted by men from the Labor Temple who told the former that it would be the best thing for them to "get out, because there would be friction in the yard if they did not, and told them that the best thing to do was to work along with the regular switchmen who had walked out, because if they didn't it would make it very uncomfortable for them even after the switchmen went back to work; * * * there were no exact threats made against me or the boys who stayed on the job;" that the icemen thereupon left the yards.

Another official testified that a "local chairman" of the engineers had said that he would not instruct an engineer to go to work, because of the danger, and, when asked as to what danger he referred to, said:

> "Well, the fact that the officials are working on there, these fellows are liable to mob violence if they go out on that engine."

The latter official further testified:

> "I should say it took from two to three years for an engineer to acquire sufficient knowledge of an engine to operate it with safety to himself and to the equipment. In order to start to work in the yard it would require a thorough knowledge of all the tracks and switches and whistle signals where we whistle for various tracks, which all requires possibly two or three weeks' steady work before he would know those in one portion of the yard, and then he would not know all of the yard."

It was shown that the only cause which precipitated the strike of the switchmen was that the latter objected to handling freight transferred to the defendant carrier by the Pacific Electric Railway, which latter was then having strike trouble with its men.

[1] Defendants first advance the proposition that the judgments, as against both the Southern Pacific Company and the Director General of the Railroads, cannot be sustained. The argument to this point is, briefly, that the owning corporation, having been superseded in the management and control of its property, cannot be held responsible for the breach of any contract or the failure to keep any obligation imposed upon the carrier. It is admitted that, at all of the times material to the causes of action with which we are here concerned, the United States government held complete control of the transportation facilities of the defendant company, and that the handling of all freight was governed by a Director General, acting on behalf of the President of the United States. The counsel for respondent pays scant attention to this proposition, in that behalf contenting himself with the observation that one or the other of the defendants is liable, and that it is immaterial to his client as to which may be required to ultimately respond to the judgment. However, the proposition is fairly advanced by the appellants, and requires consideration at the hands of the court, even though we are left without the help of respondent's counsel in reaching a decision on the question. The act of Congress of August, 1916 (U. S. Comp. St. § 1974a), was an emergency measure designed to facilitate the handling of

troops and war supplies. It authorized the President "in time of war" to take possession of systems of transportation or any part thereof. and to use the same for the carrying of troops and war material to the exclusion of other traffic as far as was necessary. In December, 1917, the President issued a proclamation (section 1974a) wherein he declared that necessity existed for the taking possession of every system of transportation located wholly or in part within the boundaries of continental United States, and appointed a Director General to represent the government as the managing head of the combined transportation facilities. The proclamation further provided that no attachment or writ of execution should be levied against any of the properties of the transportation systems, but that suits might be brought against the carriers and judgments rendered as theretofore "until and except so far as said Director may, by general or special orders, otherwise determine."

In March, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115¾a-3115¾p), Congress supplemented the act referred to with comprehensive legislation which provided for adjustment of the business relations between the government and the owners of the trnsportation systems, and provided that the government control, then acknowledged by the act to be existing, should continue for a maximum period of not longer than the end of one year and 9 months following the proclamation of the President declaring a peace treaty to have been ratified. Section 10 of that act contained a provision which, in its interpretation by the courts, has resulted in entirely different conclusions being announced in the decisions as to the liability of the owners of the transportation facilities during government control. We quote that portion of the section material to the point:

> "Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law. * * * Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. * * * But no process, mesne or final, shall be levied against such property under such federal control."

In connection with this provision, General Order No. 50, made by the Director General on October 28, 1918, is to be considered. That order provided in part as follows:

> "Actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise."

The order further recited that its provisions should not apply to suits for the recovery of fines, penalties, or forfeitures, and that, in the actions to which it was applicable which had already been commenced and were pending against carrier companies, the pleadings might be amended by substituting the Director General for the "carrier company." It was claimed in many suits which were brought throughout the country that, under the provisions of the act of 1918, there was preserved to a plaintiff the right to sue the transportation owner; that the word "carrier" was synonymous with owner. With this construction admitted, it was plain that Order No. 50 of the Director General was in conflict with the statute, and hence invalid. On the other hand, it was as often insisted that the word "carrier" was used in the statute to designate the transportation agency, and that the provision quoted was inserted only for the purpose of making clear that liability should follow the agencies, both for breach of contract and for negligent acts. Decisions agreeable to the different contentions were announced. The federal trial judges were wide apart in their conclusions. Appellate tribunals of some of the states, notably those of North Carolina, repeatedly held that the railroad owners could be sued. Counsel for appellants have cited a number of decisions holding the contrary. In our investigation of the subject we find that one suit brought in the state courts, wherein it was determined by the state appellate tribunal that the owning company could be sued, was taken on writ of error to the Supreme Court of the United States and decision therein rendered. This decision sets at rest all conflict of authority on the question. The case was that of Missouri Pacific Railroad Co. and Hines, Director General, v. Ault, 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —. It was there held that the railroad company was not a proper party defendant. The decision recognized Order No. 50 as a valid exercise of the power conferred upon the Director General. The word "carriers" occurring in section 10 of the act of 1918 was defined:

> "Here the term 'carriers,'" said the court, "was used as it is understood in common speech—meaning the transportation systems as distinguished from the corporations owning or operating them. * * * If the cause of action arose while the government was operating the

system the 'carrier while under federal control' was nevertheless to be liable and suable. This means, as a matter of law, that the government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts."

This decision is conclusive upon the question presented, and, under the law thus established, it must be held that the judgment as against the Southern Pacific Company was unauthorized, and must be set aside.

[2-4] Broadly speaking, it may be admitted that the obligation assumed by a common carrier of freight or merchandise is that of an insurer, with the qualification only that it will not be liable where extraordinary occurrences, not within its control, produce damage. At common law, in its early rigor, "acts of God and the public enemy" afforded the only defense. This obligation is still imposed wherever statutes have not changed it. It is permitted to be modified by special contracts entered into between the shipper and carrier. Under the English law it was early established that it was lawful for a carrier to modify, to some extent and in certain particulars, its liability as an insurer. The carrier on a through shipment had the right to stipulate against liability for the negligence of a connecting carrier. Amendments to the federal Interstate Commerce Act now prohibit the contracting for such exemption. Carmack Amendment of 1906; Cummins Amendment of 1915; Barnes' Federal Code 1919, p. 1920 (U. S. Comp. St. § 8604a). It has always been held that the carrier may not contract to free itself from damages caused by its own negligence. Generally, however, it may be now stated as a correct expression of the law that the carrier may contract for exemption from liability where the shipment is damaged without the fault of the carrier or its agencies. Nothing in the federal law forbids the making of a contract limiting liability where there is no negligence either on the part of the initial or connecting carrier. The federal statute, as amended, in its restricting phrases, refers in terms to a limitation for damage caused by the carriers themselves. The words are that liability shall accrue "for the full actual loss, damage, or injury to such property caused by it or by any such common carrier," etc. And so, the law, with respect to the right of a carrier to exempt itself from liability for damage occurring because of the act of some extraneous agency, remains (otherwise than as has been stated) undisturbed. In the case of New York Central Railway Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, speaking of the extent to which such limiting contracts by carriers might go, Mr. Justice Bradley said:

> "Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence, * * * they have no longer any plea of justice or reason to support such a stipulation. * * * The exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore, not binding."

See Boston & Maine Ry. v. Piper, 246 U. S. 439, 38 Sup. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469.

Mr. Hutchinson in his work on Carriers (3d Ed.) vol. 1, cs. VI, VII, treats of this subject in a comprehensive way. He cites authorities sustaining the right of the carrier to stipulate for exemption from damages caused by fire, strikes, mob, loss by thieves or robbers, also where goods are of a dangerous character. Sections 420, 421, 422, 423. See, also, section 230 et seq., 4 Ruling Case Law, pp. 764–811.

[5, 6] The provision of the bill of lading in this case, issued to the plaintiff upon shipment of its merchandise, wherein it stipulated that the carrier should not be responsible for loss or damage occurring "from riots or strikes," expressed a condition binding upon the shipper. The mere proof of the occurrence of a strike, however, would not establish freedom from the obligation to respond in damages to the shipper. It would be incumbent upon a carrier asserting that defense to show that, notwithstanding the strike on the part of its employees, it had used every reasonable effort to preserve the shipper's property, to prevent its being damaged, and to cause it to be transported to its destination. Irrespective of limiting conditions in the bill of lading, it has been held that the occurrence of a strike among the employees of a carrier is not sufficient in itself to excuse the latter for failure to deliver goods shipped or to carry the same within a reasonable time to their destination. Pittsburgh, Cincinnati & St. Louis W. Co. v. Hallowell, 65 Ind. 188, 32 Am. Rep. 63; Central R. R. & Banking Co. v. Georgia Fruit & Vegetable Exchange, 91 Ga. 389, 17 S. E. 904. On the other hand, it has been held that mob violence, preventing employees from working, may excuse a carrier for like failure. Geismer v. Lake Shore, etc., Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837. And in Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422, the court declared:

> "For the delay resulting from refusal of the employees to do duty, the company is responsible. For delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible.

even though the men whose violence caused the delay had, but a short time before, been employed by the company."

In International & G. N. R. Co. et al. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545, it was stipulated that the shipper assumed all risk of damage, injury or loss sustained from delay or detention in transportation "occasioned by mob, strike, or threatened violence, etc., or any other cause than the negligence of the carrier." The defendant offered to prove that its failure to carry and deliver live stock was due to the interference of strikers. The evidence was rejected. It was held that the ruling was error, and the court said:

> "If, as was proposed by the proof offered, it could be shown that 'no freight or live stock trains were or could be run over the road, because of the interference of the strikers,' it might have shown that the horse was, under the circumstances, delivered within a reasonable time, or a sufficient excuse for the failure to deliver within such time."

The stipulated condition there was much the same as that which is expressed by the conditions of the bill of lading here. It will be noted that the court there apparently considered that it was necessary, in the making out of the defense of the carrier, that it should prove not only that live stock trains were not run over the road affected by the strike, but that none "could be" run, owing to strike conditions. This citation is of some aid to the point that, to entitle the carrier to justify its failure to carry the merchandise of the plaintiff, the burden was upon it not only to show the existence of a strike, but to show further that it exerted all reasonable efforts in attempting to procure men to manage trains, and that such efforts were without avail, and as to whether such efforts have been used is generally a question of fact. This question as to where the burden of proof rests, upon the issue of a strike as an excusing condition, is suggested but not decided in Pennsylvania R. R. Co. v. Olivit Bros., 243 U. S. 574, 37 Sup. Ct. 468, 61 L. Ed. 908.

[7] However, the shipper, to make a prima facie case under the rule established by all of the leading authorities, is required to show only the fact of shipment made and a failure to deliver at destination. Where the carrier formerly justified under the common-law rule, the affirmative was always upon it to excuse delay by showing destruction of, or damage to, the goods to have been occasioned by "act of God or the public enemy." The effect of allowable limiting conditions in a contract of shipment is but to add to the common-law list of excepting causes modifying the obligation of the carrier as an insurer. It is familiar doctrine that the position of disadvantage occupied by a shipper, who is compelled to relinquish control of his property when he places it in the hands of the carrier, without ready means of ascertaining and fixing the blame in case of damage or destruction of his goods, is sufficient reason why he should be relieved of the duty of showing what has happened to his property. The evidence of conditions which might establish the exceptional facts necessary to relieve the carrier is within the reach of the carrier, and ordinarily not easily procurable by the shipper. The logic of all rules governing defenses of the nature here considered requires, we think, that the burden of proving exonerating facts be borne by the carrier.

The trial judge, in determining the facts, made the following findings:

> "(14) That it is true that the failure of said defendants to safely and within a reasonable time transport and deliver said shipments, or to transport or deliver the same, and whereby the whole of said shipments were wholly lost to plaintiff, was not caused by or attributable to mob violence, riots, intimidation, the act of God, the public enemy, nor from any defect or vice in the property forming said shipments or any part thereof, nor from the violation of any duty which plaintiff owed to said shipments or the property forming the same.
>
> "(15) That it is true that the failure of said defendants to transport and deliver, or transport or deliver, or preserve said shipments while awaiting, or in course of transportation, was caused solely by the negligent and wrongful acts and conduct of defendants' train service, during the course of their regular employment, in abandoning the performance of their duties."

It was evidently the view of the learned judge that the defense, based upon alleged strike conditions and the limiting term of the bill of lading, could only be established by proof that the carrier was prevented from securing men to replace the strikers and the sympathizing train operatives by mob violence and intimidation exercised by persons outside of its control. Such conditions, if they existed, would indeed assist in establishing the defense, although we are not prepared to declare that the limiting term of the bill of lading could only be invoked where there existed violence, actual or threatened, on the part of the persons disconnected from the carrier's employ.

[8] We are of the view that where a carrier, after a strike which is brought about through no fault of the employer, uses every reasonable effort to fill the places of the strikers, and every reasonable effort to obtain men and means to care for property intrusted to it for shipment, which property is lost or destroyed while in its charge, the exceptional conditions may then be deemed to have been established and exoneration from liability will follow. From what has been said it will appear that, had the judgment rested upon the finding alone that there had been no violence, riots, or intimidation to excuse the

carrier (finding 14), the issue would be left undetermined as to whether the carrier had not nevertheless been exonerated through conditions arising after the commencement of the strike which could not have been overcome by the exercise of reasonable care and diligence.

[9] Finding 15, however, determines that the failure to transport and deliver, or preserve, the shipments, "while awaiting or in course of transportation," was caused solely by the negligent and wrongful conduct of defendant's servants in abandoning the performance of their duties. This latter finding fastens liability upon the carrier, and supports the judgment. And we think that the evidence justifies it. The burden cast upon the carrier to show its freedom from fault was not sustained. The evidence does not disclose what the condition of the cantaloupes was when received other than that they were in "good" condition, nor within what time they would become valueless with or without ice, nor whether they became a total loss through deterioration; in fact, we are not told by the record as to what ultimately became of them, nor how long the strike continued. One witness for defendant testified that it would have taken a week to secure men from other points to man the trains. Whether the strike lasted that long we are not informed. Nor are we informed as to what state the cantaloupes would have been in at the expiration of that time, all attendant conditions considered. Clearly, then, the evidence did not go far enough to establish the defense designed by the limiting terms of the bill of lading to be made available to the carrier, and the inference of negligence, as made by the findings, is clearly justified.

The judgments as against the defendant Director General of Railroads are affirmed. The judgments as against Southern Pacific Company are reversed.

We concur: CONREY, P. J.; SHAW, J.

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55 Cal. App. 321

PEOPLE v. BARR et al. (Cr. 588.)

(District Court of Appeal, Third District, California. Nov. 23, 1921. Hearing Denied by Supreme Court Jan. 19, 1922.)

1. Criminal law 🔑775(6), 1172(2)—Instruction to scrutinize evidence of alibi with care objectionable, but not prejudicial.

An instruction that an alibi is capable of being successfully fabricated, and that testimony thereof should be scrutinized with care, was objectionable, but did not constitute prejudicial error so as to justify reversal of a conviction.

2. Criminal law 🔑913(4)—New trial necessary unless judgment is pronounced within statutory period.

Trial court must grant a new trial where it has failed to pronounce judgment within the time limited by Pen. Code, §§ 1191, 1202, notwithstanding that such failure was the result of granting accused's request for a continuance.

3. Criminal law 🔑1186(4)—Appellate court will not affirm judgment rendered after statutory period.

Const. art. 6, § 4½, relating to harmless error, does not authorize an appellate court to affirm a judgment of conviction rendered after expiration of the period fixed by Pen. Code, §§ 1191, 1202, notwithstanding that the error was brought about by the granting of a continuance at accused's request.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Tom Barr and another were convicted of robbery, and appeal. Reversed.

A. R. Schottky and Terry W. Ward, both of Merced, and John A. Wall, of Mariposa, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendants were convicted of the crime of robbery, and they appeal from the judgment and the order denying their motion for a new trial. It is admitted by appellants that the evidence in the case was conflicting, and it is not insisted that the verdict was entirely unsupported. Appellants, however, base their claim to a reversal upon two grounds: First, that the court misdirected the jury; and, second, that the court erred in pronouncing judgment upon defendants after the time for pronouncing judgment had expired by virtue of sections 1191 and 1202 of the Penal Code.

[1] The instruction of which appellants complain is as follows:

> "You are further instructed that the fact, which experience has shown, that an alibi as a defense is capable of being, and has been occasionally successfully, fabricated; 'that even when wholly false its detection may be matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance—these are considerations attendant upon this defense which call for some special suggestions upon the part of the court.
>
> "These are that, while you are not to hesitate at giving this as a defense full weight, that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendants or as creating the reasonable doubt which entitles the defendants to an acquittal, still you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you. People v. Lee Gam, 69 Cal. 552; People v. Wing, 31 Cal. App. 785."

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

While said instruction is objectionable as pointed out in People v. Purio, 194 Pac. 74, yet it has been held that it does not constitute prejudicial error, and that it does not justify a reversal of the judgment. People v. Lee Gam, 69 Cal. 552, 11 Pac. 183; People v. Wing, 31 Cal. App. 785, 161 Pac. 759.

[2, 3] The second point is more serious. The jury rendered its verdict on July 12, 1921. Three days thereafter defendants filed a motion for a new trial, based on all the grounds prescribed in section 1181 of the Penal Code. The hearing of said motion was continued by the court to August 1, 1921. On said date the defendants filed a supplementary motion for a new trial, based upon the provisions of said sections 1191 and 1202 of the Penal Code. The court, however, denied said motion for a new trial, and proceeded to pass sentence upon the defendants.

Said section 1191 provides that the time for pronouncing judgment must not be less than 2 nor more than 5 days after the verdict or plea of guilty, but that the court may extend the time not more than 10 days for the purpose of hearing or determining any motion for a new trial or in arrest of judgment. It is thus to be seen that, where a motion for a new trial is made, the last date upon which the judgment may be pronounced is 15 days after the verdict of guilty is rendered. Herein it was 20 days thereafter. Section 1202 provides that, if the judgment is "not rendered or pronounced within the time so fixed, or to which it is continued under the provisions of section 1191 of this Code, then the defendant shall be entitled to a new trial."

The learned district attorney of Merced county at the time this cause came on regularly for hearing contended earnestly and forcibly that the error should be disregarded, for the reason that it was waived by the defendants in requesting a continuance, and by virtue of the application of section 4½ of article 6 of the Constitution of the state.

Even if we were inclined to agree with this contention if the question were res integra, it is sufficient to say that the case is virtually controlled by the decisions cited by appellants, and it must be held, in view of the facts, that the trial court had no alternative than to grant the motion for a new trial. Said decisions are reviewed by Justice Hart in the case of People v. Lamattina, 38 Cal. App. 82, 175 Pac. 484, and it is scarcely necessary to do more than to refer to that opinion. We may add, however, that in denying the petition for hearing by that tribunal the Supreme Court was careful to say:

"In denying the application for a hearing in this court we are not to be understood as holding that the pronouncing of judgment may be postponed beyond the lapse of the time prescribed in section 1191 of the Penal Code, as amended in 1911. The opinion sufficiently shows that it was not so postponed in this case."

It is true that in the decisions to which we have referred no specific reference was made to said section 4½ of article 6 of the Constitution, but it must have been considered by the courts in those cases decided since the adoption of said amendment. Indeed, if we may concede that its language is broad enough to apply to proceedings taken after verdict, to extend it to cover the error herein as contended for by respondent would be to nullify completely the effect of said sections 1191 and 1202. We must attribute no such purpose to the people in adopting the amendment. Said sections of the Penal Code were probably overlooked by the court and the district attorney when the time was set for pronouncing judgment, but manifestly that furnishes no reason for us to disregard the plain provisions of the statute.

In view of said decisions, and what we have stated, we think no further discussion is called for.

The judgment and order are reversed.

We concur: FINCH, P. J.; HART, J.

55 Cal. App. 557

JAYNES v. WEICKMAN et al. (Civ. 3454.)

(District Court of Appeal, Second District, Division 2, California. Dec. 6, 1921.)

1. Trade-marks and trade-names and unfair competition ⚷70(3) — "Action Transfer Company" held so nearly like "Active Transfer Company" as to warrant injunction.

"Action Transfer Company" *held* so similar to "Active Transfer Company" as to authorize an injunction against its use; it being necessary only that the name used be so similar to that sought to be protected that deception will be the natural and probable result.

2. Trade-marks and trade-names and unfair competition ⚷3(2)—Use of "Active Transfer Company" as trade-name may be protected.

The use of "Active Transfer Company" as a trade-name may be protected by injunction; the word "active" not being ordinarily regarded as descriptive of a transfer company or the business conducted by it.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Maud E. Jaynes against Charles C. Weickman and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 197 Pac. 672.

A. G. Reily, of Los Angeles, for appellants.

Collier & Labarere and Walter H. Sprague, all of Los Angeles, for respondent.

WORKS, J. In this action the plaintiff, claiming to be the owner of a business conducted under the names Active Transfer Company and Active Parcel Delivery, sought to enjoin the defendants from using in connection with a business conducted by some of them the names Action Transfer Company and Action Parcel Delivery. A decree went for the plaintiff, and the defendants appeal.

In great part, appellants' presentation of their appeal is like that with which we had to deal in Alves v. Alves, 202 Pac. 157. There is here a discussion of several questions of fact, without mention of a claim that any finding of the trial court is not sustained by the evidence. Several questions of law are presented without our attention being called to alleged errors of the trial court to which the discussions may be applied. Appellants' presentation is different, however, from the effort of appellants in Alves v. Alves, in that the brief here is not altogether pointless.

[1] There is a sufficient presentation of the question whether the words "Active" and "Action," as used by the parties respectively in connection with the other words above set forth, are so similar that the public will be deceived by appellants' use of one of them. In solving such a question it is necessary only that a court be satisfied from an inspection of trade-names or legends used by the parties that the one used by the defendant is so similar to the one used by the plaintiff that a deception will be the natural and probable result. 38 Cyc. 773 to 776; Schmidt v. Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790. It is manifest to us that such a similarity exists in the present instance. The legend "Action Transfer Company" could not escape being viewed by the public, or by some considerable part of it, as referring to the Active Transfer Company.

[2] Appellant also adequately presents the question whether the word "Active" is subject to appropriation as a trade-name. It is, of course, true that there can be no property in words merely descriptive of an article or business, or of some quality pertaining to them. As instances of this rule it is doubtless true that one could not protect through injunctive process such trade names as Sweet Oranges or First Quality Cigarettes. We cannot say that the name Active Transfer Company is to be placed in the same category. The first word of that legend ordinarily would not be regarded as descriptive of a transfer company or of the business conducted by it. The designation is sufficiently fanciful, to our minds, to entitle respondent to use and to protect the use as a trade-name of the phrase of which it is a part.

It is contended that the trial court committed error in two instances in the admission of evidence. If the correctness of the contention be granted, which we do not decide, the errors were harmless, after what we have said above as to our ability to determine by comparison of the names used by the parties that the use by appellants of the one employed by them would naturally and probably lead to a deception of the public.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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55 Cal. App. 56

DANERI v. CITY OF SAN DIEGO.
(Civ. 4039.)

(District Court of Appeal, First District, Division 2, California. Dec. 7, 1921.)

Venue ⚷61—Defendant applying for change of venue in exercise of special privilege not required to make application at first appearance.

Defendant's application to change the place of trial, not made under Code Civ. Proc. § 396, on the ground that the county in which the action was brought was not the proper county, but on ground that right to change was special privilege granted it by section 394, was not required to be made at the time of the defendant's first appearance in the action.

Appeal from Superior Court, San Bernardino County; Rex. B. Goodcell, Judge.

Action by Emanuel Daneri against the City of San Diego. From an order denying its motion for a change of the place of trial, defendant appeals. Order reversed, with instructions.

S. J. Higgins, City Atty., and A. F. H. Wright, Deputy City Atty., both of San Diego, and T. B. Cosgrove and Hunsaker, Britt & Cosgrove, all of Los Angeles, for appellant.

Olin Wellborn, Jr., Stephen Monteleone, and Bert Campbell, all of Los Angeles, and McNabb & Hodge, of San Bernardino, for respondent.

LANGDON, P. J. This is an appeal by the defendant from an order denying its motion for a change of the place of trial of this action. The plaintiff, a resident of San Diego county, brought this action against the city of San Diego to recover damages for the destruction of and injury to real and personal property owned by the plaintiff and situated in the county of San Diego. The injury was alleged to have been caused by reason of the defective construction and operation of the lower Otay dam and reservoir owned and operated by the defendant, which overflowed, causing great injury to adjoining property.

The complaint was filed in January, 1918, in the county of San Bernardino. In May, 1919, defendant filed a demurrer to the complaint, and later filed a motion to strike certain allegations from the plaintiff's amended complaint. After the demurrer had been overruled and the motion to strike out portions of the complaint had been denied, the defendant filed its written motion to have the action transferred for trial from said county of San Bernardino to a county other than the county of San Diego under the provisions of section 394, Code of Civil Procedure.

The respondent herein has not seen fit to favor us with a brief in this matter setting forth his position with regard to the propriety of the order from which the appeal was taken, and we can only surmise that the motion was resisted in the lower court by the plaintiff upon the theory that it was made too late because it was not filed at the time the defendant filed its demurrer to the complaint. We know of no reason for the denial of the motion of the defendant. The theory above set forth is without merit because the motion was not made under the provisions of section 396, Code of Civil Procedure, and was not a motion upon the ground that the action was not commenced in the proper county, and did not ask that the action be transferred to the proper county.

It has been held in the case of Mono Power Co. v. Los Angeles, 33 Cal. App. 675, 682, 166 Pac. 387, that the only case in which it is necessary for the defendant to make such a motion at the time of first appearance is the case where the motion is upon the ground that the action has not been brought in the proper county. It is clearly stated in said last-mentioned case that in all other cases of change of place of trial it is not necessary that the motion be made at the time of first appearance.

The defendant in this case did not make its motion under the provisions of section 396, Code of Civil Procedure. It did not set up the fact that San Bernardino county was not the proper county, nor ask for a transfer to the proper county; but it exercised a special privilege granted to it under section 394, Code of Civil Procedure, and demanded a change of place of trial irrespective of and without regard to whether the action was brought in the proper county or not.

As this motion was made under the provisions of section 394, Code of Civil Procedure, defendant was not obliged to make it at the time of its first appearance in the action. Mono Power Co. v. Los Angeles, supra.

The order appealed from is reversed, with instructions to the trial court to grant defendant's motion and transfer said action for trial from said county of San Bernardino to a county or city and county other than said county of San Bernardino and other than the county in which the plaintiff resides or is doing business, and other than the county in which the defendant city is situated.

We concur: NOURSE, J.; STURTEVANT, J.

55 Cal. App. 532

SOTO v. GLOBE OIL MILLS. (Civ. 3759.)

(District Court of Appeal, Second District, Division 1, California. Dec. 5, 1921.)

1. Appeal and error 🔑979(2)—Setting aside verdict as against evidence reversed only for abuse of discretion.

It is the duty of the trial judge to set aside a verdict which appears to him not to be sustained by the weight of the evidence and to grant a new trial, and such order will not be disturbed on appeal, unless it plainly appears that there has been an abuse of discretion.

2. Factors 🔑66—Evidence held to show no abuse of discretion in setting aside verdict for plaintiff.

In an action for the conversion of cattle, evidence that defendant bought the cattle from one whom plaintiff had represented to be his agent, that plaintiff had stated to others that he had transferred the cattle to the agent, and that defendant had paid the agent for the cattle, and tending to show that such person was plaintiff's factor, having possession, with power to sell and collect, *held* insufficient to support a verdict for plaintiff.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Frank C. Soto against the Globe Oil Mills to recover damages for conversion. From an order granting a new trial after verdict for the plaintiff, plaintiff appeals. Affirmed.

Fred W. Morrison, of Los Angeles, for appellant.

W. G. Van Pelt and Bertin A. Weyl, both of Los Angeles, for respondent.

JAMES, J. This action was brought to recover damages alleged to have been sustained by the plaintiff by reason of the defendant having appropriated to its own use property of the plaintiff, consisting of 98 head of cattle. A jury returned a verdict in favor of the plaintiff and the trial judge granted a motion for a new trial, from which order plaintiff has appealed. The only question to be considered is as to whether, upon the evidence presented in the trial court, the making of the order complained of amounted to an abuse of discretion.

[1] The rule is a familiar one and well settled that it is the duty of a trial judge, wherever it appears to him that a verdict is not sustained by the weight of the evi-

dence, to grant a new trial, and that such order will not be disturbed unless it plainly appears that there has been an abuse of discretion. Drathman v. Cohen et al., 139 Cal. 310, 73 Pac. 181; In re Martin, 113 Cal. 479, 45 Pac. 813; Weringer v. Rutledge, 180 Cal. 566, 182 Pac. 31. A brief consideration of the evidence as the record shows it will demonstrate, we think, without the aid of further authorities, that the order should be affirmed.

[2] Plaintiff was the owner of cattle in the number mentioned in his complaint. He shipped same from Arizona to Los Angeles. In company with one Zukerman he went to the office of the defendant, where an offer was made to purchase the cattle, which offer plaintiff refused. At that time the plaintiff referred the defendant's purchasing agent to Zukerman for further negotiations. Defendant's agent, who conducted the negotiations, in the course of his testimony, stated that Zukerman in Soto's presence announced that he was the agent of Soto, which claim Soto did not deny, and that Zukerman, in Soto's presence, made a counter offer which defendant in turn refused to accept. The witness stated:

> "I saw Zukerman about two days after when he came into our office. * * * Zukerman came to our office and said he had bought the cattle from Soto, and offered to sell them to me. I bought 40 head from him at that time as I remember. He was given a check for $2,838.70. Before I gave Zukerman the check I had some conversation with Mr. Hickox at the Santa Fé stockyards. He told me that Soto had told him that he had disposed of the cattle to Zukerman. I relied on that statement before consummating this deal with Zukerman. The cattle were delivered in due course and I saw Zukerman again in two or three days. He came and offered me the steers. I bought only the cows the first time. I bought the steers and Zukerman was given a check for $2,597.25."

It appears that Zukerman had failed to account to Soto for the proceeds received from the sale of the cattle and had decamped. Soto admitted that he had delivered the possession of the cattle to Zukerman for the purpose of allowing Zukerman to make a sale thereof, and admitted that he had told a clerk at the Santa Fé freight office that the cattle belonged to Zukerman when he arranged to have the shipping receipts turned over.

We have called attention to enough of the testimony to show that the court was justified in determining that the weight of the evidence was not in support of the verdict of the jury. From that evidence it appears that plaintiff delivered the cattle into the possession of Zukerman for purposes of sale, and the inference is plainly justified that as a factor Zukerman was authorized, not only to sell the cattle, but to collect the proceeds of the sale. The duty of this court being only to determine whether the trial court abused the discretion committed to it, a further discussion or analysis of the evidence would serve no useful purpose.

The order appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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55 Cal. App. 523

CLAYTON et al. v. RANDOLPH MARKETING CO. (Civ. 4035.)

(District Court of Appeal, First District, Division 2, California. Dec. 5, 1921. Hearing Denied by Supreme Court Feb. 2, 1922.)

1. Contracts 🔑155—Uncertainty to be interpreted against party writing contract.

In case of uncertainty in a contract, not removed by Civ. Code, §§ 1635–1653, the language should be interpreted most strongly against the party writing the contract, in view of section 1654.

2. Factors 🔑44—Commission merchant held not entitled to percentage of amount expended for freight and expenses.

A marketing company under a contract giving it a commission of "20 per cent. of the net f. o. b. destination sales," *held* not entitled to 20 per cent. of the gross sales price, which included freight, insurance, ice, demurrage, and detention en route or at the point of destination.

3. Trial 🔑45(1)—Offer of evidence held properly refused as not sufficiently specific.

In action to recover commissions under a contract providing for a certain percentage "f. o. b. destination sales," the trial court did not err in excluding oral testimony under offer that if the court was in doubt as to the meaning of f. o. b. destination sales, or believed plaintiffs were in any doubt as to such meaning, defendant would show that they understood it as defendants did; the offer not clearly indicating its scope.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by J. D. Clayton and others against the Randolph Marketing Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Henry B. Stewart and Guy L. Rockwell, both of Brawley, and Le Roy M. Edwards, of Los Angeles, for appellant.

C. L. Brown, of El Centro, for respondents.

STURTEVANT, J. [1, 2] The plaintiffs sued the defendant for an accounting; the trial court awarded the plaintiffs a judgment for $4,882.13, and the defendant has appealed. The trial court tried the case sitting without a jury, and made findings in which it found that the defendant was a corporation; that on September 20, 1918, the plaintiffs and defendant entered into a written contract which is fully set forth in plaintiffs' complaint; that the plaintiffs have fully performed said contract; that in doing so the plaintiffs delivered to the defendant to be marketed 65 carloads and some broken lots of lettuce; that the defendant received the produce and sold the same for $69,470.98 on board the cars at the place of sale; that the defendant paid freight and expressage in the sum of $15,736.63; that the defendant paid expressage for sundry items in the sum of $65.75, demurrage, $32.36, refrigeration, $175, taxes, $237.30; and that the net sale price on board the cars at point of delivery was $53,223.94. The court also found that the defendant had advanced to the plaintiffs $37,697.03, and that it was entitled to a commission of 20 per cent. on the net sales, or in the sum of $10,644.79. Deducting the advances and the commission from the net sales item above stated, the difference is $4,882.12, the amount for which the judgment was ordered. This controversy involves the correct interpretation of the meaning of the contract in so far as it provides for the payment by the plaintiffs to the defendant of a commission. The contract is quite long, and it is sufficient for the purposes of the decision in this case to state that the provisions concerning the commission are contained in a paragraph worded as follows:

> "That for a consideration mentioned in paragraph 4 of this agreement the growers hereby appoint the distributor their exclusive agent for selling and distributing all lettuce and spinach owned, grown, or controlled by the growers, for the seasons of 1918 and 1919, upon a commission of 20 per cent. for the net f. o. b. destination sales of all lettuce and spinach delivered to and accepted for shipment at Brawley, Cal. * * *"

The dispute between the parties is whether, under the above passage, the defendant was authorized to compute a commission of 20 per cent. on the sales price at the point of destination after deducting freight, or whether it should have computed the commission on the sales price at that point without deducting freight. The contract was written by the defendant, and in case of uncertainty not removed by sections 1635–1653 of the Civil Code, the language should be interpreted most strongly against the defendant. Civ. Code, § 1654. When the defendant answered it annexed to its answer a document which it called a balance sheet. That balance sheet shows the defendant's claim as to its rights with reference to each particular carload. As stated above, there were 65 carloads. As to 33 of these carloads no freight is charged—apparently the contents of the car were sold subject to the freight being paid by the purchaser; as to 12 of the cars charges were made for such items as detention, demurrage, brokerage, and cartage; where freight, refrigeration, and cartage were incurred, as on the first item, the defendant sought to charge commission on the gross sales price, $1,513.35; where a carload was sold without incurring any of those expenses, as on the second shipment, the defendant sought to charge a commission on the sales price, $685; a similar practice was followed with reference to other shipments from the 10th day of February, 1919, the date of the first shipment, until the 5th day of April, 1919, the date of the last shipment. It is claimed by the defendant that it was authorized to base its commission on the gross sales price at the point of destination because it was negotiating and attending to sales in large amounts, and was advancing moneys to finance the transactions. But this same claim could be made, with force less in degree only, with reference to the second car on which the defendant did not advance the freight. If the appellant is right in the contention which it made in the lower court, that its commission should be based on the wholesale price, including freight such contention has its support in this: That the freight item was inserted to augment the commission. But if the parties were seeking to augment the commission, it should have been augmented by the amount of the freight, whether the freight was paid by the defendant or the purchaser. Certainly no one would claim that 20 per cent. was to be allowed as interest for a few days on the freight moneys advanced. If such an argument should be made, it would require express language in the contract to uphold it. When the defendant did, from February to April, on 33 of the carloads, enter a charge for commission based on the sale at destination, without including any freight, the defendant went far by its own act in construing its contract adversely to the contention it now makes.

We think it was correct in the construction which it then placed on its contract, and that it is incorrect in the claim which it is making at this time. The contract provides a commission of "20 per cent. of the net f. o. b. destination sales." The commission is to be based on sales. It is to be based on destination sales. Again, not gross sales, but net sales, and, furthermore, sales free on board. Bearing each one of these calls of the contract in mind it is patent that cartage at the point of destination cannot possibly be considered, because cartage can commence only after the goods leave the car and when the goods have ceased to be "on board." What we have said regarding cartage applies to handling, insurance, demurrage, brokerage, and every other item that was incurred after a sale had been made. By the terms of the contract the appellant became the broker of the grower for the purpose of negotiating a sale; but the plaintiff did not specifically authorize the defendant to delegate its authority at the plaintiffs' expense. Before a sale was made, and down to the time that the car arrived at its point of destination, under the clear terms of the contract, the respondent would be liable for insurance, icing, demurrage, and detention en route or at the point of destination. When a sale had been made, deducting those expenses from the sales price and deducting the freight, we have arrived at a figure which complies with every call of the contract "net f. o. b. destination sale," and on this account so ascertained the appellant was entitled to compute its commission of 20 per cent. To such an interpretation the appellant replies that, "We have construed the words as though they read 20 per cent. of the net f. o. b. shipping point sales." This is manifestly not so. That wording would indicate that the parties intended that the burden would rest on the appellant of paying at its own expense the freight, and all handling, insurance, icing, demurrage, and detention charges which might be incurred after the car left the point of shipment. Moreover, to talk of the subject of sales at shipping point is to ignore the word "net" entirely; that word ceases to have the meaning "net," or to have the meaning "gross," or any other meaning. It is, in effect, stricken out of the contract. When the clause in question was being argued in the trial court, and after counsel had cited authorities and argued the matter, the trial court remarked: "* * * I think it would mean exactly the same reading 20 per cent. of the net sales f. o. b. destination." In this statement we think the trial court was entirely correct and that it did not misconstrue the contract.

[3] The appellant claims that the trial court erred in not allowing it to introduce oral testimony. The proceedings were as follows:

> "Mr. Rickwell: * * * If the court is in any doubt as to the interpretation of *f. o. b. destination sales,* and if the court is of the opinion that the plaintiffs were in any doubt as to the meaning of *f. o. b. destination sales,* we will ask them what they understood and we will *put on witnesses to show that they understood it as we understood it.* [Italics ours.]
>
> "The Court: I do not think there is any necessity to introduce evidence on that point. * * *"

The specific offer was rightly refused. If the appellant had some other matters to present, it should have made an offer which clearly indicated the scope of the offer.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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55 Cal. App. 273

ROTHAERMEL v. AMERIGE. (Civ. 3753.)

(District Court of Appeal, Second District, Division 1. California. Nov. 21, 1921. Hearing Denied by Supreme Court Jan. 19, 1922.)

Injunction 🔑51—Mandatory injunction to compel removal of encroaching foundation between buildings not granted.

Where foundation of building on adjoining lot extended 1½ inches over the boundary line, and could not be removed without tearing down a building on one of the lots, and a judgment in ejectment was had against the encroaching owner, a grantee of the successful party in the ejectment suit was not entitled to a mandatory injunction compelling the removal of such foundation.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Albert H. Rothaermel against George H. Amerige. Judgment for plaintiff, and defendant appeals. Reversed.

S. M. Davis and Walter Eden, both of Santa Ana, for appellant.

Marks & Launer, of Fullerton, for respondent.

JAMES, J. Judgment was entered in this action as prayed for by the plaintiff, except as to the amount of certain damages, and defendant has appealed.

Plaintiff is the owner of a parcel of land located in the city of Fullerton, county of Orange. Upon this land there was erected by the predecessor in interest of the plaintiff a two-story brick building. The south wall of this building was placed within about 2 inches of the line dividing the property of plaintiff's predecessor from that of the adjoining landowner, title to which latter land was afterward acquired by the defendant. At the time of the erection of the building referred to, there were no building improvements upon the adjoining property. Defendant's grantor in turn caused to be erected a brick wall along the dividing line between the two properties, up to a height of one story, this wall becoming a part of a building thereon constructed. The surface of the latter wall seems not to have intruded upon the property later acquired by the plaintiff, but the contention was made by plaintiff's predecessor in interest that the foundation footings of the wall did extend over and onto the latter's property to the extent of 2 inches. As a result of this contention an action was brought in March, 1916, by plaintiff's predecessor against the defendant here. The action was in form one of ejectment, the complaint containing appropriate allegations as to ownership and the trespass of the defendant. Writ of restitution and damages in the sum of $500 were prayed for. The court, after trial, entered judgment, wherein it was determined that defendant had and held possession of the "south 1½ inches of said real property in plaintiff's complaint described." The court in that action further found that—

> "The plaintiff is not damaged by the foundation of defendant's building extending one and one-half inches upon the plaintiff's property hereinbefore described, and up to plaintiff's foundation wall."

The judgment was one appropriate to an action of ejectment, in that it directed that the defendant "vacate and restore to the possession of said plaintiff the south 1½ inches of that certain lot" describing the parcel, and further directed that "writ of assistance" be issued to restore to the plaintiff the possession of the property without further proceedings. After plaintiff's predecessor had secured the judgment and all of the relief that she had asked for, except that she was found to have sustained no loss in damages, she seems to have been in a quandary as to what should be done to make effectual the right secured. As only the foundation footings of defendant's building protruded onto the land of plaintiff to the extent of the 1½ inches, and as the two brick walls existed there, separated only by a space of about the same width, it was plainly impossible to have the footings removed without taking down one or the other of the walls. A writ of assistance or for possession, as the same is termed in section 380, Code of Civil Procedure, would not have authorized the sheriff to molest defendant's wall other than to remove the footings. After the entry of that judgment the plaintiff here came into the ownership and possession of the north property. Prior to that time, and after the entry of the judgment referred to, the defendant had served written notice upon plaintiff's predecessor that he relinquished all right to the 1½ inches, or the fixtures attached to his wall, which the court had found were intruding upon the land of the opposite party. The plaintiff, however, proceeded to bring this suit, wherein he sought to obtain an affirmative judgment requiring the defendant to remove the inch and a half foundation footings as an existing incumbrance to the free use of plaintiff's property. In the complaint the former judgment was pleaded as establishing the right of ownership and possession in plaintiffs predecessor. The trial was proceeded with, evidence heard, and the court determined that the plaintiff was entitled to the relief prayed for, except that damages for the withholding of the property was placed at the nominal sum of $1. The decree as rendered required the defendant to, "within six months from the date hereof, remove, from the south 1½ inches of the property described, the concrete foundation and brick wall thereon situated, and deliver up and surrender to the plaintiff possession of said south 1½ inches of said property." The appellant properly characterizes this judgment as being in form one for a mandatory injunction. The last action was in no sense an action upon the judgment of ejectment, for, if such were the case, the only judgment proper to be rendered would be one like that first entered, which would leave the plaintiff in precisely the same situation as his predecessor was at the time of the conclusion of the first suit. We have here a case where a bare legal right, unsupported by any damage shown, is sought to be enforced by mandatory writ requiring affirmative personal action to be taken. Appellant makes the point, and we agree wholly with the argument, that the case is one in which the plaintiff is shown to be utterly without the right to claim such equitable relief. As is stated by the editor in Ruling Case Law (vol. 14, pars. 14, 15–57), mandatory injunctions are most frequently employed in cases of nuisances, trespasses of an irreparable nature and for the protection of easements, and the text further states:

> "It is also true, as a general rule, that the court should not interfere by way of mandatory injunction, even though the injury be clearly established, where there has been a long-continued delay in asserting the right, and a remedy exists at law, or where the injury is so slight as to bring it within the maxim de minimis, or full compensation can be made in damages. If there is an adequate remedy at law, no relief will be granted, especially where there is no appreciable damage, and its issuance would require the performance of an act which would be difficult, and involve a considerable expense."

A number of cases are cited from other jurisdictions fully sustaining the statement of the text. Appellant's counsel have also made pertinent citations of California decisions, notably Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; Clough v. Healy Co., 200 Pac. 378. It is also insisted that the judgment in the first action which was pleaded in the answer, became res adjudicata as to every form of relief to which the plaintiff was then entitled, also that the facts as disclosed by the evidence were such as to estop the plaintiff from making the claim which he by this suit asserts. Both propositions are fairly debatable, but, in view of the conclusion which we have reached as to the question discussed, we think it unnecessary to give consideration to further points urged against the validity of the judgment. Plainly enough it appears that the plaintiff was awarded relief to which the facts did not show him to be entitled.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(55 Cal. App. 534)

BERRY et al. v. CROWELL et ux.
(Civ. 3747.)

(District Court of Appeal, Second District, Division 1. California. Dec. 5, 1921. Hearing Denied by Supreme Court Feb. 2, 1922. Rehearing Denied Jan. 2, 1922.)

1. Trial ⚷395(1)—If findings fairly determine material issues they will support judgment.

If it can be gathered from the whole of the findings of the court that material issues are fairly determined, the finding will support the judgment, and if the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with.

2. Appeal and error ⚷1041(2)—Refusal to allow amendment of complaint not error, where it would have been unavailing.

In a suit to rescind a contract for exchange of land, it was not error to refuse permission to amend prayer of complaint by adding a demand that defendants be declared involuntary trustees, where such amendment would have been of no avail to plaintiffs because by reason of the facts found they would not be entitled to any different judgment than that entered.

3. Judgment ⚷139—Setting aside defaults within discretion of trial judge.

The matter of setting aside defaults rests within the sound discretion of the trial judge.

4. Judgment ⚷107—Clerk's entry of default void where answer on file.

Where a default is entered by the clerk against defendants in the face of a plain record showing an answer on file, such entry is void.

5. Judgment ⚷137—Court may expunge void default entries without notice on its own motion.

The court on its own motion without notice to any one may expunge a void default entry made by the clerk, and that the court acts on the suggestion of defendants' counsel does not affect its power.

Appeal from Superior Court, Riverside County; George H. Cabaniss, Judge.

Action by C. F. Berry and others against George W. Crowell and wife for rescission of contract. Judgment for defendants, and plaintiffs appeal. Affirmed.

D. B. Chapin and Walter W. Little, both of Los Angeles, for appellants.

M. Estudillo, of Riverside, for respondents.

JAMES, J. Plaintiffs appeal from an adverse judgment. The appeal is presented by the alternative method. The questions argued relate to orders of the trial judge vacating certain default entries made by the clerk of the court; it is also contended that neither the findings nor the pleadings sustain the judgment, and that prejudicial error was committed by the court in denying a motion to allow plaintiffs to amend their complaint at the trial.

The controversy arose as a result of an exchange of real properties which was had between parties to the action. Plaintiffs were the owners of 80 acres of land in the state of Texas. Defendants were the owners of a lot in the city of Riverside, Cal. Plaintiff C. F. Berry was, at the time of the transaction, a resident of the city of Riverside. W. E. Berry, a son, was part owner in the Texas land, and he resided outside of the state of California. The entire transaction, in so far as the plaintiffs were concerned, appears to have been conducted by C. F. Berry. The complaint in this action stated a cause of action to rescind the contract of exchange upon the ground of alleged fraudulent representations made by defendant George W. Crowell respecting the value of the Riverside property. It was alleged that C. F. Berry was a farmer by occupation, and was ignorant of the values of property in the city of Riverside, and that he was "easily led, imposed upon, circumvented and overcome by cunning, artifice, and undue influence"; it was alleged that George W. Crowell falsely and fraudulently represented that his property in the city of Riverside was of the value of $6,000, and that "plaintiff could rely absolutely upon defendant's statement as to said value because defendant was well posted as to property values in said city, and that it was not necessary for the plaintiff or his son to make any investigation for themselves"; it was alleged that in fact the Riverside property was not worth in excess of the sum of $3,250, all of which the defendant George W. Crowell well knew at the time he made the aforesaid representations. Preliminarily, the plaintiffs alleged that both Crowell and C. F. Berry were members of a religious organization, and that defendant George W. Crowell was an elder of the church. The second allegation contained in the complaint is as follows:

> "That the office of elder, in said religious organization, is by said organization conferred only upon one whose Christianity is unquestioned, and whose integrity is unimpeachable, and, according to the doctrine of said organization, the statements and representations of an elder in said organization are entitled to full faith and credit."

Immediately following this allegation the complaint charges that—

> Crowell, "in addition to the duties imposed upon him by said religious organization, also is, by profession, a trader in lands and property of all kinds, and is an artful and shrewd business man of large experience."

There is the further allegation that Berry was induced to rely upon the statements of

Crowell by reason of the fact that the men "were brothers together, in said church." Defendants admitted that Crowell held the office in the church, and that it was of the character alleged, but denied that the statements or representations of an elder in the organization were entitled to any more credit than that of other members. The answer in its further allegations, affirmative and of denial, tendered an issue as to all of the fraudulent acts alleged, and affirmed that no representations as to the value of defendants' land were made except that George W. Crowell stated that said land "stood him" about the sum of $5,660, and in this connection it was affirmed that such representation was true.

[1] The trial judge generally found the facts to be against the allegations of the complaint, and the findings contained the further recital that all of the allegations of defendants' answer were true "except as herein otherwise found." The allegations of denial contained in the answer and the findings of the court covering those matters are prolix; they lack clearness, and are often conjunctive where the statements should be direct and separate. Plaintiffs' counsel complains of that condition, and, because of it, makes an argument that the answer did not sufficiently tender an issue, and that the findings do not support the judgment. We have referred to the fact that, under the general finding of the court, all facts alleged in the answer not specifically referred to in those findings are determined to be true. This general finding is sufficient to embrace that allegation contained in the answer setting forth, from the side of the defendants, just what representations were made and all of them. Necessarily it would follow that, if the representations as alleged by the defendants only were made, and those representations were true, as found by the court, the allegations of the plaintiffs, as to other representations made and their alleged falsity cannot be true. If the answer may be said to have tendered a single material issue, and we have no doubt that it did, a determination by the court of that issue adversely to the plaintiffs would defeat a recovery, irrespective of the fact that other issues may not have been clearly found upon, or the court had made unnecessary findings, or findings as to facts not in issue, or undenied. If sufficient can be gathered from the whole of the findings of the court that material issues are fairly determined, the finding will support the judgment. "It was not necessary that the facts as found should be in any particular form or follow the pleadings. If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with." Ready v. McDonald, 128 Cal. 663, 61 Pac. 272, 79 Am. St. Rep. 76; Millard v. Legion of Honor, 81 Cal. 340, 22 Pac. 864. So, also, where findings are seemingly contradictory. American National Bank v. Donnellan, 170 Cal. 15, 148 Pac. 188, Ann. Cas. 1917C, 744.

[2] It was not error for the court to refuse to allow plaintiffs to amend the prayer of their complaint. This amendment proposed to add a demand that the defendants be declared to be involuntary trustees of the plaintiffs. The amendment would not have helped plaintiffs' case at all (assuming that the prayer was not already sufficient to authorize such relief) because, by reason of the facts found, plaintiffs would not be entitled to have the court enter any different judgment than that which was entered. The answer did not admit the confidential relationship which plaintiffs alleged existed.

[3-5] The alleged errors pointed to by counsel for appellants, referring to orders made by the court setting aside defaults entered against the defendants by the clerk, are entitled to but little consideration. The first default for want of an answer was set aside upon seasonable application being made and good cause shown. It has been held so often that the matter of setting aside defaults rests within the sound discretion of a trial judge that we need not refer to the cases. The profession is well advised of the law in that regard. The second default entered against the defendants was entered by the clerk in the face of a plain record showing an answer on file. Plaintiffs complain that they were given no sufficient notice of the application to set aside this second default. Notice of that motion was served upon the plaintiffs; whether the time given was sufficient or not is utterly immaterial. The second default entry as made by the clerk was void, and its character in that regard appeared plainly by an inspection of the record. In such a case the court, of its own motion and without notice to any one, might have caused it to be expunged. That it acted upon the suggestion of defendants' counsel does not affect its power in any respect. There are no other points suggested which require any consideration by the court.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

55 Cal. App. 461

PEOPLE v. CAPELLI. (Cr. 585.)

(District Court of Appeal, Third District, California. Nov. 30, 1921. Hearing Denied by Supreme Court Jan. 26, 1922.)

1. Intoxicating liquors ⚷24—Wylie Local Option Law held strictly a "local option law."

The Wylie Local Option Law constitutes a general scheme whereby the electors of certain designated territories in the state may determine for themselves whether within such territories the sale of intoxicating liquor may or may not be licensed and carried on, and is strictly a local option law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Local Option Law.]

2. Intoxicating liquors ⚷132 — Wylie Local Option Law held not inconsistent with Volstead Act.

The Wylie Local Option Law, whenever its prohibitory provisions are in practical operation in the manner prescribed thereby, is in no wise repugnant to, or inconsistent with, but, as far as it goes, operates in furtherance of, the purpose of the Volstead Act.

3. Statutes ⚷64(2)—Provision of Wylie Local Option Law sanctioning sale of intoxicating liquors held not to render other provisions invalid.

Section 11 of the Wylie Local Option Law, in effect sanctioning the license and sale of intoxicating liquors in certain districts by popular vote, not being interdependent on the remainder of the act, does not render such remainder inoperative, although that section is without effect.

4. Statutes ⚷64(1)—When void provisions may be disregarded stated.

If the different parts of a statute are severable and independent, and provisions within the constitutional power of the Legislature are capable of being carried into effect after the void part is eliminated, and it is clear from the statute itself that it was the intent to enact these provisions irrespective of the others, the unconstitutional provisions will be disregarded, and the statute read as if they were not there.

5. Statutes ⚷64(2)—Wylie Local Option Law enforceable notwithstanding void subsidiary section.

It being the manifest purpose of the Legislature in enacting the Wylie Local Option Law to provide a mode whereby traffic in alcoholic liquors could be suppressed, and the provisions of section 11 authorizing licenses in certain districts by popular vote being subsidiary to the main purpose of the act, such section was not essential to the validity of the act, and, though such section is void, the remainder of the act may be enforced.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

E. Capelli was convicted of violating the Wylie Local Option Law, and he appeals. Affirmed.

W. D. L. Held, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged with the violation of the provisions of the so-called "Wylie Local Option Law" under an information filed in the superior court of Mendocino county by the district attorney thereof, and which charged him with willfully and unlawfully keeping and conducting a place where alcoholic liquor was sold, served, and distributed within the boundaries of the first supervisorial district of said county and outside the corporate limits of any city or town, said supervisorial district "being then and there no license territory."

This appeal is by the defendant from the judgment of conviction. The sole question in this case is whether the Wylie liquor law, under the provisions of which defendant was convicted, has been superseded or invalidated by the act of Congress known as the "Volstead Act" (41 Stat. 305), the object of which is the enforcement of the terms of the Eighteenth Amendment to the federal Constitution. The contention of the appellant is that the effect of the enactment of the Volstead Act is necessarily to render nugatory or without force the provisions of the Wylie law. The Wylie liquor law, as it may conveniently be termed, was passed by the Legislature of 1911 (Stats. 1911, p. 599), and the first section thereof provides:

> "Qualified electors of any incorporated city or town, or of that portion of any supervisorial district not included within the boundaries of any incorporated city or town, numbering not less than twenty-five per cent. of the number of votes cast for all candidates for Governor in the territory described in the petition, at the last preceding election for Governor of the state, may petition the city council, board of trustees or other legislative body of such city or town or the board of supervisors of the county in which such supervisorial district is situated, to call an election to vote upon the question, whether the sale of alcoholic liquors shall be licensed in such city, town, or supervisorial district outside of incorporated cities and towns."

The tenth section of the act reads:

> "Unless a majority of the votes cast on this question at such election are in favor of license, the territory described in the petition shall be no-license territory on and after ninety days from the date of said election; and the city council, board of supervisors or other governing body having jurisdiction thereof, shall thereupon make an entry on its records declaring that such described territory is no-license territory; but a failure to make such

entry shall not affect the result or effect of such election."

The eleventh section is as follows:

> "When any city, town, or supervisorial district outside of incorporated cities and towns, becomes no-license territory it shall remain such until at a subsequent election, called, as herein provided, to vote on the question of whether the sale of alcoholic liquors shall be licensed therein, a majority of the votes cast on that question are in favor of license. It shall thereupon cease to be no-license territory within the meaning of this act."

Of the Wylie act, in speaking of the effect thereof upon a municipal ordinance designed to prohibit traffic in alcoholic liquors, this court, in Ex parte Anixter, 22 Cal. App. 117, 120, 134 Pac. 193, 194, had this to say:

> "That law, it is very true, applies to the whole state, and it is, therefore, a general law in the truest sense, and would have to be so to be constitutional, but its purpose is not, and nowhere can there be found in any of its provisions any language disclosing an intention, to prohibit, ex proprio vigore, the retail sale of intoxicating liquors throughout the state or in any subdivision thereof. It merely constitutes and involves a general scheme whereby the electors of certain designated territories in the state may determine for themselves whether, within such territories, the sale of such liquor may or may not be licensed and carried on."

[1] We adhere to the above brief exposition of the nature and scope of the Wylie law, and further declare, notwithstanding the asseveration of the Attorney General in his brief to the contrary, that it is strictly a local option law, which is described by Bouvier's Law Dictionary as:

> "A right granted by legislative enactments to the inhabitants of particular districts to determine by ballot whether or not licenses shall be issued for the sale of intoxicating liquors within such districts"

—or, as it is defined upon the authority of numerous cases in 25 Cyc. p. 1534:

> The term "local option implies the grant of the right to one locality to adopt and another to decline to avail itself of a law."

See, also, Ex parte Handler, 176 Mo. 383, 389, 75 S. W. 920; State v. Brown, 19 Fla. 563, 598; State v. Barber, 19 S. D. 1, 101 N. W. 1078, 1081; Cooley, Const. Lim. 146: In re O'Brien, 29 Mont. 530, 546, 75 Pac. 196, 1 Ann. Cas. 373; Boyd v. Bryant, 35 Ark. 69, 73, 37 Am. Rep. 6. Nor are we in accord with the theory of the Attorney General that the Wylie law, in analogy to the situation as to the insolvency laws existing in the states at the time of the enactment of the national bankruptcy law, is suspended until its provisions are invoked by any of the geographical units contemplated by the statute. The insolvency laws of a state are practically "a dead letter" so long as there exist national bankruptcy laws, although it may be true that a repeal of the latter would operate to revive the former as they existed at the time of the enactment of the bankruptcy laws; but, as suggested, while the national bankruptcy laws are in force, the state insolvency act can no more be put into operation than may a law which has been repealed. While it is true that the operation of the Wylie law remains dormant until its provisions may be or are invoked by the electors of certain of the indicated subdivisions of the state, the law is, nevertheless, in effect and is as much a part of the legal system of the state as any other law. If this were not true, the provisions of the law could never be applied by a resort thereto in the manner pointed out by its own provisions. But this discussion, it seems to us, is entirely dehors the real question which is submitted here for solution and the points which must be considered in the decision of that question.

The learned counsel for the appellant, in support of the theory upon which they urge the validity of this appeal, argue that, since the provisions of the Wylie law are not self-executing, or do not, ex vi termini, operate to prohibit traffic in intoxicating or alcoholic liquors, and since, furthermore, it also authorizes the electors of any of the subdivisions, after any such territory or district has been duly voted a no-license territory, to vote upon the question of whether the sale of alcoholic liquors shall be licensed therein with the result that such territory or district shall cease to be no-license territory within the meaning of said act, the said act is necessarily nullified by the provisions of the Volstead Act. In other words, counsel for the appellant do not contend that the Eighteenth Amendment or the Volstead Law supersedes any legislation, state or local, which by its terms is prohibitory in its nature, but concede that if the Wylie law, by its terms, involved a direct inhibition against the traffic in alcoholic liquors, and the force thereof was not destroyed by the provision therein giving to the electors of any particular geographical unit the right to do that which the federal laws prohibit, namely, to declare by their votes that within the limits of such unit the sale of alcoholic liquors may be licensed, then neither the effect of the amendment to the federal Constitution prohibiting the manufacture, sale, etc., of intoxicating or alcoholic liquors, nor that of the legislation by Congress designed to enforce said amendment would be to render said state law invalid.

In the recent case of the People v. Collins, 202 Pac. 344, the defendant was convicted under the Wylie act of the crime of selling alcoholic liquor in "no-license territory." On his appeal to this court, he contended, as it is here contended, that the Wylie act "was superseded and rendered inoperative by the national prohibition act known as the Volstead

Act and, therefore, his conviction was void." In reply to the contention this court said:

> "It is sufficient to refer to In re Volpi, 199 Pac. 1090, and Ex parte Crookshank, 269 Fed. 980."

Both the Volpi and Crookshank Cases involved municipal ordinances prohibiting the manufacture, sale, etc., of alcoholic liquors within the limits of the respective municipalities concerned therein and the question submitted and decided in each case was whether or not the power in a municipality to enact and enforce within its limits an ordinance prohibiting the sale of liquor and not inconsistent with the Eighteenth Amendment to the federal Constitution or the Volstead Act, was destroyed by said amendment or the congressional legislation referred to. In each of said cases it was held (and, of course, properly) that the state or any of its political subdivisions, by virtue of the police power inherent in the people of the former and expressly granted by the people through their Constitution to the latter, may enact any legislation looking to the enforcement of the federal laws prohibiting the manufacture, sale, etc., of alcoholic liquors, and that therefore the ordinances considered in said cases involve a valid exercise of such power. In neither of those cases, however, was the Wylie act involved; nor were there presented and urged in the Collins Case, supra, the points advanced here in impeachment of the validity of the Wylie act as the direct effect of the federal laws, constitutional and legislative, prohibiting the manufacture, sale and transportation of alcoholic liquors for beverage purposes. It will hence be necessary to consider the question whether the force of the Wylie law has been destroyed or in any wise impaired by the federal constitutional amendment or the congressional legislation referred to more extendedly than it was found necessary to do in the Collins Case.

[2] The Wylie act is a state law, and, as is said in the Anixter Case, supra, and as is obviously so, it is in the truest sense a local option law. It in effect declares to the electors of certain designated geographical subdivisions of the state that it is optional with them whether they will avail themselves of its prohibitory provisions and so suppress or disallow the sale of alcoholic liquors within such subdivisions; and if, in any given case, the electors, according to the modo et forma pointed out by the act, invoke the prohibitory provisions thereof, then the act, in so far as the district thus affected is concerned, becomes, ipso facto, a prohibitory law or enactment—as much so, indeed, as if such an act were enacted by the people of the whole state under the power of the initiative or referendum. In other words, the exercise by the electors within any of the territorial units or subdivisions designated in the Wylie act of their option to avail themselves of the prohibitory provisions thereof at once makes that act, as to such unit or subdivision, a prohibitory law. It then stands, as to such territorial subdivision, precisely the same as though the Legislature, if it were not fettered by constitutional restrictions as to the passage of special laws, had passed a law directly prohibiting the sale or possession of alcoholic liquors within such unit or subdivision. It follows, therefore, that the Wylie act, whenever its prohibitory provisions are given practical operation in the manner prescribed thereby, is in no wise repugnant to or inconsistent with, but as far as it goes (while, of course, not specifically intended for that purpose) operates as in furtherance of the purposes of the Volstead act. Ex parte Volpi, supra; Ex parte Crookshank, supra; People v. Collins, supra.

It now remains to be determined whether, in view of the Eighteenth Amendment to the federal Constitution and the congressional legislation designed to enforce the terms of said amendment, the effect of section 11 of the Wylie law is to invalidate the force of the whole act. Section 11 of the Wylie act, it will be observed, in effect sanctions the licensing of the sale of intoxicating liquors in any district or city or town which has previously been voted "dry" by providing that alcoholic liquors may be dispensed therein if a majority of the electors of such district or city or town cast their votes at an election held for that purpose "in favor of license." Obviously, the federal constitutional amendment and the Volstead Act have rendered that section of the Wylie act absolutely void and nugatory; but it does not follow from the fact that said section is invalid or incapable of enforcement that thereby the whole act of which it is a part must fall. It is perfectly plain that, in the enactment of the Wylie law, the principal or central purpose of the Legislature was to provide a mode whereby the traffic in alcoholic liquors in California could be suppressed. It was, in other words, undoubtedly intended as a step looking to prohibition, leaving it, however, to the electors themselves of certain indicated local communities whether they would avail themselves of the prohibitory provisions of the act. This, we say, was unquestionably the main or principal motive actuating the Legislature in enacting the law. The incorporation into the law of section 11, which in effect authorized the electors of any territorial unit or subdivision by a majority vote at an election held for that purpose to nullify the force and effect of the prohibitory provisions of the law previously invoked therein, involved only a secondary or subsidiary consideration—that is to say, it is clear that it was not the controlling consideration prompting the enactment of the law.

[3] It is manifest that section 11 could

have been in the first instance or originally eliminated from the act, or, in other words, not incorporated into the act by the Legislature as among the provisions thereof, and still the legal integrity of the prohibitory provisions of the statute would not have been impaired and the act in itself would have been complete for the evident paramount purpose or object for which it was designed, namely, to enable electors within the indicated territorial subdivisions to avail themselves of its provisions with a view of suppressing the traffic in intoxicating liquors within the limits of such subdivisions. Thus it is plainly manifest that section 11 and the prohibitory provisions of the statute are not interdependent, or the one part so dependent upon the other as that the invalidity of said section 11 has the effect of rendering invalid the other provisions.

[4] It is a familiar and cardinal canon of statutory construction that—

> "If the different parts of the statute are severable and independent of each other, and the provisions which are within the constitutional power of the Legislature are capable of being carried into effect after the void part has been eliminated, and it is clear from the statute itself that it was the intent of the Legislature to enact these provisions (the prohibitory provisions of the Wylie act) irrespective of the others, the unconstitutional provisions will be disregarded and the statute read as if these provisions were not there." Hale v. McGettigan et al., 114 Cal. 112, 119, 45 Pac. 1049, 1052.

[5] Again, in the same case, beginning at the bottom of page 119, it is said:

> "For the purpose of statutory construction, the intention of the Legislature, as shown by the general scope and purpose of the law, is to be ascertained. * * * And, if the general scope of an act is within its power, the act is not to be rendered null by reason of a subsidiary provision which was beyond its power to enact. If the manifest purpose of the Legislature can be carried into effect by upholding the act and disregarding such subsidiary provisions, that purpose will not be defeated by an unconstitutional provision contained in a subordinate section in the act."

See, also, Robinson v. Bidwell, 22 Cal. 379; People v. Todd, 23 Cal. 181; Maclay v. Love, 25 Cal. 367; People v. Whyler, 41 Cal. 351; Ex parte Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; In re Mitchell, 19 Cal. App. 567, 573, 126 Pac. 856.

As above declared, it is very clear that the provisions of section 11 are subsidiary to the main purpose of the Wylie act, and it is equally clear that that section is not essential to the validity of the act for the principal purpose for which it was enacted.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

187 Cal. 750

PEOPLE v. DAVIS. (Cr. 2370.)

(Supreme Court of California. Jan. 5, 1922.)

Criminal law ⚷1149 — Refusal to set aside conviction on plea of guilty, on ground that plea was coerced, not disturbed on conflicting evidence.

The trial court's denial of motion to set aside conviction of murder in first degree, entered on plea of guilty, on the ground that accused's plea was obtained by coercion, will not be reversed, where the evidence is in conflict as to such coercion; nothing appearing to show abuse of discretion in denying the motion.

In Bank.

Appeal from Superior Court, Shasta County; Charles O. Busick, Judge.

Arthur Owen Davis was convicted of murder in the first degree, and from order denying motion to set aside the judgment of conviction he appeals. Affirmed.

Martin I. Welsh, of Sacramento, and James T. Matlock, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Jesse W. Carter, Dist. Atty., of Redding, for the People.

PER CURIAM. This is an appeal from an order of the superior court of Shasta county denying the motion of the defendant to set aside the judgment of conviction of murder in the first degree entered against him upon his plea of guilty on January 20, 1921. No motion for a new trial was made by said defendant, nor was any appeal from said judgment taken by him, but on March 18, 1921, the defendant made the above motion that the said judgment be vacated and set aside and that defendant be permitted to withdraw his plea of guilty theretofore entered and substitute a plea of not guilty to the information on file therein.

Said motion was based on the following ground, namely:

> "That the said plea of guilty was obtained from defendant and defendant was induced to enter said plea by coercion, fear, threats, misapprehension, persuasion, promises, assurances, inadvertence, ignorance of his rights and of the consequence of his act, without advice of counsel, without being advised of his legal rights, without proper arraignment, without being fully advised as to his rights on arraignment, without being informed or advised by counsel or by said court as to what the punishment for the crime of murder would be, without said court offering to appoint or assign counsel to aid and advise the defendant in his defense, without full knowledge of his rights, without defendant fully comprehending the serious consequences of his plea of guilty, and in violation of his constitutional and legal rights."

The motion was supported by the defendant's own affidavit and by the affidavits of certain other persons presented at the hearing thereon, and was opposed by the presentation of the affidavits of the justice of the peace before whom the defendant's preliminary examination was held, of the district attorney, of the several officers of the law implicated in the charges made in the defendant's motion, and also by affidavits of several other persons who were cognizant of the circumstances surrounding the defendant's arrest, imprisonment, examination, arraignment, plea, judgment, and sentence. The official record of the proceedings of the court was also presented in opposition to said motion. The court denied said motion, and from its order to that effect this appeal has been taken.

In the case of People v. Mooney, 178 Cal. 525, 174 Pac. 325, it was held that a proceeding by way of motion to set aside the judgment, when made after the judgment has been rendered and become final, and after a motion for new trial has been made, or the time therefor has expired, is in the nature of an application for a writ of coram nobis at common law. It was further held in that case that, where remedies exist by statute which did not exist at common law, the office and function of the writ are abridged thereby, and in such cases the writ is unavailable. These remedies are the right to appeal and to make a motion for a new trial, and where they are provided by statute, to that extent an application for a writ of coram nobis cannot be entertained. Upon the hearing of the defendant's motion in the trial court no objection was made to the presentation of any of the various matters urged by the defendant as the bases of said motion, nor has any such objection been urged here; but, notwithstanding this state of the record, this court, in entertaining and passing upon this appeal, is not to be understood as holding that as to any of the grounds urged by the defendant in support of his said motion which would have been reviewable upon motion for a new trial or upon appeal from the judgment, he was entitled to make said motion or to have the order denying the same reviewed upon this appeal.

With respect to the other grounds upon which the defendant predicated his said motion and which were triable thereon, as for example, the ground that the defendant's plea of guilty was extorted from him by coercion or induced by wrongful persuasions, promises, assurances, or threats, we do not consider it necessary to set forth in detail the evidence presented pro and con in regard to these matters. We have fully examined the record and have satisfied ourselves that as to all such matters in fact, as to every ground relied upon by the defendant in support of his said motion, the evidence is in direct and substantial conflict. We may even go further and say that upon the face of the record the preponderance of such evidence is in favor of the proposition that the defendant's plea of guilty was not induced by coercion, or threats, or improperly created fears, or by improper or deceiving persuasions or assurances, and that the defendant's consent to interpose said plea and his subsequent action in declining to avail himself of the aid and advice of counsel, and in consenting to a speedy hearing upon his said plea and to the entry of an immediate judgment thereon, were not procured or induced by any improper conduct on the part of the officers of the law, nor of any failure or neglect on the part of the justice conducting the defendant's examination, or the trial judge presiding at his trial, in the performance of the duties required of them by law to be performed for the defendant's protection, and that the proceedings attending his arrest, detention, examination, arraignment, trial, and sentence were in all respects regular. This being the state of the record, we are constrained to hold that the trial court acted within the bounds of a proper discretion in denying the defendant's motion, and hence its action in so doing will not be disturbed upon appeal.

The appellant urges certain matters upon this appeal relating to the defendant's youth and possible misapprehension as to the enormity of his final crime and as to the severity of the penalty following the perpetration of such a crime; but these are matters which, while properly presentable to the court pronouncing judgment, and while still presentable to the pardoning power upon an appeal for the exercise of clemency, have no place or potency in this tribunal, occupied, as it must be, solely in a consideration of the legal questions presented upon such an appeal.

Order affirmed.

SHAW, C. J., RICHARDS, Justice pro tem. and WILBUR, SLOANE, and SHURTLEFF, JJ., concur.

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187 Cal. 753

PEERY v. CITY OF LOS ANGELES et al. (ANDERSON, Intervener).

ANDERSON v. CITY OF LOS ANGELES et al.

(L. A. 7112, 7113, 7124.)

(Supreme Court of California. Jan. 13, 1922.)

1. Municipal corporations 🔑921(1)—Sale of bonds of municipal corporations at less than par illegal.

Under the charter of Los Angeles providing that in the creation of bonded indebtedness the general laws of the state should be observed and followed, and St. of 1901, p. 29, § 6, provided that municipal bonds issued as provided for in section 2 should not be sold for less than their par value, the sale of bonds at less than par value so as to enable them to bear 6 per cent. interest instead of 4½, as permitted in St. 1921, p. 844, § 1, is illegal, as violating a vital and essential condition upon which a permission from the electors for the creation of the indebtedness and the issue of bonds was obtained.

2. Municipal corporations 🔑918(2)—Terms and conditions of statute under which a bond election is held need not all be set out in the ordinance calling election.

Unless expressly made so, it is not essential that all terms and conditions of the statute under which a bond election is to be held shall be set forth in the ordinance calling the election, or detailed upon the ballot submitting the main question to the voters for their approval; and failure of St. 1901, p. 28, § 2, as amended by St. 1915, p. 97, to require the statement that the bonds shall not be sold below par in the ordinance calling the election does not relieve from the requirements of section 6 that they shall not be sold below par.

3. Municipal corporations 🔑907—Provision in charter that in issuance of bonds the general laws of the state should be followed held not affected by subsequent statute permitting sale of bonds for less than par.

Where bonds were issued by city of Los Angeles under St. 1901, p. 29, § 6, providing that the bonds should not be sold for less than their par value, and among other things that the rate of interest to be paid on the bonds must be specified in the ordinance calling the election for the bond issue, a provision in the charter of the city that in creating bonded indebtedness the general laws of the state shall, so far as applicable, be observed and followed, does not permit a sale of the bonds remaining unsold at less than par, so as to bear an income of 6 per cent. interest instead of 4½ per cent., the rate voted, as permitted by St. 1921, p. 844, § 1, providing for the sale of unsold bonds at a price which would net the purchaser not more than the equivalent of 6 per cent. per annum.

4. Constitutional law 🔑143—New statute cannot affect rights of citizens who voted bonds relying on original charter and statutory provisions.

Where the inhabitants of the City of Los Angeles, in pursuance of St. 1901, p. 29, § 6, providing that bonds issued by a city shall be sold for not less than their par value, voted to issue bonds bearing interest at 4½ per cent., the exercise of the constitutional rights of electors in approving the creation of the bonded indebtedness created a status analogous to a contract, which may not be changed under St. 1921, p. 844, permitting unsold bonds of a municipality to be sold below par so as to bring the purchaser not more than 6 per cent. interest.

In Bank.

Appeals from Superior Court, Los Angeles County, J. P. Wood, Judge.

Suit by Herbert Peery against the City of Los Angeles and others, in which H. W. Anderson intervened, consolidated with a suit by H. W. Anderson against the city of Los Angeles and others. From a judgment for defendants, plaintiffs and intervener appeal. Reversed.

Emmet H. Wilson, and Ingle Carpenter and Dana R. Weller, both of Los Angeles, for appellants.

Jesse E. Stephens, W. B. Mathews, Ray Eberhard, and Trent G. Anderson, all of Los Angeles, for respondents.

RICHARDS, Justice pro tem. In these two cases there are three appeals: One by Herbert Peery, and one by H. W. Anderson, plaintiff and intervener, respectively, in the first of said actions, and one by H. W. Anderson as plaintiff in the second of said actions. The same questions are presented upon each of said appeals. These actions were each instituted for the purpose of obtaining an injunction against the defendant city of Los Angeles and its officials, restraining it and them from disposing of certain municipal bonds of said city for less than the par value thereof, or upon terms which would yield to the purchaser thereof a rate of interest in excess of the rate specified in the ordinances calling the respective elections held in said city for the purpose of securing the approval of its electors for the incurring of the indebtedness to be evidenced by said bond issues; and, also, for the purpose of having declared void a certain contract between said city and one I. H. Hellman, relative to the purchase of a certain portion of said bonds. As to the facts in each of these cases, there is no dispute.

In the year 1914 the city of Los Angeles duly and regularly adopted certain ordinances providing for and calling a special election within said city for the purpose of submitting to the qualified voters thereof the proposition of incurring a bonded indebtedness in the sum of $6,500,000, for the purpose of acquiring and constructing certain works for supplying the city and its inhabitants with electricity for heat, light, and power. It was provided in said ordinances that the maximum rate of interest to be paid upon said indebtedness was 4½ per cent. per annum, payable semiannually, which rate, it was specifically provided, should not be exceeded in the issuance of bonds for said indebtedness. The election, provided for in said ordinances was duly held on the 8th day of May, 1914, and resulted in a vote of more than two-thirds of the electors voting at said election approving the incurring of said indebtedness and the issuance of said bonds. Thereafter, at intervals, several issues of portions of said bonds were duly authorized and made, aggregating in all a total of $4,446,000, leaving the balance of said bonds, amounting in their face value to $2,054,000, undisposed of at the time of the institution of these actions. The complaints in these actions allege, with relation to the said portion of said bonds remaining undisposed of, that the city of Los Angeles, through its said officials, are negotiating for the sale of said remaining portion of said bonds, and are intending and threatening to sell the same for less than the par value thereof, and upon terms which will net to the purchaser an amount of interest more than the equivalent of 6 per cent. per annum, payable semiannually on the par value of said bonds.

During the month of May, 1919, the city of Los Angeles duly passed and adopted another set of ordinances, providing for the incurring of a further bonded indebtedness in the sum of $13,500,000 for the purpose of the construction of certain other works for the further supply of electric light, heat, and power to said city and the inhabitants, and also for the acquisition of a certain electric distributing system owned by the Southern California Edison Company, situate within said city, and for the calling and holding of a special election within said city for the purpose of securing the approval of the electors thereof for such bonded indebtedness. In the ordinances providing for the calling of said election it was expressly provided that the maximum rate of interest to be paid on said indebtedness was 5 per cent. per annum, payable semiannually, which rate should not be exceeded in the issuance of bonds for the said indebtedness. The election provided for in said ordinances was duly held on the 3d day of June, 1919, and resulted in a vote of more than two-thirds of the electors of said city voting at said election approving the incurring of said indebtedness and the issuance of said bonds. The entire amount of said bond issue yet remains unsold. The complaints in each of these actions allege that on or about the 1st day of August, 1921, I. H. Hellman made the city council of said city of Los Angeles a proposal in writing whereby he offered to purchase the entire issue of the aforesaid bonds for the sum of $11,965,000 and accrued interest to the date of delivery; that on the 2d day of August, 1921, the said city council of said city passed and adopted a resolution accepting said proposal, and now intends and threatens to sell and issue said bonds in accordance therewith, and for less than the par value thereof, and upon terms which will yield to the purchaser a rate of interest in excess of 5 per cent. per annum upon the par value of said bonds. These actions were accordingly instituted for the purpose of restraining the consummation of the sale of any part of the unsold portion of either of these bond issues for less than their par value, or upon terms which it is alleged would in effect work an increase in the rate of interest to be paid upon said bonds in excess of that provided for in the ordinances calling the special election for the purpose of securing the approval of the electors of the city for each of these bond issues. The complaints in each of these actions proceed to allege that the defendants therein, in thus intending and threatening to sell and dispose of the unsold bonds in each of said bond issues, are acting professedly upon and under the authority of an act of the Legislature of California, approved May 31, 1921, and entitled "An act authorizing any county, city, town, district, or political subdivision organized under the laws of this state to sell any unsold bonds thereof at a price netting the purchaser not more than six per cent. per annum, payable semiannually" (St. 1921, p. 844), and that said statute is in violation of the Constitution of the United States and of the state of California, in that the same is retroactive and impairs the vested rights of the plaintiffs and intervener as taxpayers of said city, and of all other voters, property owners and taxpayers thereof, and changes and impairs the obligation of the contract entered into by the voters of said city by and through said elections, and also of the contract which the said voters at said elections authorized the defendants to enter into in reference to the terms of issuance and sale of said bonds; and in so doing deprives these plaintiffs and all other property owners and taxpayers of said city of their property without due process of law.

The answers of the defendants in each of said actions consist chiefly in the denial that any threatened or contemplated sale of the remaining unsold portion of either of said bond issues would be in violation of the Constitution of the United States or of the state of California, or of law, and in that respect the defendants deny that the act of the Legislature approved on June 1, 1921, relating to the disposal of the remaining unsold bonds of municipalities upon the terms provided in said act, is unconstitutional or void as violating any vested or other rights of said plaintiffs or of the voters, property owners or taxpayers of the city of Los Angeles, or as impairing the obligation of any contract made or authorized by the voters of said city, or as depriving the property owners or taxpayers thereof of their property without due process of law. The defendants, therefore, prayed that the plaintiffs and intervener take nothing by their said actions.

Upon the trial of these actions the court made its findings to the effect that substantially all of the allegations of the plaintiffs in each case and of the intervener were true, with the exception of those allegations attacking the constitutionality of the act of the Legislature approved June 1, 1921, or assailing the legality of the proposed sale of the remaining unsold portion of said bonds thereunder, or upon the terms proposed by said I. H. Hellman for the purchase by him of the whole of the later issue of said bonds. The court accordingly decided that the plaintiffs and intervener were entitled to take nothing by their respective actions, and that the defendants were entitled to judgment in their favor and for their costs. From these judgments the plaintiffs and the intervener, respectively, have prosecuted these appeals.

In order to reach a proper understanding of the questions presented for consideration upon these appeals, it is necessary that the several constitutional and statutory provisions involved in the discussion thereof should be set forth. Section 18 of article 11 of the Constitution of California provides:

> "No county, city, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at any election to be held for that purpose. * * * Any indebtedness or liability incurred contrary to this provision * * * shall be void."

The statute of 1901 which provided the procedure for the creation of bonded indebtedness by cities, under which the city of Los Angeles proceeded in respect to both of the bond elections and bond issues in question here, contains, in section 2 thereof, as amended by St. 1915, p. 97, the following provision:

> "* * * The ordinance calling such election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness, and shall fix the date on which such election will be held, the manner of holding such election and the voting for or against incurring such indebtedness, and in all particulars not recited in such ordinance, such election shall be held as provided by law for holding municipal elections in such municipality; provided, however, that if the rate * * * to be paid on such indebtedness shall not exceed four and one-half per centum per annum payable semiannually, the rate of interest need not be recited in such ordinance, but in its discretion the said legislative branch may recite in such ordinance the maximum rate of interest to be paid on such indebtedness, not exceeding six per centum per annum payable semiannually, which rate when so recited, shall not be exceeded in the issuance of bonds for such indebtedness."

The act of 1901 also provides, in section 6 thereof, that such bonds should be issued and sold "for not less than their par value." Stats. 1901, p. 29. The charter of the City of Los Angeles provides, in section 2, subdivision 29, that the city shall have the right and power:

> "To incur indebtedness, by the issuance of bonds, for any of the purposes for which the city is authorized to provide, or for carrying out any of the powers possessed by the city; provided that, in the procedure for the creation of such bonded indebtedness, and for the issuance of such bonds, the general laws of the state of California, in force at the time such proceedings are taken, shall, so far as applicable, be observed and followed."

The bonded indebtedness and bond issues of said city in question herein were proposed and voted for by the electors of said city in conformity with the foregoing provisions of its said charter, and of the act of 1901. The ordinances proposing each of said bond issues and calling the elections for the purpose of authorizing the same expressly provided that the maximum rate of interest to be paid upon the indebtedness evidenced by the first bond issue was to be 4½ per centum per annum, payable semiannually, and by the second bond issue was to be 5 per cent. per annum, payable semiannually; and also expressly provided that said bonds should be issued in accordance with the provisions of the act of the Legislature of 1901.

In 1921 the Legislature adopted the act relating to the sale by municipalities of unsold bonds to which reference has heretofore been made. Section 1 of said act reads as follows:

> "Section 1. Any county, city and county, city, town, district or other political subdivision organized under the laws of this state may sell any bonds thereof remaining unsold, and which have heretofore been authorized by the qualified electors thereof at an election called and held as provided by law, at a price which will net the purchaser not more than the equivalent of six (6) per cent. per annum, payable semiannually, on the par value of such bonds; provided, that this act shall not apply to any such bonds which have been authorized under a law permitting the sale thereof at a price netting the purchaser more than such equivalent." Stat. 1921, p. 844.

The main contention of the appellants is that both the statutes of the state and the charter and ordinances of the city of Los Angeles, having relation to the two bond issues involved in the instant cases, do expressly prohibit the sale of said bonds for less than their par value; and the appellants further contend that this express prohibition reaches back to the very inception of the proposition for the creation of a bonded indebtedness in each case, and enters vitally into the vote of the electors of said city, granting permission to its officials to create a bonded indebtedness and issue these bonds upon the express condition and understanding that they were not to be sold for less than their par value.

[1] The statute of 1901, under the terms of which the proceedings leading up to the creation of the municipal indebtedness evidenced by each of these bond issues were taken, does contain the express provision that municipal bonds isued in accordance with its procedure should not be sold "for less than their par value." The charter of the city of Los Angeles adopts the provisions of the general laws in force at the time as the procedure to be followed in providing for such indebtedness and for the issuance of such bonds. Stats. 1911, p. 2063. The ordinances of said city proposing these respective bond issues and providing the procedure for holding the required elections conformed to the provisions of the said act of 1901, and, while they do not expressly embrace the provision in said act that such bonds, when issued, should not be sold for less than par, they do so in effect by conforming to the general terms of said act and advising the electors that their permission to create such indebtedness and to issue such bonds is sought under its terms and conditions, among which is the express provision that the bonds so issued with their approval should not be sold for less than their par value. We are constrained, therefore, to hold that this express prohibition of the act of 1901 against the sale of the bonds in question at less than their par value forbids the violation on the part of the said city and of its officials of a vital and essential condition upon which the permission of the electors of said city for the creation of said indebtedness and issue of said bonds were obtained.

[2] In arriving at this conclusion we are mindful of the argument put forth by the respondents herein to the effect that the provisions in the act of 1901, forbidding the sale of municipal bonds voted and issued under its procedure for less than their par value, is not to be found in that portion of said statute prescribing what shall be contained in the proposition to be submitted to the electors for their approval; such as the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the rate of interest to be paid, and the like; and hence is not an essential or mandatory portion of said statute, nor one upon which the voters were required to exercise their election. This argument is neither persuasive nor sound. The electors of the city were advised by its charter and by its ordinances calling these bond elections that the law under which the city and its electors were acting in the matter of the proposed creation of a bonded indebtedness and the issue and disposition of these bonds was the act of 1901, all of the provisions of which were presumably known to every elector whose approval was sought thereon. We do not understand that it is essential, unless expressly made so, that all of the terms and conditions of the statute under which a bond election is to be held shall be set forth in the ordinances calling such election, or detailed upon the ballot submitting the main question to the voters for their approval; nor do we understand the case of People, etc., v. City of Los Angeles (Cal.) 200 Pa. 947, to so decide. It follows from the foregoing that any attempt on the part of said city or its officials to dispose of these bonds for less than their par value, while the state of the law under which the said indebtedness was proposed to and approved by the electors of said city remained unchanged, would have been abortive and could have been restrained at the suit of any property owner and taxpayer injuriously affected by such an act.

[3] The respondents, however, contend that the law in relation to the price at which these respective bond issues were to be sold has not remained unchanged, and they direct our attention to the fact that the Legislature of this state has enacted the statute approved June 1, 1921, the title and provisions of which are above quoted, enabling municipalities to sell any of the bonds thereof remaining unsold at the date of the approval of said act at a price which shall net the purchaser not more than the equivalent of 6 per cent. per annum on the par value of

said bonds. It is not disputed that the above provision in said act amounts to the granting of permission to municipalities to dispose of their remaining unsold bonds at a price below their par value; but the contention of the respondents is that the Legislature, having originally had power to impose upon municipalities the aforesaid restriction against the sale of their bonds below par, had power through the passage of said act to remove said inhibition and relieve municipalities from the burden thereof. The respondents present this contention in several different forms. They argue, first, that by the terms of the charter of the city of Los Angeles, above quoted, it is provided that—

> "In the procedure for the creation of such bonded indebtedness and for the issuance of such bonds, the general laws of the state of California in force at the time such proceedings are taken shall, so far as applicable, be observed and followed."

The construction which the respondents would have us place upon this provision of the charter is that whatever changes the Legislature might make in the general laws with relation to the bond issues of municipalities up to the time of the actual issuance and sale of such bonds would be controlling as to the issuance and sale of such bonds after the passage of the later enactment. The respondents cite in support of this phase of their contention the case of Fritz v. San Francisco, 132 Cal. 373, 64 Pac. 556. This case does not sustain the respondents' contention in that regard, but rather leans in the other direction, since it is therein decided that when the general law under which proceedings for the issuance of certain bonds had been initiated in the city of San Francisco was entirely superseded by the adoption of the charter of said city, which provided its own complete scheme for the issuance of municipal bonds, the bonds formerly voted for under the general law could not be issued under the provisions of the charter. We are also referred to the cases of Brownell v. Town of Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685, and Morgan v. Falls City, 103 Neb. 795, 174 N. W. 421, as sustaining the respondents' contention. But in the first of these cases it was merely held that a subsequent Legislature might correct irregularities in the action of officials conducting a bond election which did not affect the consent of the taxpayers previously given; while in the latter case it was expressly held that an attempted statutory change in the terms of the bonds voted for under a prior law, providing that they should become due in 40 years, but be payable at any time after 10 years, which change would make such bonds fall due in 20 years and payable at any time after 5 years, could not be permitted, the court holding that this was a substantial change affecting the rights of the taxpayers. The court also held that—

> "The proposition to make the bonds payable at any time after 5 years was never submitted to the voters; hence was never adopted by them; bonds issued must conform to the proposition adopted by the electors."

But aside from the inaptitude of these citations we do not accept the construction of the Los Angeles charter provision for which the respondents contend, since to do so to the extent claimed would be to sanction an entire subversion of the will of the electors as to practically all of the conditions upon which their consent to the incurring of the indebtedness and the issuance and disposition of the bonds had been obtained through the simple expediency of a legislative enactment. For reasons hereafter to be given, such an interpretation of the charter provision should not be adopted.

The respondent further urges in support of its main contention in this regard that since the Legislature in adopting the statute of 1901 might have omitted the requirement as to the sale of bonds to be voted and issued thereunder for not less than their par value, a subsequent Legislature would have power to relax or remove this restriction at any time; and we are cited to the case of Cole v. City of Los Angeles, 180 Cal. 617, 182 Pac. 436, as sustaining this view. In the above-cited case the question was whether or not the statement in the ordinance calling the election that "the maximum rate of interest to be paid on said indebtedness shall be six per cent. per annum payable semiannually" complied with the statute which required the ordinance calling the election to state "the rate of interest to be paid on the indebtedness." It was held that such variance could be cured by statute. There the electorate were fully advised as to the maximum indebtedness to be incurred and voted for such maximum, and no constitutional question was involved.

[4] The respondents finally urge that a subsequent Legislature would have power to change this requirement in the earlier statute under which these bonds were voted, for the reason that the electors, in voting to approve the creation of the indebtedness and issue and sale of the bonds in the form and upon the terms specified in such statute, did so with the knowledge that the terms of such statute were subject to legislative change, and therefore gave their approval of these bond issues with the understanding that such changes might be made. This argument is nothing more nor less than a seductive sophistry, since to give it the application for which the respondents contend would be to render every substantial statutory or contractual right of individuals subject to be

taken away for no better reason than that they had acted or contracted in view of possible changes in the law. There is one comprehensive answer to each and all of the foregoing arguments of the respondents in support of the general proposition that the act of the Legislature of 1921 has been effectual to remove the requirement of the act of 1901, that these bonds should be voted for and issued upon condition that they should not be sold for less than their par value. It is this: The Constitution, by virtue of the section above quoted, gives to the electors of a municipality the substantial right to grant or refuse their approval to the incurring of any indebtedness beyond the limit expressed in said constitutional provision. The act of the Legislature of 1901, in giving effect to this provision of the Constitution by providing the procedure in conformity with which the electors' approval or disapproval of a proposed bonded indebtedness was to be expressed, has provided the particular terms and conditions upon which the approval of the electors might be secured. Among these were the requirements that the ordinances calling the election should recite the objects and purposes for which the indebtedness was proposed to be incurred, the estimated cost of the public improvement to which the funds secured were to be applied, the amount of the principal of the indebtedness, the rate of interest to be paid thereon. These recitals must be set forth in the ordinances providing for and calling the election, but, in addition to these, there is the added provision that the bonds when issued should be sold "for not less than their par value." This provision in the act has a two-fold purpose: First, to assure the electors that the entire sum for which they vote to burden themselves and their city with a bond issue will be realized from the sale of the bonds; second, to assure the electors that the objects and purposes for which the bonded indebtedness is to be incurred shall be fully subserved through the application of the whole face value of the bonds to such objects and purposes. This thought is well expressed in the case of Uhler v. City of Olympia, 87 Wash. 1, 151 Pac. 117, where the court, in dealing with an attempted payment of commissions and compensation for selling certain municipal bonds, aptly said:

> "This limitation on the power of the council is just as prohibitive, and, if disobeyed would result in the same evil, as if the statute had provided that the bonds should be sold at not less than par. In either case the object of the law is to prevent speculation in municipal securities, and to insure to those who must ultimately pay the bonds, a dollar in lawful currency for every dollar of obligations issued."

In these aspects this stipulation in the statute providing for the bond election is as vital as any other provisions in it, since it goes directly to the matter of the relative amount of the burden and benefit which the electors are to agree by their votes to assume. The proposition having thus been made by the officials of a city to the voters thereof to approve a bonded indebtedness for the specified purposes in the specific amount of principal, at the specified rates of interest and upon the express assurance that the bond issues, if approved, should not be sold for less than their par value, what relation is created as between the city, through its officials on the one hand, and the electors on the other, by the latter's formal acceptance of such proposition through the required vote? In some jurisdictions it has been held that the relation thus created is a contractual one, which cannot be changed in any essential particular by the officials of the city, either with or without the aid of later legislation. In the case of Merchants', etc., Bank v. Escondido Irrigation District, 144 Cal. 329, 77 Pac. 937, which involved the question as to whether the board of directors of an irrigation district, after the property owners forming the district had voted to issue bonds for the purpose of carrying out the object of its formation, under an act declaring how said bonds should be paid, could be permitted by a later and amendatory act to provide a different method of payment of the indebtedness secured by said bonds, this court said:

> "The act providing for the organization of the district, and the organization of the district under the provisions of the act by the vote of its electors, cannot be otherwise regarded than as a contract between the state and the individuals whose property was thereby affected. The contract, indeed, lacks one of the ordinary elements of contracts—namely, the actual consent of all the parties to it; but by the provisions of the statute the majority of the electors were empowered to act and consent for the individual proprietor; and unless this were a legitimate exercise of the powers of the state, the statute itself would be invalid. Hence the consent of all the parties to the contract was in fact given either personally or by their authorized agents; and there was thus created a complete contract between the parties by the terms of which the property owners in the district consented to the burden imposed upon their property by the provisions of section 17 of the original act, and to no other. The burden thus imposed was, that the bonds issued under the act should 'be paid by revenue derived from an annual assessment upon the real property of the district,' and that their lands should 'be and remain liable' for such assessment; and this implied that this should be the extent of the burden. But by the amendatory act the board of directors is authorized, without the consent, or even the knowledge, of the landowners, to pledge or hypothecate the property acquired by their contributions—that is to say, acquired with their money—and thus to subject them to the liability of losing entirely the property thus acquired; which is not only their

property, but by the express provision of the statute (section 13) has been 'dedicated and set apart to the uses and purposes set forth in the original act;' which would leave them only the liability for continued assessments until the balance of the bonds shall be paid. We have no doubt, therefore, that in this respect also the Legislature went beyond its constitutional powers."

The authorities in other jurisdictions holding the same view are Deland v. Platt Co. (C. C.) 54 Fed. 823; David v. Timon (Tex. Civ. App.) 183 S. W. 88; Scott v. Forrest, 174 Ky. 672, 192 S. W. 691; Percival v. City of Covington, 191 Ky. 337, 230 S. W. 300; Wullenwaber v. Dunigan, 30 Neb. 877, 47 N. W. 420, 13 L. R. A. 811; Lawson v. Kanawha County Court, 80 W. Va. 612, 92 S. E. 786. We do not, however, deem it necessary to go so far in this case as to hold that a contractual relation, in the ordinary sense of the term, has been created between the electors of the city of Los Angeles and the officials thereof by the proposal and approval of these bond issues, but we are satisfied that a status analogous to such relation was created through the exercise of the constitutional right of the electors of said city in approving the creation of the bonded indebtedness represented in these two bond issues upon the express conditions and assurances contained in the act of 1901, which may not be changed in the manner and to the extent it is sought to be changed under the provisions of the act of 1921, without working, in effect, a fraud upon the electors through securing their votes for the approval of these bond issues upon terms and conditions which will not be kept if the attempted sale of these bonds below their par value is given the sanction of this court. In the case of Wallace v. Ball, 205 Ala. 623, 88 South. 442, the court, in dealing with a similar constitutional provision to ours, and with similar situation to that presented in these cases, through the attempted legislation identical in effect to that of the statute of 1921, says:

> "A majority of the voters answered by ballot, 'Yes.' Now the Legislature attempts by this act, without any clear intimation thereof in its title, to authorize these bonds sold at a discount—below par—which will net to the purchaser 7 per cent. per annum on his investment. The interest on a bond is a part of the bond. If the Legislature can increase the rate of interest or sell the bonds below par after the voters authorized a sale at par and at 5 per cent. interest, then they can take away entirely from the majority of the voters the right to have the bonds issued. The Constitution gives the Legislature the right to fix the mode and manner of getting the will of the qualified voters on a bond issue; and it gives to the majority of the qualified voters at the election the right to authorize the issuance of the bonds by the board of revenue. The voters having fixed by ballot the amount of the bond issue, the maximum rate of interest, and under a law stating they must not be sold below their face value, it is then beyond the power of the Legislature to authorize a higher rate of interest thereon or a sale of these bonds below par."

In the case of Skinner v. City of Santa Rosa, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512, which was a case wherein the officials of the city of Santa Rosa had undertaken to change the amount of interest to be paid upon certain municipal bonds of said city, after a vote of its electors approving the issue of such bonds, this court held that the provision for the payment of the added interest upon said bonds would in effect increase the amount of the indebtedness which the electors had by their votes approved, and would to that extent be a violation of the constitutional inhibition. And the court goes on to say:

> "If the terms and conditions submitted to the electors may be departed from, and such election held to authorize the issuance of bonds under other terms and conditions, a door will be opened authorizing the common council to submit a proposition so favorable as to secure beyond question a favorable vote, and then change the conditions as to rate of interest and otherwise, even without any fraudulent purpose or intent, so that, if again submitted, an overwhelming defeat would result. * * * In the case at bar, where the question arises before the bonds have been delivered, we hold that the city has no power to issue them in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election, and with the statute under which the proceedings were had."

It is not intended by anything said in this opinion to suggest or intimate that there was any actual fraudulent intent on the part of the officials of the city of Los Angeles in seeking to take advantage of the terms of the statute of 1921 by disposing of these bond issues at less than their par value. Nevertheless so to do, either with or without the sanction of said act, would be to accomplish a purpose directly violative of one of the essential conditions upon which the constitutional approval by the electors of said city of these bond issues was obtained, and in that sense a fraud would be wrought by permitting that condition to be violated by the sale of these bonds below par. For this reason we are constrained to hold that the authorization attempted to be conferred upon said city of Los Angeles to dispose of the unsold portion of these bond issues for less than their par value by the act of 1921 is invalid, and hence that the plaintiffs and intervener in these actions were entitled to an injunction restraining such attempted or threatened sales.

The judgment is reversed.

We concur: WASTE, J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.

SHAW, C. J. I concur in the foregoing opinion. I wish to add, however, that, in my opinion, the vote of the people, by which the city was authorized to sell the bonds at a price not less than par, constituted a part, and a material part, of the contract evidenced by the bonds, as stated in Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. 937. The city is the nominal obligor or promisor on the bonds. It has no authority to make the promise and issue the bonds, except such as it obtained by this vote, and that authority was conditioned that the buyer of the bonds, the promisee, should pay to the city at least the par value as the consideration thereof. The real payors of the bonds are the people who pay the taxes levied to raise the fund for that purpose. They are, under the constitutional scheme, in substance and effect the principals whose authority must be first given, in order to authorize their agent, the city, to make the contract. This authority, as evidenced by the records of the election at which the authority was given, must be considered as a part of the contract, at least to the extent that the conditions therein stated cannot be disregarded by the city in selling the bonds, nor by the purchaser at the sale, and, this being so, it necessarily follows that an act of the Legislature purporting to authorize a disregard thereof would, if valid, impair a material portion of the contractual obligation.

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187 Cal. 674

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. WORSWICK et al.

MILLER & LUX, Inc., et al. v. SAME.

(Sac. 3119, 3120.)

(Supreme Court of California. Jan. 4, 1922. Rehearing Denied Feb. 2, 1922.)

1. Waters and water courses 🔑19—Where neither local customs, laws, nor decisions do not recognize rights of lower appropriator superior to upper, acts of Congress do not create right.

Inasmuch as neither the local customs, laws, nor decisions of the California courts had ever recognized or upheld the doctrine that water rights acquired by an appropriation or diversion on private land would be superior to the riparian rights pertaining to land above the place of diversion, Act Cong. July 26, 1866, § 9 (U. S. Comp. St. § 4647), supplemented by Act July 9, 1870, § 17 (U. S. Comp. St. § 4648), protecting rights so recognized neither created such superior right nor provided for the maintenance or protection of the same.

2. Waters and water courses 🔑19—Statute protecting water rights recognized by local customs, etc., construed.

Act Cong. July 26, 1866, § 9 (U. S. Comp. St. § 4647), providing that whenever by priority of possession rights to the use of water have vested and accrued and are recognized by local customs, laws, and the decisions of courts, the possessors and owners thereof shall be maintained and protected therein, refers to the customs, laws, and decisions of the courts of the particular state in which the appropriation is made, and in which the land affected lies.

3. Waters and water courses 🔑138—Riparian owner's rights not affected by any interference or use below his land.

The rights of a riparian owner in the waters of an abutting stream are not affected by any interference with the waters of the stream, made on privately owned land after they have passed below the boundaries of his land, and such use below, no matter how long continued or what may be the nature of the claim of right thereto, in no manner affects the riparian rights of the upper owner, since to establish a right by prescription, the acts by which it is sought to establish it must invade the rights of the party against whom it is set up, and afford ground for an action.

4. Waters and water courses 🔑21—Diversion of water on land of United States gives right to water superior to riparian rights of subsequent purchaser of public land lying above.

Under Act Cong. July 26, 1866, § 9 (U. S. Comp. St. § 4647), and Act July 9, 1870, § 17 (U. S. Comp. St. § 4648), where the diversion of water from a river is made on land then belonging to the United States, the right of the appropriator to the water thereby taken is superior to the riparian rights of a subsequent purchaser of land from the United States lying above the point of diversion.

5. Waters and water courses 🔑21—Appropriation of waters on land belonging to state not paramount to riparian rights of public lands above place of diversion.

Where appropriations of water were made in 1871 and 1872, and the headgates and dams of the appropriators' canals were situated on lands classed as swamp and overflow lands granted to the state by Act Cong. Sept. 28, 1850 (U. S. Comp. St. §§ 4958–4960), but not patented until 1895, such appropriations were not, under Act Cong. July 26, 1866, § 9 (U. S. Comp. St. § 4647), supplemented by Act July 9, 1870, § 17 (U. S. Comp. St. § 4648), paramount to the riparian rights of one subsequently purchasing public lands of the United States situated above the place of diversion.

6. Public lands 🔑58—Title to swamp land relates back to date of grant.

Under Act Cong. Sept. 28, 1850 (U. S. Comp. St. §§ 4958–4960), granting swamp and overflowed lands to the state, when land was identified and a patent issued to the state by the United States in 1895, the title so transferred to the state related back to the year 1850, and inured to the benefit of the state and its successors in interest for all purposes as if the legal title to the land finally identified had passed at the date of such act.

7. Waters and water courses 🔑19—Desert Land Act, declaring waters free for appropriation, refers only to desert land.

The Desert Land Act March 3, 1877 (U. S. Comp. St. §§ 4674–4678), providing that the right to the use of water shall depend on bona fide prior appropriation, and that all surplus water above actual appropriation and use shall remain and be free for appropriation and use by the public for irrigation, mining, and manufacturing purposes, subject to existing rights, applies only to desert lands, and does not apply to all the public lands of the United States, so as to make rights under appropriations of water paramount to riparian rights.

8. Waters and water courses 🔑33—Determination by commissioner that lands are "desert lands" must be shown by plaintiff if material.

In an action to quiet title to water appropriated from the San Joaquin river as against upper riparian owners who acquired title after the passage of the Desert Land Act (U. S. Comp. St. §§ 4674–4678), which committed the question of determining what were desert lands to the Commissioner of the General Land Office, it was incumbent on plaintiff to show the fact, if material to his case, that such determination had been made with respect to the land in question, and in the absence of such showing it is presumed no such determination by the Commissioner had been made.

9. Waters and water courses 🔑152(6)—Burden on lower appropriator to show appropriation and use for public purposes were known to upper owner, if material.

In an action to quiet title to water rights by one who had appropriated water by means of canals and devoted it to public use for more than 40 years, as against upper owners who had permitted the water to flow by their lands without any use thereof, the burden was on plaintiffs to show defendant's knowledge of their appropriation and use of the water, if material, though such appropriation and use were notorious.

10. Waters and water courses 🔑152(8)—Finding that upper owners did not know of appropriation and use of water not contrary to the evidence.

In an action to quiet title to water rights by one who had appropriated water and devoted it to public use for more than 40 years, as against upper owners who had made no use of the water, a finding that the appropriation and use of such water, though notorious, was unknown to the upper owners, *held* not contrary to the evidence, consisting of extracts from newspaper articles referring to the size of the canal and the extent of territory to be irrigated thereby.

11. Waters and water courses 🔑138—Elements of estoppel to assert riparian rights stated.

To constitute an estoppel in favor of an appropriator of water, as against a riparian owner, the person sought to be estopped must have failed to do some act which it was within his power to do, and the person claiming the estoppel must have relied on such failure to such an extent and for such a period that the subsequent doing of the act would cause him injury.

12. Waters and water courses 🔑138—Upper riparian owner without right to interfere with lower appropriation not estopped from asserting rights to water.

Since courts had adopted the rule that a diversion below one's riparian land did not concern or injure him, and it had become a rule of property, an upper owner was not estopped from asserting his riparian rights to the injury of the lower owner merely because he had not used the water on his land.

13. Waters and water courses 🔑129—Diverter may obtain title by prescription against lower owner even if public service company.

A person, by taking water from a stream above the place of diversion of water therefrom by a public service corporation for public use, may acquire title by prescription even as against such public use, whether he be a riparian owner or not.

14. Pleading 🔑406(7)—Without demurrer or objection to evidence, pleading lacking in certainty is waived.

Where a pleading is lacking in certainty and no demurrer submitted or objection made to the evidence on the subject, the lack of sufficient averment is deemed waived.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Actions by the San Joaquin & Kings River Canal & Irrigation Company, Inc., against W. H. Worswick, Jr., and others, and by Miller & Lux, Inc., and another, against W. H. Worswick, Jr., and others. From a judgment in each case for defendants, plaintiffs appeal. Appeals consolidated. Judgments affirmed.

Edward F. Treadwell, of San Francisco, for appellants.

Snook & Church and Charles E. Snook, all of San Francisco, for respondent White & Friant Lumber Co.

Harris & Hayhurst, of Fresno, for respondents F. M. Helm and others, T. R. Burnham and others, G. A. Ferguson, H. G. Johnson and Riverside Vineyard Co.

Drew & Drew, of Fresno, for respondents H. A. Sessions and Charles Westrup.

E. D. Edwards, of Fresno, for respondent F. M. Lane.

R. M. Widney, of Pacoima, for respondent John Widney.

SHAW, C. J. In each of the cases above entitled the plaintiff appeals from the judgment. The two cases were begun separately, and separate pleadings, findings and judgment were filed and made in each case. They were, however, tried together in the court below, and the two cases are submitted, so far as the plaintiffs are concerned, upon the same briefs. As the questions are, for the most part, identical, they may be treated together.

In case No. 3119, that of the San Joaquin & Kings River Canal & Irrigation Company, Inc., the complaint alleges that, under an appropriation and diversion of the waters of the San Joaquin river, made in the year 1871, by the San Joaquin & Kings River Canal & Irrigation Company, the predecessor in interest of the plaintiff, the said company was the owner, from the year 1871 down to the 12th day of June, 1905, of the right to divert from said river a flow of 1,000 cubic feet of water per second; that under a similar appropriation and diversion, made in the year 1897, the said company was the owner, from the last-mentioned year down to the 12th day of June, 1905, of the right to divert from said river an additional flow of 350 cubic feet per second of the waters thereof; that on the day last mentioned said company sold and transferred to the plaintiff all of its said water rights, together with its canals and works for the diversion and distribution of said water, and that plaintiff has been ever since said transfer, and now is, the owner thereof; that both the plaintiff and its said predecessor were public service corporations, and that as such they each, during the time of their respective ownerships thereof, devoted said water to the public use for irrigation of land and other beneficial purposes. It further alleges that during all of this time the defendants were fully aware of the diversion and public use of said water by said plaintiff and its said predecessor, and that the defendants did not object to the same, nor did they, or either of them, divert or use the water of said river until within the last five years preceding the commencement of this action; that during said five years defendants have taken and diverted from the river large quantities of the waters thereof, thereby depriving the plaintiff of the water to which it is entitled as aforesaid, and that the rights of the defendants in said waters are subject and subordinate to the said rights of plaintiff. The action was begun on October 6, 1913. The prayer is that plaintiff's title to its said water rights be quieted and that the defendants be enjoined from diverting water so as to interfere therewith.

In case No. 3120, that of Miller & Lux, Inc., and Union Colonization Company, the complaint alleges a diversion from the San Joaquin river of 120 cubic feet of water thereof by the predecessor of said plaintiffs in the year 1872, and the continuous use thereof by said predecessor in interest and by plaintiffs as owners in common as successors, by the continuous distribution thereof for the irrigation of land and other purposes, through a canal know as the Chowchilla canal, and that plaintiffs as such successors are now the owners of the said canal and of the right so acquired in 1872 by the plaintiffs' predecessors in interest to take said quantity of water for the beneficial purposes aforesaid. It further alleges that the plaintiff Miller & Lux, Inc., owns a number of parcels of land, fully described, bordering upon the said river and the branches and channels thereof; that the plaintiff Union Colonization Company is also the owner of certain described parcels of land riparian to said river; that the plaintiffs, respectively, have for many years diverted and used the waters of the river and its branches and channels for the irrigation of their said lands, and that other portions of the said lands, by reason of their low elevation, are annually and periodically overflowed and moistened by the waters of said river, and thereby its productiveness is greatly increased; that the riparian right of the said plaintiffs to use the waters of said river and its branches upon their land as aforesaid is subject to the right of the plaintiffs by appropriation to take and use the 120 cubic feet of water per second as above mentioned; that within five years last past the defendants have constructed pumping plants above the head of the said Chowchilla canal and above the lands of plaintiffs above mentioned, and by means thereof have taken large quantities of water from the river so as to prevent plaintiffs from diverting or using the water so appropriated and owned by them as aforesaid and from receiving and using the waters necessary for the irrigation and moistening of their lands riparian to said river as aforesaid; that the rights of the plaintiffs to said 120 cubic feet of water and to the use of said water on riparian lands are superior to those of the defendants in said stream; that the defendants have no right to the waters of the said river.

The prayer is that plaintiffs be adjudged to be the owners of the right to divert said 120 second feet of water from said river, and of the right to have said river flow through their said riparian land and to the reasonable use of the waters thereof on said land; that said right to said 120 second feet be quieted and declared superior to any rights of defendants, and that the riparian rights, if any, of defendants and plaintiffs be ascertained and justly apportioned and defined. This action was begun on April 17, 1914.

In case No. 3119 several of the defendants filed separate answers. Each defendant claimed the right to use the waters of the river as riparian owners of land situated on the river above the points of diversion of the plaintiff.

In case No. 3120 the answers set up the ownership of land riparian to the stream and the right to use the waters thereof as riparian owners, all of said land being situated above the riparian lands of the plaintiffs in said action and above the point of diversion by said plaintiffs of said 120 second feet of water.

In case No. 3119 the court found that the plaintiff was the owner, subject to certain rights found to be in the defendants, of the right to divert from said river a continuous flow of 1,360 cubic feet of water per second, of which 760 second feet was held under said appropriation made in 1871, and 600 second feet was held under the said appropriation made in 1897, mentioned in the complaint; that the defendants, within five years last past, have, by means of pumps, diverted from the river above said plaintiff's dams, large quantities of water and thereby the plaintiff has been prevented from diverting and using the amount of water so appropriated and owned by it as aforesaid, and that the said appropriation and use of said water by the plaintiff was notorious, but was unknown to said defendants; and that said defendant did not consent thereto.

As to the defendants' rights in said case the court found that certain of the defendants, respectively, owned tracts of land bordering upon said river above the head of said canals of plaintiff, and that as such owners they are entitled to take and use for the irrigation of said lands a reasonable amount of the waters of said river, and that said riparian rights of the defendants are superior to said rights of the plaintiff.

It further found that of said riparian lands of the defendants, certain parcels, containing in the aggregate nearly 6,000 acres, were a part of the public land of the United States at the time of the appropriation of the 760 second feet of water in 1871 now owned by the plaintiff, and that at the time of said appropriation other parcels of the defendants' riparian land, aggregating over 500 acres, were not at that time part of the public lands of the United States, but belonged to private owners.

It also found that the headgates and dams of plaintiff's said canals are situated on lands which at the time said first appropriation of 760 feet was made were classed and claimed as swamp and overflowed lands by the state authorities; that applications to purchase the same from the state were made and approved in 1864; that pursuant to said applications the state issued patents to said purchasers; that said lands were listed by the United States to the state of California as swamp and overflowed lands on November 21, 1895, and were patented to the state on January 10, 1896, and that the plaintiff had acquired all the title of the original purchasers from the state to the lands on which its headgates and dams are situated. At the time of the 1897 appropriation, under which plaintiff diverts 600 second feet of water, all of the lands involved in the action were in private ownership. On March 3, 1877, when the desert land law was enacted by Congress, 2,162 acres of defendants' said riparian lands were public lands of the United States.

With respect to case No. 3120 the court found that the plaintiffs therein were the owners as tenants in common, subject to certain rights of the defendants therein, of the right to divert and use 120 cubic feet flowing per second of the waters of the San Joaquin river, by and through the Chowchilla canal, which right began in the year 1872, the headgates thereof being in part on land entered from the state as swamp and overflowed land by entry approved on March 23, 1861, and patented by the state to the purchaser in 1874, and in part on lands similarly entered from the state by entries approved and patented in 1869; that all of said land was listed to the state by the United States as swamp and overflowed land in 1895 and patented to the state in 1896 as aforesaid, and that said right of plaintiffs was subject and subordinate to the riparian rights of the defendants therein as found to exist by the court; also that the plaintiffs Miller & Lux, Inc., and Union Colonization Company, respectively, were the owners separately of certain tracts of land riparian to the river, particularly described, as alleged in the complaint, and that the defendants severally have within the last five years pumped out of said river and used on their own land riparian thereto large quantities of water, and thereby have deprived the plaintiffs of the water so appropriated by them through the Chowchilla canal, and have diminished the water available to the said plaintiffs on their said riparian tracts of land.

The riparian lands of the defendants described are the same as those described in the other findings in case No. 3119, so far as they lie above the headgate of the said Chowchilla canal, and the dates when they ceased to be public land are the same as the dates given in the findings in the other case.

The conclusions of law in each case were as follows: That the rights of the several defendants to take and use water from the San Joaquin river on lands riparian thereto, situated above the plaintiff's points of diversion under their respective appropriations, are paramount to the rights of the plaintiffs under such appropriation, regardless of the time when the uses on the riparian land began, and regardless of the fact that large portions of said riparian land were at the time of the inception of the appropriations part of the public land of the United States; in other words, that the rights of said riparian proprietors to use water from the river on the riparian land are superior to the rights of the plaintiffs under the several appropriations made before the use on the riparian land began.

The conclusions in each case also involve the proposition, although not expressly stated, that the fact that when the several appropriations under which plaintiff's claims were initiated, the land on which the headgates and dams were located was swamp and overflowed land, which had been previously entered from the state as such land and afterwards patented by the United States to the state, is not a material factor in the case and the question whether such land is or is not to be regarded as land in private ownership from the time of the entry thereof under the state laws as swamp and overflowed land.

The plaintiffs insist that their rights to the water of the river, under the appropriations of 1871 and 1872, are superior to the riparian rights thereto, pertaining to the land of the defendants situated above the dam and headgates of the plaintiffs' canals, with respect to all of said lands that were public lands of the United States, or of the state of California at the time the plaintiffs' appropriations were made, respectively.

The question, for the purposes of discussion, should be subdivided into two classes: (1) Where the land on which the diversion works are located is, at the time the diversion is effected, in private ownership, or is held in other ownership than that of the United States; (2) where the diversion works are made on land then belonging to the United States, as part of its public domain. We will take up these points in the order stated.

The plaintiffs rely upon the act of Congress of July 26, 1866 (14 U. S. Stats. 253, § 9 [U. S. Comp. St. § 4647]) and of July 9, 1870, supplemental thereto (16 U. S. Stats. 218, § 17 [U. S. Comp. St. § 4648]), and of the Desert Land Act of March 3, 1877 (19 U. S. Stats. 377 [U. S. Comp. St. §§ 4674–4678]). Their contention is that these acts have the effect of giving the appropriator of water for the irrigation of land in private ownership, who makes his diversion by means of a dam or headgate also located on land in private ownership, a right paramount to all riparian rights pertaining to public land situated above such place of diversion.

[1-3] Section 17 of the act of 1870 purports to be amendatory of section 9 of the act of 1866. The appropriations in question were made subsequent to 1870, and therefore the two acts may be taken together in order to determine the effect thereof in the present case. So considered they are as follows:

> "Whenever, by priority of possession, rights to the use of water * * * have vested and accrued, and the same are recognized * * * by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed." Section 9. "All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by" the aforesaid section 9. Section 17.

Proceeding to an analysis of this language, it will be seen that the only water rights which are protected, maintained, acknowledged or confirmed by these enactments are those rights which "are recognized by the local customs, laws and decisions of the courts." This, of course, means in each case, the customs, laws, and decisions of the courts in the particular state in which the appropriation is made and in which the land affected lies. Section 17, taken in connection with section 9, must be construed as declaring that lands granted by patents issued by the United States shall be subject to such water rights as had previously vested or accrued under rules which have been established or recognized as law by the decisions of the courts of this state on the subject. It is necessary, therefore, to determine whether or not the decisions of our courts have established the proposition that an appropriation from a stream for use upon lands in private ownership, and made by means of a dam situated upon land in private ownership, gives to the appropriator a right to the water appropriated which is superior to the right of riparian owners above to the use of water from the stream upon the riparian land. There are no decisions in this state which declare or recognize this doctrine. On the contrary, it has always been held that the rights of the riparian owner of such land above are superior to those of the diverter or appropriator below. The law as established and recognized by the decisions of this state, in every case in which it has been considered, is declared to be that the rights of a riparian owner in the waters of the abutting stream are not affected by any interference with the waters of the stream, made on privately owned land after they pass below the boundaries of such riparian land. Such use below, no matter how long continued, or what may be the nature of the claim of right thereto by the user thereof, in no manner affects the riparian rights pertaining to the land above the place of use and point of diversion. Thus in Hargrave v. Cook, 108 Cal. 77, 41 Pac. 19, 30 L. R. A. 390, the court said:

> "With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in and no longer any rights to it, would have no concern. * * * None of his rights would or could be impaired thereby, and without such an impairment he would be without injury, and, consequently, without cause for complaint or redress. 'His right extends no further than the boundary of his own estate. He cannot complain of the mere facts of the diversion of the water course either above or below him,

if, within the limits of his own property, it is allowed to follow its accustomed channel.'"

And further, speaking of the effect of these facts on the law of prescription, the court proceeds to say:

> "Before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an invasion of that other's rights, and the doing must either have been so long continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it."

The same doctrine has been declared in Hanson v. McCue, 42 Cal. 310, 10 Am. Rep. 299; Bathgate v. Irvine, 126 Cal. 140, 58 Pac. 442, 77 Am. St. Rep. 158; Cave v. Tyler, 133 Cal. 567, 65 Pac. 1089; Hudson v. Dailey, 156 Cal. 627, 105 Pac. 748; Perry v. Calkins, 159 Cal. 177, 113 Pac. 136; Miller & Lux v. Enterprise, etc., Co., 169 Cal. 423, 147 Pac. 567; and Holmes v. Nay, 199 Pac. 327.

The proposition is settled by these decisions, and it should be adhered to as a rule of property, even if we were doubtful of its soundness in logic, reason, and justice. But we have no such doubt. The rule that such diversions do not affect the upper riparian rights follows logically from the well-settled rule stated in the above-cited cases, and in every other case on the subject of prescription, that—

> "In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the right of the party against whom it is set up. The enjoyment relied upon must be of such a character as to afford ground for an action by the other party." Anaheim W. Co. v. Semi Tropic W. Co., 64 Cal. 192, 30 Pac. 625.

The precise question presented in this case was decided in Cave v. Tyler, above cited. It was there expressly held that a diversion or appropriation of water of a stream, the diversion being on land privately owned and for use on such land, at a point below a tract of government land abutting on the stream only at points above such point of diversion, and the use thereof for five years, gave the appropriator or diverter no rights under the aforesaid acts of Congress as against the riparian rights of a subsequent purchaser from the United States of government land situated upon the stream above the point of diversion. The nature of the water rights intended to be recognized and protected by the said acts of Congress are there clearly described by Justice McFarland. We cannot hope to speak with greater authority on such a subject than this eminent jurist. He was an active practitioner at the bar in the mining regions of California during the period when the rights referred to in said acts became established and "recognized" by the "local customs, laws and the decisions of the courts." No one could be better advised than he as to those customs, laws and decisions and the nature of the rights intended to be maintained and protected by the acts aforesaid. Inasmuch as neither the local customs, the local laws, nor the decisions of the California courts had ever recognized or upheld the doctrine that water rights, acquired by an appropriation or diversion below on private land, would be superior to the riparian rights pertaining to any land above the place of diversion, the conclusion is inevitable that section 9 of the act of 1866 neither creates such superior rights nor provides for the maintenance or protection of such rights.

[4] On the second phase of the questions the decisions in this state are to the effect that where the diversion is made on land then belonging to the United States the right of the appropriator to the water thereby taken is superior to the riparian rights of a subsequent purchaser of land from the United States lying above the point of diversion. South Yuba, etc., Co. v. Rosa, 80 Cal. 333, 22 Pac. 222; Healy v. Woodruff, 97 Cal. 464, 32 Pac. 528; Wood v. Etiwanda Water Co., 122 Cal. 153, 54 Pac. 726. The opinions in these cases decide the question but do not state fully the reasons for the conclusion. It is apparent, however, that they must be based on the hypothesis that the reservation provided for by section 17 of the act of 1870 in favor of accrued and vested rights runs to the appropriator of water upon land of the United States and creates in him a right superior to that of the riparian right of the United States pertaining to the land it then owns situated above the place of diversion, so that a subsequent purchaser of such upper lands takes subject to the lower appropriation. We need not go further into the reasons for these decisions, for we are of the opinion that the appropriations under which the plaintiffs claim were not made on land which was at the time thereof the property of the United States in the sense that it must be in order to come within the scope of the two acts of 1866 and 1870. To this question we now address ourselves.

[5] The important facts bearing upon the question last mentioned are as follows: The tracts of land on which the dams and headgates by which said respective appropriations were made are situated are of the character known as swamp and overflowed lands. Said tracts were acquired from the state of California by the respective predecessors in interest of the plaintiffs under applications to purchase the same as swamp

and overflowed lands. These several applications were approved in the years 1861, 1864, and 1869, respectively, and patents therefor were issued by the state to the respective entrymen under said applications in the years 1869 and 1874. Said several tracts were listed and set off by the United States to the state of California as swamp and overflowed lands on November 21, 1895, and in pursuance thereof they were patented to the state with other swamp and overflowed land on June 10, 1896.

The theory of the plaintiff on this point is that the title to these swamp and overflowed lands remained in the United States, until they were patented to the state in 1896, that this title was absolute and unqualified, that therefore these appropriations were made on public land of the United States, and accordingly, that the appropriations of 1871 and 1872 were superior in right to all riparian rights pertaining to any land at that time belonging to the United States situated on the stream above said place of diversion.

The swamp and overflowed lands were granted to the state by the United States by the act of September 28, 1850 (U. S. Comp. St. §§ 4958–4960). By that act it was made the duty of the secretary of the interior "to make out an accurate list and plats" of all such lands situated within each state, and, at the request of the Governor thereof, to "cause a patent to be issued to the state therefor." The act declares that "on that patent, the fee simple to said lands shall vest" in such state. It has been decided many times, and upon careful and elaborate consideration, both by the United States Supreme Court and by this court, that this act operated as a present transfer at that date to each state of all lands within its borders coming within the description of "swamp and overflowed" lands, and that the title of the state thereto did not depend on the actual issuance of a patent to the state therefor by the United States. French v. Fyan, 93 U. S. 170, 23 L. Ed. 812; Wright v. Roseberry, 121 U. S. 488, 509, 7 Sup. Ct. 985, 30 L. Ed. 1039; Tubbs v. Wilhoit, 138 U. S. 137, 11 Sup. Ct. 279, 34 L. Ed. 887; Owens v. Jackson, 9 Cal. 322; Summers v. Dickinson, 9 Cal. 554; Kernan v. Griffith, 27 Cal. 89; Tubbs v. Wilhoit, 73 Cal. 63, 14 Pac. 361; Foss v. Johnstone, 158 Cal. 119, 130, 110 Pac. 294.

The decisions in Michigan, etc., Co. v. Rust, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591; Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; McCormick v. Hayes, 159 U. S. 338, 16 Sup. Ct. 37, 40 L. Ed. 171; Chapman v. St. Francis Levee Dist., 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. 564; U. S. v. Chicago, etc., Co., 218 U. S. 242, 31 Sup. Ct. 7, 54 L. Ed. 1015; and Sawyer v. Osterhaus (D. C.) 212 Fed. 765, do not overrule French v. Fyan and the other cases first cited, as the plaintiffs contend. On the contrary, it is stated in all of them that the act of 1850 operates as a present grant to the state of the swamp and overflowed lands within the particular state. They merely hold that while the act of 1850 grants the equitable title, it does not carry the legal title, that identification of the lands as swamp and overflowed lands in the manner specified in the act and the issuance of a patent therefor by the United States to the state is necessary to pass the legal title out of the United States. They further declare that prior to the final identification of the lands as swamp and overflowed lands by the final lists and plats of the Secretary of the Interior, it is within the power of that officer to revise his surveys, lists, and plats, and make corrections therein, under proper proceedings and notice to the particular state, or its successors in interest, and that the identification of the lands cannot be considered as finally settled until this is done and the patent issued in accordance therewith. They all recognize, however, that the beneficial title of the state, under the act, is full and complete, lacking only the identification of the land and the issuance of patent in pursuance thereof, to convert it into a legal title. They also affirm the proposition that the Land Department of the United States has no power arbitrarily to destroy the equitable title so granted to the state, although it has jurisdiction, "after proper notice to the party claiming such equitable title, and upon a hearing, to determine whether or not such title has passed."

[6] It clearly follows, therefore, that the full beneficial enjoyment of the land passed to the state by the act of 1850, and at that time subject to the contingencies incident to identification and to no others. It would also follow of necessity that when thereafter, as appears here, the land is identified, and a patent therefor issued by the United States, all questions concerning the title of the state or any person claiming under it cease to be of any consequence. The title so finally transferred relates back to the year 1850, and inures to the benefit of the state and its successors in interest for all purposes as if the legal title to the land finally identified had passed at the date of the act. The acts of 1866 and 1870 could not have been intended to operate for the benefit of appropriations made upon land in which the United States did not then have, and has never since acquired, any beneficial interest.

Our conclusion is that the appropriations of 1871 and 1872, by which the water rights of the plaintiff were acquired, are not, by the aforesaid acts of Congress of 1866 and 1870, made superior or paramount to the riparian rights pertaining to the public lands of the

United States situated on the stream above the place of diversion, and afterwards purchased by the defendants from the United States.

[7, 8] The findings show that some 2,242 acres of land belonging to the defendants, and upon which they are using water from the river, were purchased by them, respectively, from the United States after the passage of the act of March 3, 1877, known as the Desert Land Act. It is contended by the plaintiffs that, with respect to the waters used by these defendants on said lands under claim that they had a right to do so as riparian owners, the rights of the plaintiffs under their said appropriations are made paramount to such riparian rights by the provisions of the said Desert Land Act. 19 U. S. Stats. 377.

The title of this act is, "An act to provide for the sale of desert lands in certain states and territories." It provides for the sale of desert lands in amounts not exceeding one section to any qualified person who declares on oath that he intends to reclaim such desert land by conducting water upon the same within three years thereafter. Then follows a proviso as follows:

> "Provided however that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, *shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.*" Section 1 (U. S. Comp. St. § 4674).

Section 2 of the act (section 4675) provides:

> "That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act."

Section 3 (section 4676) provides further that—

> "The determination of what may be considered desert land shall be subject to the decision and regulation of the commissioner of the General Land Office."

The theory of the plaintiffs is that this act operates as a separation of the riparian rights pertaining to all lands of the United States from the land itself and a dedication of the waters covered by such riparian rights to public use for irrigation, mining, and manufacturing purposes, and that in consequence of this dedication the riparian rights pertaining to the land acquired from the United States by the defendants after the passage of said act are subject and subordinate to the rights of the plaintiffs to take the water so appropriated by them, and devote the same to public use as they have been and are doing. In support of this proposition the plaintiffs rely on the decision of the Supreme Court of Orgeon in Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083. The court in that case, in a very elaborate opinion, reached the conclusion that the last clause of section 1 above quoted applied to all lands of the United States, and was a dedication of the waters thereon to public use subject to existing rights. The Supreme Court of Washington, however, in Still v. Palouse, etc., Co., 64 Wash. 606, 117 Pac. 466, and in Bermot v. Morrison, 81 Wash. 538, 143 Pac. 111, Ann. Cas. 1916D, 290, reached precisely the opposite conclusion. In the first-mentioned Washington case the court said:

> "The act itself manifestly relates only to the reclamation of desert lands and confines the use of the water to the amount 'actually appropriated and necessarily used for the purpose of irrigation and reclamation'; such right to be determined by bona fide prior appropriation. As to such lands, Congress recognized and assented to the appropriation of water in contravention of the common-law right of the lower riparian owner to insist on the continuous flow of the stream,"

—and it proceeded to hold that, as none of the persons making this claim had settled upon or obtained the land as desert lands under the act of 1877, no rights under said act were attached to such lands. This decision was followed in the subsequent case. We think the conclusion of the Washington Supreme Court was correct. It is obvious from the framework and language of the act of 1877 that it was not intended to apply to all the public lands of the United States. Its main purpose was to provide for the sale of desert lands which could be reclaimed by bringing water thereon. It may be true that as to such lands the purpose was to divert the riparian rights in the waters existing thereon and devote the same to the public uses stated. We do not think that question is involved in the present case, and we need not express any opinion on it. There is nothing in the act which justifies giving that particular part thereof so wide an application as to embrace all lands of the United States, wherever situated. The plaintiffs do not claim that any of the land belonging to the defendants was purchased or acquired under the Desert Land Act, and there is no finding that in fact such lands were desert lands. The act itself commits the determination of the question what may be considered desert lands to the Commissioner of the General Land Office. It is not claimed that he has made any determination of the fact with respect to any tract of land in controversy in this action. It was for the plaintiffs to show this fact, if it were material to their case, and as they have not done so we must presume that no such determination was ever made. It follows from what we have said that the rights of the plaintiffs under their appropriations are not affected by the provisions of the Desert Land Act.

[9, 10] Another contention of the plaintiffs is that the defendants are estopped to assert that their title as riparian owners is paramount to the rights of the plaintiffs under their appropriations below. They claim the estoppel on the ground that the plaintiffs have been diverting the water by means of its canals and under its appropriation and devoting the same to public use for irrigation and other purposes for more than 40 years, and that the defendants did, during all of that period, permit the water of the stream to flow by their own lands without any use thereof and to pass on down to the plaintiffs' headgate, there to be taken out and appropriated to the public use, without protest, objection or notice of their respective claims. In support of this estoppel they invoke the rule set forth in the decisions of this court in cases where a railroad company or canal company serving a public use has taken the land of another for such railroad or canal and has operated the same without objection by the owner and without compensating him therefor. In these cases it is held that the owner of the property, after having permitted such public use to begin and continue until public rights have accrued therein, cannot enjoin the operation of the railroad or canal, and that his only remedy is an action for damages for the taking of his property for public use. Fresno, etc., Co. v. Southern Pacific, etc., Co., 135 Cal. 207, 67 Pac. 773; Southern California Co. v. Slauson, 138 Cal. 344, 71 Pac. 352, 94 Am. St. Rep. 58; Gurnsey v. Northern C. P. Co., 160 Cal. 709, 117 Pac. 906, 36 L. R. A. (N. S.) 185; Katz v. Walkinshaw, 141 Cal. 136, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; Newport v. Temescal Water Co., 149 Cal. 538, 87 Pac. 372, 6 L. R. A. (N. S.) 1098; Barton v. Riverside Water Co., 155 Cal. 515, 101 Pac. 790, 23 L. R. A. (N. S.) 331.

The finding of the court is:

> "That the taking, appropriation *and use* of said water by plaintiffs was notorious, but was unknown to the said defendants, and the said defendants did not acquiesce in or assent thereto." (Italics ours.)

It is contended that this finding is contrary to the evidence. It devolved upon the plaintiffs, in support of their estoppel, if the fact was material to such estoppel, to prove that the defendants had knowledge not only of the existence of the canals and the diversion of the water thereby from the river, but also that the same was being devoted to public use. The only evidence on the subject consisted of a number of extracts from articles published in California newspapers in the years from 1871 to 1878, inclusive. The nearest newspaper to the location of the lands of the defendants was the Fresno Expositor, which published one article on the subject in 1873. The articles referred to the size of the canal, the extent of territory to be irrigated thereby, but did not definitely state whether the use to which the water was to be applied was a public or private use. No evidence is called to our attention showing actual knowledge on the part of any one of the defendants that the plaintiffs, or either of them, were engaged in supplying water for public uses, or that either of them had ever seen any of the publications introduced in evidence. The fact that the taking and use of the water was notorious, as found by the court, was not proof of knowledge by defendants, but was merely a circumstance from which, with other circumstances, the court might or might not have inferred such knowledge. Its finding shows that it did not infer knowledge. We do not think the finding was contrary to the evidence. In our consideration of the case, therefore, it must be assumed that none of the defendants had knowledge of the public use to which the water was devoted. We do not mean to say that such knowledge was material, however.

The question presented by the plaintiffs in regard to such estoppel has never been decided by this court. In Miller & Lux v. Enterprise, etc., Co., 169 Cal. 423 to 430, 147 Pac. 567, the court discussed the question at length, and set forth the various decisions on the subject and the reasons which support the doctrine which the plaintiffs invoked. After so doing, however, the court declined to decide the question. After extensive quotations from the decisions holding that injunction would not be granted in the cases stated, the court said:

> "It is to be observed that in all of the above cases the public use involved an interference with the property rights of a private owner, sufficient to give such owner an immediate right of action to abate or prevent the same. * * * This right in the owner to enjoin the public use before it had become established, appears to have constituted an important factor in the statement of the doctrine." Page 430.

This case, it may be observed, involved the same canal and the same appropriation that is involved in S. F. No. 3119, now under consideration.

[11, 12] From what we have already said it is clear that the upper riparian owners could not have maintained any action or proceeding to prevent the appropriation of the water from the stream by plaintiffs after it had passed below defendants' lands. It is difficult to see how they could be estopped by the taking of the water below and its dedication to a public use when they could by no means within their power prevent or restrain the same. In order to constitute an estoppel of this character the person sought to be estopped must have failed to do some act which it was within his power to do, and the person claiming the estoppel must have relied on such failure to such an extent and for such a period that the subsequent doing of such act would cause him injury. In the present case the act which it is now claimed the defendants should have done was not within their power. They could not have prevented the appropriations by the plaintiffs. We may add that since the courts had many times decided that a diversion below his land did not concern or injure the riparian owner above, and they had each presumably rested secure in this rule, which had become a rule of property, it would not be consonant with justice to say to such proprietor that he has lost those rights through no fault or failure of his own, but simply because he has not seen fit to use the waters upon his riparian land, and that to do so would be equivalent to this court erecting a statute of limitations against an upper riparian proprietor, and in the same breath decreeing that it had barred all his rights. For these reasons we are of the opinion that no estoppel is created against the defendants to now claim their riparian rights, although the same may cause injury to the plaintiffs' appropriation by consuming part of the water of the stream before it reaches the plaintiffs' place of diversion.

[13, 14] It appears that the court found that certain of the defendants had obtained by prescription a right to divert from the stream at points above the plaintiffs' places of diversion some $13^{75}/_{100}$ second feet of water, which they had applied to the irrigation of some 31 acres of nonriparian land and 759 acres of riparian land. They claim that this finding is not sustained by the evidence nor by the law. We know of no rule of law that would prevent a person who owned land riparian to the stream above the place of diversion of water therefrom by some other person, even by a public service corporation for public use, from taking water from the stream and acquiring title thereto by prescription as against such public use. A public service corporation is no more exempt from this deprivation than any other owner of a water right. Nor are we aware of any rule of law that any person, although not a riparian owner, may not acquire a prescriptive right as against a public use below by taking water out of the stream above which otherwise would run down to the canals of the public service corporation. It is not claimed that the evidence does not show that the taking and use of the water was adverse, under claim of right, and continuous for a period of five years before the action was begun. Such being the case, there is no merit in the claim that the finding is not sustained by the evidence. Furthermore, with respect to the use on the riparian lands, inasmuch as the owners had the right to use the same without asking leave of the plaintiffs, the finding that they acquired the right by prescription is immaterial. With respect to the finding as to defendants' rights by prescription, the plaintiffs complain that the pleadings did not aver such right, and that therefore such finding was improper. This objection affects only the right adjudged to defendant White & Friant Lumber Company to take about 1¼ second feet of water for irrigation on 31 acres of nonriparian land. The pleading was lacking in certainty as to the quantity claimed and taken. But there was no demurrer for uncertainty and no objection to any evidence on the subject. Under all these circumstances, the lack of sufficient averment should be deemed to have been waived at the trial.

As to the claim that the diversions above did not, so far as appears, diminish the stream flowing at their dams to such an extent as to deprive plaintiffs of the quantity of water they had appropriated, it is sufficient to refer to Horst v. Tarr M. Co., 174 Cal. 436, 163 Pac. 492, and to say that the complaints herein are based on the allegation and theory that the diversions by defendants did deprive plaintiffs of water to which they were entitled.

No other points worthy of mention are presented in support of these appeals.

In each of the cases mentioned herein the judgment is affirmed.

We concur: LENNON, J.; SHURTLEFF, J.; SLOANE, J.; WILBUR, J.; WASTE, J.

55 Cal. App. 539

NILES SAND, GRAVEL & ROCK CO. v. MUIR et al. (Civ. 4027.)

(District Court of Appeal, First District, Division 2, California. Dec. 6, 1921. Hearing Denied by Supreme Court Feb. 2, 1922.)

1. Interest ⚷19(2)—Recoverable on price of goods sold by written contract.

Where the amount recovered was, as held on a former appeal, due on a written contract to pay a definite price per ton for materials furnished defendants by plaintiff, the amount due, being ascertainable by arithmetical calculation, was an amount capable of being made certain within Civ. Code, § 3287, and interest was properly allowed thereon.

2. Interest ⚷39(3)—Calculated to date of original judgment when merely modified on appeal.

As respects the date from which interest should be calculated, when the judgment of the trial court is merely modified and not reversed on appeal, the modification stands as of the date of the original judgment, and interest was properly calculated from that date.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Niles Sand, Gravel & Rock Company against Robert B. Muir and another, doing business as R. C. Storrie & Co. From a judgment for plaintiff, defendants appeal. Affirmed.

R. H. Countryman, of San Francisco, for appellants.

John L. McNab and Byron Coleman, both of San Francisco, for respondent.

LANGDON, P. J. In this action Division 1 of this court rendered its judgment on December 27, 1920 (195 Pac. 699), upon a former appeal, directing that the judgment theretofore rendered against defendants by the superior court for the sum of $15,195.31 be modified by reducing the amount thereof by the sum of $1,442.80, leaving a balance due said plaintiff of $13,752.51, and as to said last-named sum the judgment in favor of the plaintiff was affirmed. In modifying the judgment in accordance with the opinion of the District Court of Appeal, Division 1, the trial court allowed interest on $13,752.51 from the date of the delivery of the merchandise to the defendants to the date of the entry of the original judgment. The sole question presented upon this appeal is as to the propriety of the allowance of interest.

[1] The action was brought by plaintiff for the amount due to it for certain goods, wares, and merchandise furnished to defendants consisting of concrete, gravel, crushed gravel and sand for use in the construction of Twin Peaks tunnel in San Francisco. It was found by the trial court that the material was furnished under a written contract between the parties. It was also found that the defendants had agreed to pay 75 cents per ton for the material furnished by plaintiff, and that 135,564.26 tons of same had been delivered by plaintiff to the defendants, and that $87,920.68 had been paid by defendant's upon account, all as alleged in plaintiff's complaint. As a matter of arithmetical calculation, this would leave a balance due plaintiff of $13,752.51. By mistake the judgment of the trial court was originally entered for $15,195.31, and upon appeal, Division 1 of this court pointed out the discrepancy, and reduced the judgment to accord with the findings made by the trial court. The modified judgment, from which the present appeal is taken, stands as a judgment upon a written contract; it having been found by the trial court that there were no offsets or counterclaims in favor of the defendants.

The original judgment, before the modification, allowed interest on $15,195.31 at the rate of 7 per cent. from July 21, 1917, the date of the delivery of the materials, to October 15, 1919, the date of the judgment. This allowance of interest was proper under the rule of section 3287, Civil Code, and an examination of the opinion filed herein upon the former appeal clearly shows that there was no intention to modify the judgment with respect to the allowance of interest; on the contrary, the modification was confined to a change in the principal amount due. In modifying the judgment, the trial court, following the rule of section 3287, Civil Code, allowed interest upon the reduced amount of $13,752.51 for the above-stated period of time from the date of the delivery of the materials, to October 15, 1919, the date of the entry of the original judgment. Since the court had found that the amount due was due upon a written contract to pay a definite price per ton for the materials furnished, the amount due by the defendant was ascertainable by arithmetical calculation, and was an amount "capable of being made certain" upon which interest was allowable. Keyes v. Nims, 184 Pac. 695.

[2] The further question discussed by appellant as to the propriety of the court's action in taking October 15, 1919 (the date of the entry of the original judgment), as the date of judgment in making its interest calculations rather than the later date when the modification of the judgment was actually made, is without merit. That question was considered in the case of Barnhart v. Edwards, 128 Cal. 572, 61 Pac. 176. It is clear that when the judgment of a trial court is merely modified upon appeal and not reversed, the modification thereof stands as of the date of the original judgment.

There are no other matters which require discussion. The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

55 Cal. App. 552

BECK v. SWANK et al. (Civ. 3754.)

(District Court of Appeal, Second District, Division 1, California. Dec. 6, 1921. Hearing Denied by Supreme Court Feb. 2, 1922.)

1. Vendor and purchaser 🔑8—Vendor's lack of title held not to justify rescission.

That title was not vested in a vendor at the date of making a contract of sale on monthly payments, did not entitle the purchasers to rescind and recover the money paid by them where they were not induced to purchase by reason of any representation of the vendor that he had title.

2. Vendor and purchaser 🔑186—Execution of mortgage by vendor does not excuse default in payment.

The execution by a vendor of a mortgage on the property he had contracted to sell did not excuse defaults in the payment of installments on the contract, where the mortgage was for less than the unpaid installments, and it did not appear that the vendor could not have satisfied the mortgage and conveyed a clear title whenever the purchasers were ready to pay the full consideration.

3. Vendor and purchaser 🔑95(2), 101—Acceptance of past-due installments did not prevent restoration of right of forfeiture by notice.

The acceptance by a vendor of a past-due installment on a contract of sale was a waiver as of that date only so far as installments due were concerned, and was at most a temporary suspension of the right of forfeiture which could be restored at any time by definite notice of an intention to demand prompt payments.

4. Vendor and purchaser 🔑335—Sale to third person after long default does not authorize recovery of payments.

Where a purchaser had paid nothing on a contract of sale providing for monthly payments for about a year and a half, and until the vendor had satisfied a mortgage and sold the property to another purchaser, the purchaser was not entitled to recover the moneys paid, even though the subsequent purchaser was an innocent purchaser, as the long continuance of default entitled the vendor to remain inactive and retain for his own use the moneys paid.

5. Vendor and purchaser 🔑343(4)—Purchaser suing for breach in conveying to another purchaser must show such purchaser was an innocent one.

One suing for breach of a contract for the purchase of real estate on the theory that the vendor by conveying the land to an innocent purchaser had put it out of his power to convey, and that such conduct was a fraud on plaintiff, could not recover where it was not shown that the subsequent purchaser was an innocent purchaser, who bought without knowledge of plaintiff's contract, and did not take title subject thereto.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by S. Beck against J. A. Swank and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Hocker and Robert E. Austin, both of Los Angeles, for appellant.

Minor Moore, Ward Chapman, and L. M. Chapman, all of Los Angeles, for respondents.

CONREY, P. J. Action to recover moneys paid on account of contract for the purchase of real property. Judgment was entered in favor of the defendants. The plaintiff appeals therefrom.

On February 7, 1911, the defendant Swank, as vendor, entered into a contract with John C. Wood and George H. Schroeder, as vendees, for the sale and conveyance of the lot described in the complaint. The purchasers agreed to pay the sum of $2,500 in numerous monthly installments, with interest. At the date of the contract title was vested in one Vassar. On June 17, 1911, Vassar executed to Scott a mortgage on the lot for the principal sum of $1,000. On October 2, 1913, the contract, without any certificate of acknowledgment thereon except an acknowledgment by the purchaser Wood, dated October 2, 1913, was recorded in the records of deeds of Los Angeles county. On October 21, 1911, Vassar conveyed the lot to Swank & Letton, a corporation. On June 16, 1914, that corporation conveyed the lot to defendant Gibson, subject to the mortgage. Gibson admits that at the time of receiving that deed he knew of the outstanding contract. On January 8, 1918, Wood and Schroeder assigned their contract to Maude Mason, who on March 15th following assigned the contract to Ida Miller. On April 20, 1918, Miller executed a quitclaim deed and an assignment of the contract to the plaintiff Beck. On June 10, 1918, Scott commenced an action to foreclose the mortgage. The decree of foreclosure having been entered, a foreclosure sale took place on October 1, 1918. In September, 1919, Gibson redeemed from the foreclosure sale.

The last payment made on account of the contract was made by Miller to Gibson on March 28, 1918, and at the time of assignment of the contract to the plaintiff there was a balance of more than $1,600 remaining to be paid under the contract. The court found that no part of said balance has ever been paid or tendered by the plaintiff or any one to the defendants, or either of them, nor has the making of said payments or the tender of said payments, or any of them, been excused or waived by the defendants, or either of them; that after making said redemption Gibson sold the property to a third party, but at the time of making such sale the plaintiff had been and was in default for more than 15 months, and the defendant was led to believe, and did believe, that the vendees of the contract had abandoned any claim or rights thereunder, and that, in fact, all right of the plaintiff under the contract, by reason of said default, was terminated.

[1, 2] The fact that the title was not vested in Swank at the date of making the contract with Wood and Schroeder did not entitle the purchasers to rescind the contract and recover the money paid by them. Neither did the execution of the mortgage excuse defaults in the payment of installments on the contract. The vendees never claimed that they were induced to purchase by reason of any representation made by Swank that he had title to the lot. They made payments to Gibson after the title was vested in him. The mortgage was for a sum less than the unpaid installments on the contract. There is no evidence that Gibson could not have satisfied the mortgage and conveyed a clear title whenever the vendors were ready to pay the full consideration and demand their deed.

[3] Appellant contends that he was not in default. This contention is based upon the claim that the provision of the contract making time of the essence thereof was waived by the acceptance by Gibson of overdue payments. This refers to the fact that on March 28, 1918, when the last payment was made to Gibson (and this payment was made by Miller), that payment covered the installments due February 1, and March 1, 1918. Such acceptance of a past-due installment was a waiver as of that date, only so far as installments then due are concerned. At most it was only a temporary suspension of the right of forfeiture, which could be restored at any time by definite notice of an intention to demand prompt payments. Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; Stevinson v. Joy, 164 Cal. 279, 285, 128 Pac. 751, Ann. Cas. 1914B, 961.

The complaint alleged that on March 28, 1918, Gibson informed Miller that there was a mortgage on said property for $1,000, and that said property was subject to said mortgage at the time Gibson purchased the property, and stated to the said Ida Miller that "all the money you put in this property will be thrown away," and afterwards, on the 9th day of April, 1918, confirmed said statement in writing; that, acting upon such information and the circumstances aforesaid, the said Ida Miller made no other or further payments on said property, and afterwards assigned said contract and conveyed her interest in said property to the plaintiff herein. In its findings the court stated that on said date, and at other times both before and afterwards, Gibson informed Ida Miller that there was a mortgage on the property for $1,000, and that in his opinion her rights as assignee of the vendees to said contract were subject to said mortgage; that the same was overdue, and that the mortgagee demanded payment and threatened foreclosure unless the same was paid; and informed said Ida Miller that in his opinion the property was not worth the amount of the balance which she would have to pay under the terms of said contract in order to get the deed to said property, and that in his opinion all moneys that she paid upon the property would be thrown away; but at that time, and both prior thereto and subsequent to that date, he did by letter inform said Ida Miller, and likewise her successor, the plaintiff, that he did then, and at all times would, insist upon the prompt payment of all installments as they became due under the contract, and that unless such installments were paid when they became due, the rights of the vendees under said contract would terminate, but that the defendants in this action never did, by any act or declaration, induce the plaintiff, or any of his predecessors, not to make payments under the contract, and did not waive the obligation for the payment of any of said installments, or interfere with the making of such payments. Nevertheless no payment was made after March 28, 1918, and no tender of any payment thereon has ever been made.

[4, 5] The fact seems to be that the plaintiff, knowing that the contract was in default on the part of Ida Miller, purchased the contract on April 20, 1918, for a comparatively trifling consideration, and then remained quiescent for about a year and a half until the owner had satisfied the mortgage debt and sold the property to another purchaser. He now claims, in addition to the alleged waiver of default, that, without tendering performance of the contract, he is entitled to recover the moneys paid by his assignor and her predecessors, upon the further ground that, by conveying the land to a third party, Gibson has put it out of his power to convey as required by the contract, and that he (the plaintiff), standing in the shoes of the vendees, may treat the contract as rescinded. Reliance is placed upon the decision in Brimmer v. Salisbury, 167 Cal. 522, 527, 140 Pac. 30, to the effect that, where the vendor under an executory contract of sale, who has title to the property, conveys to a third party, who is an innocent purchaser, and who takes it freed from the obligations of the contract, the conduct of the vendor is a fraud upon the vendee. But the benefit of the rule thus stated, if applicable at all, should be denied to the plaintiff in this case, because the long continuance of default on the part of the plaintiff and his assignor, under the circumstances stated, entitled the owner, Gibson, to "remain inactive, yet retain to his own use the moneys

paid by the vendee" (Glock v. Howard, 123 Cal. 1, at page 10, 55 Pac. 713, at page 716 [43 L. R. A. 199, 69 Am. St. Rep. 17]), and also because it has not been shown by the record herein that the party to whom Gibson sold the lot was an innocent purchaser who bought without knowledge of this contract or without taking the title, subject to such right as might be vested in the plaintiff to have the property conveyed to him on payment of the agreed consideration.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(55 Cal. App. 519)

PALMER v. LOS ANGELES, O. P. & S. M. RY. CO. et al. (Civ. 4050.)

(District Court of Appeal, First District, Division 2. California. Dec. 5, 1921. Hearing Denied by Supreme Court Feb. 2, 1922.)

1. Railroads ⟹72(7)—Promises by grantee held not to state condition or forfeiture.

Promises of grantee of strip of land to construct an electric railroad and operate cars *held* not to state a condition subsequent or a forfeiture which would entitle the grantor to a forfeiture if the line was not constructed.

2. Railroads ⟹62—Land conveyed for construction railroad for "railroad purpose" within Code.

Conveyance of land on which to construct a construction railroad was for a railroad purpose under Civ. Code, §§ 360, 465.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad Purposes.]

3. Corporations ⟹387(2)—Only state can complain that corporation purchased lands for unauthorized purposes.

That a grantee corporation has purchased lands for purposes not authorized by its charter is a question that may be examined into by the state, but the grantor may not complain.

4. Limitation of actions ⟹50(1)—Agreement of grantee to construct railroad not enforceable after 4 years on theory of continuing contract.

Contract by grantee railroad corporation to construct a railroad over strip conveyed cannot be specifically enforced in an action brought 17 years after the conveyance, on the theory of a continuing contract.

5. Limitation of actions ⟹24(1)—Action for specific performance of contract to construct railroad barred in 4 years.

An action by grantor of strip of land to railroad for specific performance of contract of railroad to construct a line on the strip, and to operate trains thereon, was, under Code Civ. Proc. § 337, subd. 1, barred in 4 years after the date when performance was due.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Wilton H. Palmer against the Los Angeles, Ocean Park & Santa Monica Railway Company and others. From an adverse judgment, plaintiff appeals. Affirmed.

Waldo M. York and Harry M. Irwin, both of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants; the defendants appeared and interposed demurrers; the demurrers were sustained; the plaintiff elected not to amend; and judgment was thereafter entered in favor of the defendants for their costs. From that judgment the plaintiff has appealed.

The complaint alleged the incorporation of the corporations; that on the 27th day of March, 1903, the plaintiff was the owner of a tract of land near Santa Monica in the county of Los Angeles, and that the tract was bounded on the south by the Compton and Santa Monica road; that the defendant Los Angeles, Ocean Park & Santa Monica Railway Company was incorporated to build and operate a railroad from Los Angeles to Santa Monica; that on the 27th day of March, 1903, the said company offered plaintiff that if plaintiff would convey to it a right of way for a railroad across plaintiff's land 50 feet wide and adjoining the Compton road, the company would construct an electric railroad between the two places named, and would operate cars upon said railroad for the transportation of passengers so that plaintiff could make his home upon said land and maintain an office in Los Angeles, and that it would permit plaintiff to maintain three passageways from the lands of plaintiff to the Compton road, and also made other promises, and in addition thereto offered to pay plaintiff $1,500; that thereupon plaintiff made and executed to the defendant for a consideration recited as $10, a deed, which in form is an ordinary grant, bargain and sale deed describing a tract "running northeasterly and parallel to the said Compton and Santa Monica road about 2,700 feet to a point distant at right angles 25 feet northerly from the point of intersection of the northerly line of said Compton and Santa Monica road with the southerly line of the road commonly known as Zanja street, which said line is in the center line of the strip of land 50 feet in width located as the right of way of the above named second party"; that plaintiff would not have executed said deed except for said promises; that the company has not constructed said road; that no railroad except a construction railroad has been built on the tract described; that plaintiff has been damaged "by said failure of said defendant to perform its said contract and by his being excluded from said land so claimed as a right of way in the sum of more than $2,000"; that the other defendants claim an interest in said strip, but that their rights are subject to and subsequent to the rights of the plaintiff and were acquired with full notice and knowledge of plaintiff's rights. The prayer of the complaint was that the company be directed by the court to construct and equip and operate the said railroad and fix a time for such performance, and that if the company fail to comply within the time so fixed by the court, that then the interest of the defendant company be declared forfeited and plaintiff's title be quieted and for general relief. The demurrers included nearly all of the statutory grounds, and also pleaded that the plaintiff's cause of action, if any, was barred by plaintiff's laches and the statute of limitations. Code Civ. Proc. § 337, subd. 1, section 338, subds. 1, 2, 4, section 340, subd. 1, sections 343, 318, 319, and 322.

[1-3] In the first place the plaintiff asserts that the deed dated March 27, 1903, is a grant of a right of way. In the second place the plaintiff contends that the deed is, in legal effect, a conditional deed—contains certain conditions subsequent. However, there is not a word in the deed showing or even hinting at a condition subsequent. Nor does the instrument contain any passage that can be said to be ambiguous. The deed must be measured according to its terms. The promises made by the grantee were merely the personal covenants of the grantee. It is not alleged whether the promises were made orally or in writing. We will assume they were made in writing, and as authentic as the deed itself. Certainly those promises are of no greater force than parts actually incorporated into the deed. But the language of those promises, as alleged by the pleader, does not even purport to state a condition or a forfeiture; and, if it did, such language would be strictly construed as against a forfeiture. Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 62 Pac. 295; Reclamation District v. Van Loben Sels, 145 Cal. 181, 184, 78 Pac. 638; Shaw v. Caldwell, 16 Cal. App. 1, 6–9, 115 Pac. 941. We may not hold that the deed, on its face, or as aided by the allegations of the complaint, was a deed containing conditions subsequent. Furthermore, we must hold that the deed conveyed the fee. Hannah v. Southern Pac. R. R. Co., 192 Pac. 304. But, the plaintiff says, under the provisions of sections 360, 465, Civil Code, the grantee had no power to purchase land except for railroad purposes. To this contention there are two answers. The plaintiff alleged that the grantee thereafter constructed, and now has on the land, a construction railroad—this is a railroad purpose. The other answer is that if the grantee has purchased land for purposes not authorized by its charter the question may be examined into by the state, but the grantor may not complain. Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620, 630; Savings Bank of San Diego v. Barrett, 126 Cal. 413, 417, 58 Pac. 914; Ingle Mfg. Co. v. Scales, 36 Cal. App. 410, 412, 172 Pac. 169.

[4, 5] The plaintiff claims that the promises made by the railroad company became a part of the deed. We do not understand the appellant to controvert that proposition. But the claim does not assist the plaintiff. It leads us to the position of holding that the plaintiff, at the time he filed his complaint, May 18, 1920, was attempting to enforce a contract made March 27, 1903. As an action for damages for a breach of contract, the action was barred in 4 years. Code Civ. Proc., § 337, subd. 1; Ahlers v. Smiley, 163 Cal. 200, 204, 124 Pac. 827. As an action for specific performance of the alleged contract, the action was barred in 4 years after the date when performance was due. Archer v. Harvey, 164 Cal. 274, 128 Pac. 410. To meet this point the plaintiff claims that the duty the grantee owed him was in the nature of a continuing contract. 1 Wood on Limitations, p. 659. That authority, does not support the plaintiff's contention. The rule stated in the text is but another form of stating that the statute of limitations does not run against a public nuisance, because each day a new cause of action arises. In this case this plaintiff claims that the grantee promised in 1903 to construct a railroad, and that it has not done so. That such contracts will not be enforced, we need do no more than cite Texas, etc., Ry. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed 385, and the cases cited in 15 Rose's Notes, p. 191. As an action in specific performance, the complaint did not state sufficient facts.

The plaintiff cites and relies on City of Tyler v. St. Louis Southwestern Ry. Co. of Texas, 99 Tex. 491, 91 S. W. 1, 13 Ann. Cas. 911; Aikin v. Albany, etc., R. R. Co., 26 Barb. (N. Y.) 289; Gray v. Burlington, etc., R. R. Co., 37 Iowa, 119; Hubbard v. Kansas City, etc., R. R. Co., 63 Mo. 68; and Elliott on Railroads, vol. 2, p. 441, § 942.

Each of those authorities is to the effect that, when the action is brought at a proper time, a railroad company may be compelled, in certain instances, to specifically perform its real estate contracts. We have not held to the contrary except as to the facts before us in this particular case.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

55 Cal. App. 263

HARLAN v. ALDERSON et al., State Board of Medical Examiners. (Civ. 3921.)

(District Court of Appeal, First District, Division 1, California. Nov. 18, 1921. Hearing Denied by Supreme Court Jan. 16, 1922.)

Physicians and surgeons ⚷11(2)—License of osteopath revoked where he wrote prescriptions and performed surgical operations.

License of one granted a reciprocity certificate from another state to practice osteopathy, who wrote prescriptions and performed minor and major surgery and engaged in the practice of medicine and surgery, was properly revoked on a verified complaint charging him with a violation of St. 1913, c. 354, § 14, subd. 9, as amended by St. 1915, p. 196, St. 1917, p. 109, and St. 1919, p. 1296.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by William F. Harlan against Harry E. Alderson and others, members of the Board of Medical Examiners of the State of California. From judgment annulling an order of the Board revoking plaintiff's license to practice as a doctor of osteopathy, defendants appeal. Reversed.

Harry A. Encell, of San Francisco, and Frank M. Smith, of Los Angeles, for appellants.

Frank M. Carr, of Oakland, for respondent.

KERRIGAN, J. This is an appeal from a judgment annulling on certiorari a certain order of the board of medical examiners revoking respondent's license to practice as a doctor of osteopathy in the state of California.

In the month of May, 1916, the respondent, William F. Harlan, was granted a reciprocity certificate from another state to practice osteopathy in the state of California by the board of medical examiners of the state of California. Thereafter, early in the year 1920, proceedings were initiated before the state board of medical examiners by a verified complaint against the respondent, charging him with a violation of the ninth subdivision of section 14, c. 354, Statutes of 1913, as amended by the Statutes of 1915 (page 196), 1917 (page 109) and 1919 (page 1296), of the state of California. That complaint alleges that William F. Harlan was on or about the 4th day of May, 1916, licensed by the state board of medical examiners "as a drugless practitioner." With the complaint he was served with a citation directing him to appear at a certain time and place to show cause why the license and certificate theretofore issued to him to "practice as a drugless practitioner in the state of California" should not be revoked. In due time, by a verified answer, William F. Harlan denied the charges contained in the complaint and denied that he was licensed as a drugless practitioner, but, on the contrary, alleged that he was licensed by said board of medical examiners to practice osteopathy in the state of California.

The uncontradicted evidence introduced at the hearing showed that the respondent wrote prescriptions and performed both minor and major surgery and engaged in the unlicensed practice of medicine and surgery.

The question presented here is whether or not the case falls within the provisions of subdivision 9 of section 14 of the act of 1913, which provides what shall constitute misconduct which shall warrant the board of medical examiners in revoking a license granted under the provisions of this act, and which reads as follows:

> "Ninth. The use, by the holder of a 'drugless practitioner certificate,' of drugs or what are known as medicinal preparations, in or upon any human being, or the severing or penetrating by the holder of said 'drugless practitioner certificate' of the tissues of any human being in the treatment of any disease, injury, deformity, or other physical or mental condition of such human being, excepting the severing of the umbilical cord."

We think it does so fall. Prior to 1901 licenses to practice medicine were issued to members of the medical profession by separate boards of examiners representing the schools of medicine then recognized in this state. In 1901 (chapter 51, Stats. 1901) a combined board of examiners consisting of five members from the Medical Society of the State of California, two members from the California State Homeopathic Medical Society, and two members from the Eclectic Medical Society of the State of California was provided for and empowered to issue certificates to practice medicine and surgery. Chapter 99, Statutes of 1901, enacted by the same Legislature as the chapter just referred to, provided for a board of examiners from the Osteopathic Association of the State of California, which was empowered to license persons to practice osteopathy in this state. Under the provisions of chapter 212, Statutes of 1907, the osteopathic board was abolished, and two osteopaths were added to the board of medical examiners, which was then empowered to issue licenses to (1) physicians and surgeons, (2) osteopaths, and (3) persons to "practice any other system or mode of treating the sick or afflicted not referred to in this section."

The act of 1913 (chapter 354, Statutes of 1913), which with some subsequent amendments, is the act now in force and under which the respondent's license was granted and subsequently revoked, continues the combined board provided for in the act of 1907, but provides for only two classes of certificate:

"First, a certificate authorizing the holder thereof to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions, which certificate shall be designated 'physician and surgeon certificate'; second, a certificate authorizing the holder thereof to treat diseases, injuries, deformities, or other physical or mental conditions without the use of drugs or what are known as medicinal preparations and without in any manner severing or penetrating any of the tissues of human beings except the severing of the umbilical cord, which certificate shall be designated 'drugless practitioner certificate.'"

It also provides for the issuance of "reciprocity certificates," which provision was in 1915 (Stats. 1915, c. 105, § 11) amended (section 13) to read (in part):

"The applicant shall produce a certificate entitling him to practice a system or mode of treating the sick or afflicted, as provided in this act or any preceding practice act of the state of California. * * *"

The reciprocity certificate to practice osteopathy issued to the respondent was issued on the basis of a license secured by him in the state of Missouri in May, 1904, which must have been based upon qualifications equal to those required by our act of 1901 (chap. 99, supra). Manifestly such certificate could confer no greater power or privilege than was granted to an osteopath by the last-mentioned act, section 9 of which provides (Stats. 1901, p. 115):

"The system, method, and science of treating diseases of the human body, commonly known as osteopathy, is hereby declared not to be the practice of medicine or surgery, within the meaning of an act entitled 'An act to regulate the practice of medicine in the state of California,' approved April third, eighteen hundred and seventy-six, or any of the acts amendatory thereof."

The well-settled definitions of osteopathy, both in the decisions and in dictionaries, uniformly hold that the system of osteopathy "uses no drugs." "It administers no drugs; it uses no knife." Nelson v. State Board of Health, 108 Ky. 769, at page 777, 57 S. W. 501, at page 504 (50 L. R. A. 383). "A method of treating diseases of the human body without the use of drugs. * * *" Parks v. State, 159 Ind. 211, at page 229, 64 N. E. 862, at page 869 (59 L. R. A. 190). "As a remedy a form of manipulation is used." Century Dictionary. From the foregoing and from the very comprehensive history of the practice of osteopathy written by Mr. Justice Wilbur of our own Supreme Court in Re Rust, 181 Cal. 73, 183 Pac. 548, it appears that under the present classification there can be no doubt that one holding an osteopath's license issued prior to the act of 1913, or subsequent thereto on the basis of a previously secured license from another state, would, if originally licensed in this state since the act of 1913, be licensed as a "drugless practitioner." As section 21 of the act of 1913 provides:

"Nothing in this act shall be construed to prohibit the practice by any person holding an unrevoked certificate heretofore issued under or validated by any medical practice act of this state, *but all such certificates may be revoked* * * * *in the same manner and upon the same grounds as if they had been issued under this act.*" (Italics are ours.)

It is manifest that the proceedings for the revocation of a reciprocity certificate must be had under the provisions of the section under which such certificate would have been issued if originally issued under the provisions of this act.

We think, therefore, that the proceedings were properly brought under subsection 9, and that the decision of the board of medical examiners should not have been annulled.

The judgment of the superior court is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

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55 Cal. App. 545

DEAN et al. v. POWELL UNDERTAKING CO. (Civ. 3890.)

(District Court of Appeal, First District, Division 2, California. Dec. 6, 1921. Hearing Denied by Supreme Court Feb. 2, 1922.)

Nuisance ⚷3(7)—Undertaking parlors constituting a nuisance.

Maintenance in a residence district of undertaking parlors from which would escape foul and noxious odors, or which would endanger health from infectious and communicable diseases, can be enjoined as a nuisance under Civ. Code, § 3479, but such parlors cannot be enjoined on findings that they will greatly disturb plaintiffs in the comfortable and quiet enjoyment and free use of their premises, and that plaintiffs will be annoyed and mentally and physically depressed and their health injured thereby and their properties depreciated in value.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Martha Dean and others against the Powell Undertaking Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Everts, Ewing & Wild and T. M. Stuart, all of Fresno, for appellant.

Frank Kauke and G. L. Aynesworth, both of Fresno, for respondents.

STURTEVANT, J. This is an action to abate an anticipated nuisance. The plaintiffs had judgment in the trial court, and the defendant has appealed under section 953a of the Code of Civil Procedure.

Plaintiffs and defendant own lands in the same general neighborhood in the city of Fresno. Plaintiffs and others use their lands for residential purposes; but there are in the neighborhood some business establishments. As the trial court found the district to be a residential district or neighborhood, we will consider the case in accordance with the finding of the trial court. The plaintiffs' lands are on Coast avenue, and 70 feet removed from the property owned by the defendant, which is also on Coast avenue. In their complaint the plaintiffs alleged:

> "That defendant threatens and intends to and will, unless restrained by an order of this court, erect and construct on its said property and within 70 feet of the residence of plaintiffs Martha Dean and Nellie Dean, and within 120 feet of the residence of plaintiff Ruth E. Gall, an undertaking establishment and funeral parlor at which dead human bodies will be received and kept for burial and will be embalmed and prepared for burial and where autopsies will be held and funeral ceremonies and funeral rites will be performed and at which large numbers of people will constantly come and go and assemble for such purposes and for the purpose of seeing such dead bodies and attending such autopsies and funeral ceremonies; that, if the said building is so constructed and used, plaintiffs and their respective families will be greatly and seriously disturbed in the comfortable, peaceable, and quiet enjoyment of their homes and premises by reason of the constant knowledge and depressing influence of the presence and close proximity of said undertaking establishment, and of said dead bodies and said funeral ceremonies, and the constant coming and going of persons visiting said funeral parlor for the purpose of seeing the dead and of attending funeral ceremonies thereat and being present at autopsies, and of the funeral processions and gathering of vehicles for the same; that by reason thereof plaintiffs and their families would be so greatly disturbed and depressed in mind and in spirits as to destroy their comfort and peace of mind and to seriously affect plaintiffs' health and the health of their respective families, and to destroy the value of their said property as a residence and make it impossible for them to continue to occupy the same, all of which damage will be suffered by plaintiffs, in addition to the damage suffered by other residents of the neighborhood, and the public in general; that the value of the property of plaintiffs and other property in the neighborhood will be greatly impaired and depreciated."

The briefs of counsel proceed as though the first part of paragraph 6 of the findings were worded as follows:

> "That if defendant's said premises be used for (1) embalming, storing, and keeping for burial the dead bodies of human beings, as a place for the holding of autopsies and inquests, and as a morgue, such use will greatly and seriously disturb plaintiffs and the families of each of them in the comfortable, peaceable, and quiet enjoyment and free use of their premises herein described, and said plaintiffs and each of them and their families will be annoyed and mentally and physically depressed and injured thereby; that the health and peace of mind of said plaintiffs and each of them and their families will, by reason of said use, be affected and injured and the value of their said premises for residence purposes will be depreciated and the comfortable enjoyment thereof interfered with; that all of said injuries to plaintiffs and their said premises will cause damage to them in addition to the injury and damage suffered by other residents of the neighborhood and the public in general."

Except as herein stated, there was no pleading, no evidence, and no finding of any injury or anticipated injury to the plaintiffs by any intended use, or manner of use, to which the defendant may hereafter put its property.

Counsel on both sides have copiously, industriously, and with great learning briefed and argued the case. The appellant contends that it should not have been enjoined from conducting upon its own property a business in all respects lawful and in all respects operated with the highest degree of care and under the latest approved methods, solely and entirely because a few people living in the neighborhood believe that such business so conducted will hereafter cause them mental depression. In reply to this contention the respondents have stated they are entitled to the relief awarded and that their position is supported by authorities. They cite cases that arose in those jurisdictions where a statute or ordinance had been passed limiting the locations in which an undertaking establishment might be located. City of St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171; Meagher v. Kessler, 147 Minn. 182, 179 N. W. 732; and Brown v. City of Los Angeles, 183 Cal. 783, 192 Pac. 716. As Fresno has not adopted an ordinance on that subject, the cases are not helpful. The respondents cite other cases which involved an issue and a finding by the trial court to the effect that from the building in question there escaped, or would escape, foul and noxious odors, or, as in some instances, that by reason of the operation of the particular building there was great danger to health from infectious and communicable diseases from the bodies of persons taken to the premises in question. Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182; Densmore v. Evergreen Camp, 61 Wash. 230, 112 Pac. 255, 31 L. R. A. (N. S.) 608, Ann. Cas. 1912B, 1206; Barnes v. Hathorn, 54 Me. 124; Saier v. Joy, 198 Mich. 295, 164 N. W. 507, L. R. A. 1918A, 825; Goodrich v. Starrett, 108 Wash. 437, 184 Pac. 220; Osborn v. Shreveport, 143 La. 932, 79 South. 542, 3 A. L. R. 955; Everett v. Paschall, 61 Wash. 47, 111 Pac. 879, 31 L. R. A. (N. S.) 827, Ann. Cas. 1912B, 1128; Stotler v. Rochelle, 83 Kan. 86, 109 Pac. 788, 29 L. R. A. (N. S.) 49. The doctrine announced in those cases is statutory in his state. Section 3479, Civ. Code. But the plaintiffs have not made any showing to the effect that the defendant's building will be so constructed and operated that there will escape from the building any noxious odors or that any disease will be allowed to spread therefrom. That we have not misunderstood the doctrine stated in Everett v. Paschall, supra, and Stotler v. Rochelle, supra, is made clear by an examination of Rea v. Tacoma Mausoleum Association, 103 Wash. 429, 174 Pac. 961, 1 A. L. R. 541. In that case the Supreme Court of Washington was called upon to interpret both of those cases, and (174 Pac. at page 962) it used this language:

> "No decision has been called to our attention wherein any court has awarded injunctive relief, rested upon the sole ground of the mere presence of a cemetery or other place of sepulture, unattended by injurious or offensive drainage or fumes, sensible to the complaining party, and our own search leads us to believe that no such decisions have been rendered."

Beisel v. Crosby, 104 Neb. 643, 178 N. W. 272, is the one case which the respondents cite that comes most nearly sustaining their contentions. In that case the Supreme Court of Nebraska was considering a set of facts that was altogether peculiar. The properties involved were located on a tract known as Kountze place. Commencing on page 645 of 104 Neb., on page 272 of 178 N. W., the court says:

> "Originally Kountze place was a quarter section of land platted as an addition to Omaha. The deeds for the lots limited the grant to residential purposes for 25 years. With this common purpose Kountze place became an exclusive, compact, residential district, where there are paved streets, ornamental grounds, well-kept lawns, private driveways, and beautiful homes. In the pursuit of health, recreation, and happiness, families resorted to open porches and children played on lawns. In the midst of these homes and grounds defendant bought a large, handsome residence, after the limitation restricting the use of the lot to residential purposes had expired. Over the protest of plaintiffs, defendant occupies and uses this residence for an undertaking establishment. In front of it he erected a sign, 4 feet high and 9 feet long, advertising the premises before their eyes as 'Crosby's Funeral Home.' In addition, he has constructed and intends to maintain an electric sign. There is an operating and embalming room in the basement, where the dead are prepared for burial To and from the premises an automobile hearse, with unavoidable noises, is driven night and day. Mourners and friends of the dead visit the place. The building is used as a chapel, where sermons are delivered and dirges are sung. Funerals are weekly occurrences, and there were as many as two services in one day. The congestion in the street more than once prevented neighbors from stopping automobiles in front of their own doors. Boxes, used to protect caskets, are piled on the grounds of the funeral home, in view of the public. The dead are carried to and from the hearse a few feet from the windows in the home of one of the plaintiffs. Flowers intended for the funeral home have sometimes been delivered by mistake at private residences. Complete freedom and full enjoyment of home life in the neighborhood have been lost. Lawns, porches, and front rooms have in some instances been partially abandoned, and property in the vicinity has decreased in value. There is a natural shrinking from the scenes and the sounds at the funeral home. Respect for the presence of the dead and for the mourners at funerals grows out of gentle manners and good impulses and influences human conduct. Recurring changes from happy demeanor in private homes to solemnity in the presence of death affect the spirits of rightly constituted individuals, both old and young. The business which defendant conducts among the homes of plaintiffs will tend to depress them mentally, to lower their vitality, and to weaken their power to resist disease. With full knowledge of their protest, the conditions of which they complain were forced upon them by defendant. In exercise of their right to life, liberty, and the pursuit of happiness they had united as a community in a lawful purpose to confine their district to residential purposes. On these facts and conclusions are plaintiffs entitled to equitable relief?"

It is sufficient to state that the facts involved in the foregoing case are so different from the facts in this case that we do not consider that case as controlling.

In plaintiffs' complaint they inserted something regarding the blocking of the streets, etc.—that the blocking was expected to occur by reason of the holding of funerals. But the trial court did not enjoin the holding of funerals, and this appeal is not concerned with the subject of the blocking of streets.

The appellant cites Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490. The showing made by the plaintiffs in that case is more nearly parallel to the showing made by the plaintiffs in this case. In stating its views the Court of Chancery of New Jersey quoted from an English case, and at page 486 of 43 N. J. Eq. (11 Atl. 494) said:

> "In this case, then, we have the broad, yet perfectly perceptible or tangible ground or principle announced that the injury must be physical, as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or a refined fancy. This is very comprehensive; indeed, I cannot conceive of a more liberal or broad statement of the law; yet I apprehend it is a true delineation of the law."

And then at page 488 of 43 N. J. Eq. (11 Atl. 495) the court said:

"The results of my inquiries are that, while the defendant has no right to conduct his business so as to endanger or threaten the health of the complainant or to make his home uncomfortable, either by filling the air with noxious vapors, or of the germs or seeds of disease, the evidence does not show that he has done either, and that the business of an undertaker is not a nuisance per se."

That statement squares with our views as to the rights of the parties in this case.

No case has been cited to us in which the Supreme Court of California has considered the exact question involved in this case. However, the doctrine announced by the Court of Chancery of New Jersey has been announced and followed in California. The rule was followed and applied in Varney & Green v. Williams, 155 Cal. 318, 320, 100 Pac. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88, to the maintenance of billboards; in Judson v. L. A. Suburban Gas Co., 157 Cal. 168, 172, 106 Pac. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247, to the operating of a gasworks; and in People v. Selby Smelting & Lead Co., 163 Cal. 84, 92, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267, to the operation of a smelting plant.

If the particular acts enjoined in this case under the facts found can be legally enjoined, then it would seem to follow that for the very same reasons nearly every hospital in the land could be enjoined. We cannot believe such is the law.

The trial court found that the value of the plaintiffs' property for residential purposes will be depreciated. Such findings, standing alone, and not supported by other findings showing that the defendant is maintaining, or is about to maintain, a nuisance, will not support the judgment. In many instances in populous neighborhoods the property of one person is depreciated by the near proximity of the property of another. Such burdens are ordinary incidents to residence and ownership in a city. McCloskey v. Kreling, 76 Cal. 511, 512, 18 Pac. 433; Siskiyou Lumber, etc., Co. v. Rostel, 121 Cal. 511, 513, 53 Pac. 1118. Other points are discussed in the briefs, but in view of what has been said above, it is not necessary to discuss any other points.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

(55 Cal. App. 642)

GRAYDON v. DOANE. (Civ. 3460.)

(District Court of Appeal, Second District, Division 2, California. Dec. 13, 1921.)

1. Landlord and tenant ⚷291(13)—Evidence of rental value held sufficient.

In forcible entry and detainer, testimony that the rental value of the premises during June, July, and August was "in the neighborhood of, I should say, $150 a month," was sufficient to support a judgment for $300 based on a finding that the value of use and occupation "from May 17" to date of trial on August 19 was $300, though the finding was technically without support as to the period from May 17 to June 1.

2. Trial ⚷396(2)—Finding that plaintiff was not liable for rent held not responsive to pleadings.

In forcible entry and detainer, an averment in an amended answer to the effect that at the time of the forcible entry plaintiff was indebted to defendant in certain sums due as rentals for the premises, made merely to justify the entry, did not warrant court's finding that defendant was "not entitled to recover any further or other rentals for said premises from plaintiff under the existing lease thereon"; such finding not being responsive to the pleadings.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by McCullough Graydon against Julia Doane. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Clyde R. Burr, of Los Angeles, for appellant.

Walter L. Bowers, of Los Angeles, for respondent.

WORKS, J. This is an action in forcible entry and detainer. At the time of the forcible entry plaintiff was in possession of the entered premises as a tenant of defendant. Plaintiff had judgment and defendant appeals.

The cause was tried on August 19, 1920, and the trial court found that the value of the use and occupation of the premises from May 17, 1920, the date of the forcible entry, was $150 per month, that plaintiff was damaged by the detention of the property in the sum of $300, and that defendant was "not entitled to recover any further or other rentals for said premises from plaintiff under the existing lease thereon."

[1] The first point made by appellant is that there is no support in the evidence for the finding that the value of the use and occupation, from May 17, was $150 per month. A search of a portion of the reporter's transcript, which is printed in full as an appendix to appellant's brief, the appeal being under the alternative method, discloses the fact that plaintiff testified that the rental value of the premises in question during June, July, and August was "in the neighborhood of, I should say, $150 a month." This testimony does not cover the period from May 17 to 31, it is true, but we have made no further examination of the record for the purpose of ascertaining whether there is evidence elsewhere in it to cover that period. Granting, merely for the sake of argument,

that there is no such evidence, the fact that the finding is incorrect in so far as it refers to that period is immaterial, and the error, if there be any, is harmless. It is to be noted that the judgment for damages covers but 2 months at the rate of $150 each, while the time from June 1 to August 19, a period completely embraced within the testimony of the witness, is more than 2½ months.

[2] Appellant contends that there is no evidence to support the finding that defendant is not entitled to recover further rentals under the lease between the parties. We may concede the point, although we do not decide it. The finding is responsive to no allegation in the pleadings. There is an averment in the amended answer to the effect that at the time of the forcible entry respondent was indebted to appellant in certain sums due as rentals for the premises, but the allegation was made, as the context of the paragraph in which it is contained shows, merely by way of attempt, although a fruitless one (Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447; California Products, Inc., v. Mitchell, 198 Pac. 646), to justify the entry. The question whether appellant can collect "further" or any rentals under the lease was not in the case, and nothing on the subject was in fact carried into the conclusions of law. The judgment, however, does follow in terms the finding now in question, and disposition must be made of that part of the judgment before an affirmance may result.

Respondent has filed no brief in the case, and we therefore have been deprived of an aid to which we were entitled and which it was a dereliction on the part of counsel not to extend to us. We make particular mention of the circumstance because of the fact that the number of cases in which we are called upon to perform the labors of counsel, either in whole or in part, is truly alarming.

The judgment is modified by striking therefrom the following:

"It is further ordered, adjudged and decreed: That defendant do not recover from plaintiff any other or further rents under the existing lease on said premises."

As so modified the judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(55 Cal. App. 581)

HOWLAND v. MEXIMERICAN CO., S. A., et al. (Civ. 4008.)

(District Court of Appeal, First District, Division 1, California. Dec. 9, 1921. Hearing Denied by Supreme Court Feb. 6, 1922.)

1. Fraud 🔑31—Remedy available.

One who has been induced by fraud to enter into a contract may elect to rescind it by restoring whatever he has received, or may affirm it, retaining whatever advantage he may have acquired, and still have his action for damages for deceit, in which case the adverse party is entitled to the benefit of his bargain.

2. Fraud 🔑31—Party defrauded by compromise of pending suits not limited to restoration of suits but could sue for damages.

A party to pending suits who was induced to enter into a compromise agreement by fraudulent misrepresentations was not confined, in his remedy, to a restoration of the suits, even though the agreement provided that on other party's failure to comply with conditions, the suits might be restored to the calendar upon motion, but he could elect to affirm the agreement and sue for damages.

3. Fraud 🔑47—Complaint, in action for fraud inducing execution of compromise agreement pending suits, not demurrable for failure to allege plaintiff has entered satisfaction of suits.

In action for fraud, inducing execution of compromise agreement pending suits, failure to allege that plaintiff had entered satisfaction of the suits did not render complaint demurrable.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Fred G. Howland against the Meximerican Company, S. A., a corporation, and another. From judgment for defendants rendered upon an order sustaining demurrer to complaint, plaintiff appeals. Judgment and order reversed.

Pillsbury, Madison & Sutro, of San Francisco, and Carnahan & Clark, of Los Angeles, for appellant.

Goldman, Nye & Surr, of San Francisco, for respondents.

TYLER, P. J. This action was brought to recover damages for alleged false representations on the part of defendants, and for a breach of warranty made by them in connection with a certain compromise agreement in writing entered into by and between the parties hereto. A demurrer was interposed to an amended complaint, and this is an appeal from a judgment rendered upon an order sustaining such demurrer.

It appears from the complaint that prior to the time the compromise agreement was entered into plaintiff herein had filed and there was pending in the superior court of the county of Los Angeles, two suits involving a large sum of money which the parties hereto were desirous of settling. These actions were on the calendar for trial on November 2, 1917, and for the purpose of settling and adjusting all matters involved between them the parties hereto entered into the compromise agreement which is the basis of this action.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The agreement in substance provided that the Meximerican Company should convey and transfer unto plaintiff all the real, personal, and mixed property belonging to that company, including all of its interests in certain lands in the state of Sonora, Mexico, which had been acquired by the Meximerican Company by virtue of the assignment to it of two certain contracts relating to such land. By the terms of these contracts defendants had acquired a right to purchase the land from its then owners, Victor and Fernando Aguilar, upon certain conditions. Defendants agreed that they would at any time, upon request of plaintiff, execute to him such instruments of conveyance as would completely effectuate a transfer of their interests in such lands, and that they would also, within 60 days, procure and deliver the written acknowledgment of the Aguilars that they were able and willing to deed a portion of the tract, consisting of some 8,000 acres, for which it was represented to plaintiff the Aguilars had been fully paid, but which had not yet been conveyed to defendants. In consideration of the execution of this document plaintiff agreed that the pending suits heretofore referred to would be taken off the calendar, and in the event that defendants should secure the said acknowledgment of the Aguilars as to the payment to them of the purchase price of the 8,000 acres, plaintiff would enter a full and complete satisfaction of such suits. It was further agreed that upon failure of these requirements the suits might be restored to the calendar upon motion of plaintiff. Defendants failed to carry out the terms of the compromise agreement, and in consequence this action was brought.

The action, as before stated, is one to recover damages for false and fraudulent representations made to plaintiff by defendants at the time of the execution of the compromise agreement, and for a breach of a written warranty given to plaintiff by defendants at that time, and upon which representations and warranty it is alleged the plaintiff relied, and was thereby induced to enter into said agreement. These representations and warranty were to the same effect, namely, that there were at least 8,000 acres of land in the tract for which the defendants had paid the Aguilars, which had not yet been conveyed to the defendants or either of them by said Aguilars, and which the defendant the Meximerican Company, S. A., was entitled to have conveyed to it upon request without further payment or consideration therefor. It is charged that the defendants made the statements to deceive and defraud plaintiff, and that he was deceived thereby; that the 8,000 acres of land had not been paid for; that plaintiff had demanded of defendants and the Aguilars a conveyance of the land, and that each of them had refused to make such conveyance. Defendants demurred generally and specially to the amended complaint and to each count thereof, the said demurrer including practically all of the statutory grounds. Defendants contended below, and do here, that because of the fact that the compromise agreement provided that appellant might, upon respondents' default, restore to the calendar the suits heretofore referred to which were pending when the compromise agreement was entered into and which were dropped from the calendar in pursuance thereof, appellant is confined in his remedy to a restoration of these suits.

[1-3] The trial court adopted this view, and the demurrers were sustained upon the ground that as the parties thus had prescribed the consequences that would follow the breach of the agreement, plaintiff was precluded from invoking any other remedy. We are of the opinion that the trial court was in error in its conclusion. The principle is well established that where one has been induced by fraud to enter into a contract, that he may elect to rescind the contract by restoring whatever he has received under it, or he may affirm the contract, retaining whatever advantage he may have acquired and still have his action for damages for deceit practiced upon him in making the contract. Burne v. Lee, 156 Cal. 221, 104 Pac. 438; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; 12 Corpus Juris, 360; Hines v. Brode, 168 Cal. 507, 143 Pac. 729; Christensen v. Hamilton Realty Co., 42 Utah, 70, 129 Pac. 412. In such a case the purchaser is entitled to the benefit of his bargain. And there is nothing in the contract of the parties as claimed that prevents plaintiff from pursuing the remedy here sought. The mere recital in the compromise agreement that plaintiff might restore his suits has no such effect. This right the plaintiff would have had upon the failure of defendants to perform their agreement without any express stipulation to that effect. The provision simply confers a remedial right which in any event, and without the expression of which, the law would have implied in appellant's favor. Then, too, the right of plaintiff to be remitted to his original causes of action was one for his benefit which he might waive, and sue upon the compromise if he so desired. 12 Corpus Juris, 360. True, he may not pursue both remedies, but here plaintiff has elected to stand upon the compromise agreement instead of proceeding upon his original cause of action. His suit to recover damages for false representations and false warranties inducing him to enter into the compromise agreement constitute such election. Birkel v. Nast, 20 Cal. App. 651, 129 Pac. 945. Nor is this conclusion in any manner affected by the lack of allegation that plaintiff has entered satisfaction of the suits. As before stated, the pursuit of the remedy here invoked constitutes his election.

For the reasons given the judgment and order are hereby reversed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

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55 Cal. App. 498

HILL et al. v. JACQUEMART et ux.
(Civ. 3750.)

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1921. Hearing Denied by Supreme Court Jan. 30, 1922.)

1. Municipal corporations 🔑705(2, 10)—Automobile having right of way to cross street intersection does not have right of way to turn around; plaintiff not negligent where injured after defendant's car was completely turned at street intersection.

Where two automobiles were approaching a street intersection, the one nearer and approaching from the right, under St. 1919, p. 215, § 20, subd. f, had the right of way to cross the intersection, but, on turning around the central point and returning in the direction from which it had come, lost the right of way to the other automobile, which at that time was nearer the intersection, and entering the intersection by the other automobile was not contributory negligence, preventing recovery for damages.

2. Municipal corporations 🔑705(11)—Collision of automobiles held to be proximate cause of one automobile striking telephone pole.

Where two automobiles were approaching a street intersection and one turned completely around the central point at the intersection and started back in the direction from which it came and in so doing struck the rear fender of the other, immediately after which the other automobile became uncontrollable and hit a telephone pole, the proximate cause of its striking the telephone pole was being struck by the first automobile.

3. Negligence 🔑56(1) — "Proximate cause" defined.

The "proximate cause" of an injury is the efficient cause; the one that necessarily starts the other causes in motion; the moving influence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

4. Master and servant 🔑301(1)—Automobile owner not liable for wife's negligence.

A husband is not liable for negligence of his wife in managing his automobile kept for the use of the family.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Frank L. Hill and others against Achille Jacquemart and wife. From judgment for plaintiffs, defendants appeal. Affirmed as to defendant wife and reversed as to defendant Achille Jacquemart.

Redman & Alexander, of San Francisco, for appellants.

Ostrander & Carey, of Oakland, for respondents.

TYLER, P. J. This is an action to recover damages for injuries sustained to person and property as the result of a collision between two automobiles and between one of them and a telephone pole immediately thereafter. Judgment went for plaintiffs against both defendants, and the appeal is from such judgment.

[1] The accident occurred at the intersection of Russell street and College avenue in Berkeley. The first-named street runs approximately east and west, and the latter north and south. Plaintiff Nellie P. Hill was driving a Dodge automobile in an easterly direction along the southerly side of Russell street, and at the same time defendant Mrs. Achille Jacquemart was driving a Franklin sedan in a northerly direction along the easterly side of College avenue; both being headed toward the intersection of the two named streets. It was Mrs. Hill's intention, on reaching the intersection, to turn to her right and proceed southerly along College avenue. It was Mrs. Jacquemart's purpose, upon reaching said intersection, to turn completely around thereon and to stop in front of a garage situated on the westerly side of College avenue a short distance south of the intersection. Both vehicles were being driven at a lawful rate of speed, not exceeding 15 miles an hour. Mrs. Jacquemart entered said intersection and proceeded to circle the central point thereof. Mrs. Hill did not observe the maneuver until the Franklin car was about its length from her and heading in a southwesterly direction, and Mrs. Jacquemart did not observe the Dodge automobile until the two cars were about four feet apart. As Mrs. Jacquemart was making this turn she observed a third automobile approaching rapidly from the north, and for a moment was uncertain whether said automobile would continue along the westerly side of College avenue on which it was traveling, or swing over to the easterly side of said street, which it finally did, and thereupon Mrs. Jacquemart proceeded to complete her turn. It was at this moment that she first observed the Dodge automobile turning southerly on said intersection about four feet away, and she applied her brake for the purpose of preventing a collision. She did not succeed in doing so, and the end of the bumper on the right hand side of her automobile came in contact with the left rear fender of the car driven by Mrs. Hill, which at this moment was headed in a southeasterly direction a few feet from the curb on the southwest

corner of said streets. Seventy-six feet south of the southerly curb on Russell street there was a telephone pole situated between the curb on College avenue and the cement portion of the sidewalk; and immediately after the collision the speed of the Dodge automobile noticeably increased, and thereupon it was turned towards the curb on the westerly side of College avenue, and about midway between the point of said collision and the telephone pole its right wheels rode upon and over said curb, and the automobile continued astride of the curb until it struck the pole. Immediately thereafter Mrs. Jacquemart stated to Mrs. Hill that she (Mrs. Jacquemart) had tried to stop, but that she could not, as her foot slipped off the brake; and that she herself was to blame. It was this second collision which caused most of the damage suffered.

It is claimed by appellants that Mrs. Jacquemart, having originally had the right of way as the two cars approached the intersection of the main streets, she being nearer thereto than Mrs. Hill, never lost it, and was therefore entitled to the right of way while circling the central point of such intersection, and that the accident was due to the negligence of Mrs. Hill in entering this position while Mrs. Jacquemart was upon it; that in so doing she violated the provision of the Motor Vehicle Act governing the question of right of way at intersecting points. The provision referred to reads as follows:

> "Except where controlled by such traffic ordinances or regulations as are permitted under this act, the operator of a vehicle shall yield the right of way at the intersection of their paths to a vehicle approaching from the right, unless such vehicle approaching from the right is further from the point of intersection of their paths than such first named vehicle." Stats. 1919, § 20, subd. F, p. 215.

We do not think the provision invoked warrants or supports the claimed construction. If the driver of the Franklin car was nearer to the intersection, it may be considered that she had the right of way as between her and the driver of the Dodge car, provided she desired to proceed northerly across the intersection; but it certainly would be a strained and unreasonable construction of the law to hold that a person having the right of way upon entering an intersection continues to have it until he has passed out of the intersection notwithstanding a complete change of course of his vehicle. It is obvious in the present case that when Mrs. Jacquemart had so far completed her turn upon the intersection that she was to the left of the vehicle of Mrs. Hill, she no longer had the right of way, and that such right had then passed to Mrs. Hill. The construction contended for would not diminish but rather increase congestion in traffic, one of the objects which the statute was designed to prevent. One exercising a right of way under the circumstances here involved has several courses open to him to pursue. As suggested by counsel, he might turn to the right, proceed straight across, or turn to the left and proceed westerly, or he may make a complete turn. It is obvious, considering the width of some of our streets in the outlying districts, that the claimed construction would add to, rather than diminish, congestion in traffic. Aside from these considerations, if the Legislature had intended any such right it would have been a very simple matter for it to have said so.

[2, 3] The contention is also made by the appellants that the momentary contact of the two cars resulting from the negligence, if any, of Mrs. Jacquemart, was not the proximate cause of the damage resulting from the more violent collision between plaintiffs' automobile and the telephone pole. The proximate cause of an injury is the efficient cause; the one that necessarily starts the other causes in motion; the moving influence. Smith v. Los Angeles Railway Co., 98 Cal. 210, 33 Pac. 53; Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. Here the proximate cause of the injury was the collision occasioned by the negligence of Mrs. Jacquemart running her automobile into that of Mrs. Hill. Without this collision the impact of the telephone pole happening immediately thereafter would not have occurred. It would be difficult to arrive at the conclusion that there was any intervening negligence on the part of the driver of the Hill car, which had been struck and deflected from its course by the impact of defendants' automobile, with the consequent natural perturbation of mind of the driver of the car so struck, because within a second or two thereafter she had not regained complete control. The finding of the trial court that the negligence which produced the first collision was the proximate cause of the damage will not be disturbed by this court.

[4] The judgment, in so far as it affects Achille Jacquemart, cannot, however, be sustained. The theory upon which the trial court held him to be also liable for the plaintiffs' injuries is that of responsibility for the negligence of Mrs. Jacquemart by reason of the fact that the automobile driven by her was owned by him, and was driven by her with his knowledge and consent, and was kept and maintained by him for the use, comfort, and enjoyment of his family, these circumstances in some cases having been held sufficient to constitute a member of the family undertaking to use and drive the car, an agent of the husband or owner in so doing. But this basis of liability was negatived in the recent case of Spence v. Fisher (Sup.) 193 Pac. 255, 14 A. L. R. 1083.

It follows from what we have said that the judgment against Mrs. Jacquemart must be affirmed and that against Achille Jacquemart must be reversed, and it is so ordered.

We concur: KERRIGAN, J.; RICHARDS, J.

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55 Cal. App. 454

POWERS et al. v. HOLMES, Tax Collector, et al. (Civ. 2373.)

(District Court of Appeal, Third District, California. Nov. 30, 1921. Rehearing Denied Dec. 30, 1921. Hearing Denied by Supreme Court Jan. 26, 1922.)

Municipal corporations ⚷284(1), 304(4) — Resolution excepting work already done if satisfactory to street commissioner not a delegation of authority; description in resolution of street work to be done held sufficiently definite to authorize the work done.

Under Improvement Act 1911, § 3, providing that a city council may except from improvements ordered in streets any work already done to the official grade, and section 20, subd. 9, providing that when work is ordered on a street and any property owners have already done the work at their own expense that it shall be excepted from the order for the work if it is on the official grade "and in condition satisfactory to the street superintendent," a resolution of intention to make the street improvement excepting any part thereof already done to official line and grade and satisfactory to the superintendent of streets is not objectionable as rendering the description of the work uncertain or as a delegation of authority to the street superintendent, since he is not designated as arbiter and by section 26 his decision is subject to review by the city council.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Suit by Frank E. Powers and others against H. H. Holmes, as Tax Collector of the City of Vallejo, John Doe, and others. From judgment for defendants, plaintiffs appeal. Affirmed.

Frank E. Powers, of San Francisco, for appellants.

Heller, Powers & Ehrman, of San Francisco, Kirkbride & Gordon, of San Mateo, and Harry A. Gee, of Vallejo, for respondents.

FINCH, P. J. The plaintiffs sued to enjoin the sale of certain lots to satisfy an assessment for street work under the Improvement Act of 1911 (St. 1911, p. 730) and for the cancellation of bonds based thereon issued under the Improvement Bond Act of 1915 (St. 1915, p. 1464). The defendants' demurrer to the complaint was sustained and judgment was thereupon rendered in favor of defendants.

The only point involved is whether the resolution of intention to make the street improvement was sufficient to confer jurisdiction to order the work done. The attack is upon that part of the resolution which, after describing the proposed work, continues as follows:

> Excepting from said work and improvement any part thereof already done to official line and grade *and satisfactory to the superintendent of streets of said city of Vallejo.*"

It is argued that, by reason of the italicized part of the exception quoted, the resolution "does not describe with certainty the work to be done thereunder" and delegates to the street superintendent the determination of "the extent of the work to be done." The statute provides, in section 3, that—

> "The city council may include in one proceeding, under one resolution of intention and in one contract, any of the different kinds of work mentioned in this act and any number of streets and rights of way or portions thereof [contiguous or otherwise] and it may except therefrom any of said work already done upon a street to the official grade."

Subdivison 9 of section 20 provides:

> "Whenever any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do any work (excepting grading) on such street, in front of any block, at his or their own expense, and the city council shall subsequently order any work to be done of the same class in front of the same block, said work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done, provided, that the work so done at the expense of such owner or owners, shall be upon the official grade, and in condition satisfactory to the street superintendent at the time said order is passed."

The statute itself is a part of the notice (Emery v. S. F. Gas Co., 28 Cal. 377), and it is not perceived in what manner the inclusion in the resolution of intention of the statutory provision, which is a part of the resolution without such inclusion, can render the description of the work uncertain or constitute a delegation of authority to the street superintendent.

The resolution is not uncertain as to the work to be done or that to be excepted. Before any work can be excepted, it must, of course, be of the same character as that proposed (Barber Asphalt Paving Co. v. Crist, 21 Cal. App. 3, 130 Pac. 435), and must be "done to official line and grade." The resolution evinces no intention of authorizing the street superintendent to exercise any discretion or to permit the exception of any work not measuring up to the express standard fixed by the council. "Whether any portion of the work authorized under the resolution of intention had been 'already done,' as well as the extent to which it had been done, was a question of fact, to be determined by the superintendent of streets, subject to the right of appeal to the city council on the part of any one aggrieved by his determination." San Francisco Paving Co. v. Dubois, 2 Cal. App. 44, 83 Pac. 73. See, also, McDonald v. Conniff, 99 Cal. 389, 34 Pac. 71; Perine v. Erzgraber, 102 Cal. 237, 36 Pac. 585; San Francisco Paving Co. v. Egan, 146 Cal. 638, 80 Pac. 1076. In Reid v. Clay, 134 Cal. 212, 66 Pac. 264, the improvement was described as being "for laying granite curbs * * * where not already laid, and that the roadway * * * be paved with bituminous rock, where not already so paved." The court said:

> "It is claimed that this was a delegation of power to the street superintendent or contractor to determine the character and amount of the work to be done. * * * But here nothing is left to the discretion of the superintendent. The parts of the street to be excepted are definitely described by reference to unmistakable marks on the ground. Accordingly, precisely similar assessments have been repeatedly sustained by this court."

In Williams v. Bergin, 116 Cal. 59, 47 Pac. 878, where a similar description was under consideration, the court said:

> "Whether granite curbs had been laid on any part of the street, or any part of the roadway had been paved with basalt blocks, as well as the extent thereof, was capable of exact ascertainment, and did not depend on the arbitrament or discretion of the superintendent of streets. If the assessment should include any expense for paving, or for curbs that were laid at the date of the order, it could be corrected on an appeal therefrom."

The resolution of intention does not designate the street superintendent as arbiter in the determination of what work had been done in accordance with the proposed improvement, but, under the provisions of section 26 of the statute, his decision is subject to review by the city council. Neither is vested with any discretion in determining the character of the work already done, but their sole function is to ascertain as a fact the extent and character of such work.

Respondents urge that since there is no allegation by plaintiffs that "work has already been done in front of their property, * * * the notice was as complete to them as it would have been without the reference to the street superintendent," and that therefore they are in no position to complain. In view of the conclusion reached on the main question in dispute, it is not necessary to consider this contention. In the oral argument, counsel for appellants said:

> "If the city council acquired original jurisdiction to order this work, then I am out, because any defect in the proceedings after original jurisdiction was acquired, whether through illegal enactments made by the Legislature or through the omission of proceedings—statutory proceedings—have been cured through the issuance of the bonds."

Having reached the conclusion that the city council acquired such jurisdiction, the case must be decided against appellants.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

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55 Cal. App. 653

LEE v. DAY. (Civ. 2360.)

(District Court of Appeal, Third District, California. Dec. 14, 1921.)

Judgment ⚿256(2)—**Findings held sufficient to sustain judgment.**

A finding "that each and all the allegations set forth in plaintiff's complaint are not true," followed by the finding "that all the allegations contained in defendant's answer are true," sufficiently supported a judgment for defendant as against the contention that there was no finding that "no one" of the allegations of the complaint was true.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Dick Lee against J. J. Day. Judgment for defendant, and plaintiff appeals. Affirmed.

P. H. Johnson, of Sacramento, for appellant.

Lowell, Lowell & Lowell, of Auburn, for respondent.

FINCH, P. J. The only ground presented for reversal is that the findings "are insufficient to sustain the judgment."

The complaint contains three allegations: (1) That the defendant had received a certain sum of money "to and for the use of the plaintiff." (2) That plaintiff had made demand for the same. (3) That the defendant had not paid the money to the plaintiff. The answer denied the first allegation and, by failure to deny, admitted the others.

The appellant quotes the finding attacked as follows: "That all the allegations set forth in plaintiff's complaint are not true"—and argues that this is not a finding that "*no one* of the allegations of the complaint is true, but the finding is as to all collectively; that *all* are not true." The respondent has failed to file a brief or argue the question raised by the appeal. Appellant, however, has fallen into error in quoting the finding. The finding contained in the transcript is as follows: "That each and all the allegations set forth in plaintiff's complaint are not true"; then follows the finding "that all the allegations contained in defendant's answer are true."

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In McLennan v. Wilcox, 126 Cal. 52, 58 Pac. 306, the finding claimed to be insufficient was as follows: "That each of the averments of the answer are not true." The court held the finding to be sufficient. While the use of the word "untrue" would have been more appropriate than the words "not true," the criticism of the finding of which complaint is made is somewhat hypercritical, and under the authoritiy of the case cited the finding must be held sufficient.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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55 Cal. App. 601

CASO v. KEBONI et al. (Civ. 3568.)

(District Court of Appeal, Second District, Division 2, California. Dec. 12, 1921.)

1. Damages ⚷159(5)—Income of truck driver injured in collision held admissible in action for personal and property damage.

In an action based on a collision between plaintiff's truck and defendant's truck, for injuries both to the person and to the truck, wherein it was alleged and denied that plaintiff lost the use of his truck for 10 days, court properly permitted plaintiff to testify as to how much he was earning with his truck at the time of the accident.

2. Municipal corporations ⚷706(8)—Instruction as to rights of truck driver at street intersection held properly refused.

In an action for damages occasioned by collision of motor trucks, court properly refused defendants' request to instruct "that, if you should find * * * that the defendants, * * * in turning to the left, * * * had the right of way over any vehicle approaching him from the left while he was making such turn, and if * * * defendants * * * were turning into the intersection of the streets, * * * then they had the right to maintain possession of the crossing until they had completed their turn, and if the plaintiff entered said intersection while it was then being used by the defendants, * * * such entrance would be negligence," since one entering upon a street intersection does not have the exclusive control of the entire area.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by F. Caso against K. Keboni and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

J. H. Ardis, Dailey S. Stafford, and W. S. Knott, all of Los Angeles, for respondent.

CRAIG, J. The action is one for damages for injuries to the person sustained in a collision between the plaintiff's truck and the truck of the defendant, and also for damages resulting to the plaintiff for the loss of the use of his truck for a period of 10 days. Defendant answered, and alleged contributory negligence on the part of the plaintiff. Among other denials is one "that plaintiff has lost the use of said truck for a period of 10 days," etc. From a verdict and judgment in favor of the plaintiff, the defendant appeals.

[1] Two grounds are presented by appellant's brief. The plaintiff was a witness in his own behalf. He was asked the following question:

> "Mr. Caso, how much money were you earning with your truck at the time of this accident?"

Counsel interposed an objection, on the ground that the question was immaterial. The objection was overruled, and the witness answered that he was earning "$10 or $12 or $20 a day." The question and answer were clearly material to the issue presented by the complaint and the denial contained in the answer above quoted.

[2] The defendant requested the court to give the following instruction:

> "You are instructed that, if you should find from the testimony that the defendants, at the time of the accident, in turning to the left on Long Beach boulevard, had the right of way over any vehicle approaching him from the left while he was making such turn, and if you should find that the defendants had entered said intersection and were turning into the intersection of the streets involved in this accident, then they had the right to maintain possession of the crossing until they had completed their turn, and, if the plaintiff entered said intersection while it was then being used by the defendants under the circumstances just mentioned, such entrance would be negligence, and, if you find that this negligence contributed in any degree to the plaintiff's injury, then your verdict shall be for the defendants."

This the court properly refused to do. If this instruction were a correct statement of the law, one entering upon a street intersection would, without regard to any other consideration, have the exclusive control of the entire area of the intersection until he had passed therefrom, and any other vehicle entering any portion thereof would do so at its peril. The principal issue presented by the evidence was as to whether or not the defendant in making a turn at the street intersection in question was proceeding upon his right or his left hand side. The appeal is without merit.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

55 Cal. App. 672

W. J. BUSH & CO. v. VAN CAMP SEA FOOD CO. (Civ. 3744.)

(District Court of Appeal, Second District, Division 1, California. Dec. 15, 1921.)

1. Sales 🔑261(5)—Statement as to quality of peach kernel oil held opinion and not warranty.

Where peach kernel oil was sold to a company desiring to use it for packing sardines, and the salesman stated that for the purchaser's purpose the oil was "equal to the best grades of imported olive oil," *held*, that such statement was a mere opinion and not a warranty.

2. Sales 🔑181(12)—Finding that peach kernel oil sold was of reasonably good quality sustained.

In an action by the seller of peach kernel oil to a sardine packer for damages for failure to accept the oil furnished, a finding that the oil was of reasonably good quality *held* supported by the evidence.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by W. J. Bush & Co. against the Van Camp Sea Food Company for damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Kemp & Clewett, of Los Angeles, and Patterson Sprigg, of San Diego, for appellant.

Wright & McKee, of San Diego, for respondent.

JAMES, J. This action was brought by the plaintiff to recover damages from the defendant for an alleged breach of contract. Plaintiff had judgment, from which defendant appeals.

It is alleged in the complaint that on the 15th day of August, 1918, defendant entered into a written contract with the plaintiff whereby the plaintiff agreed to sell, and the defendant to buy, 50,000 pounds of oil manufactured from peach kernels at a price of 36 cents per pound; that defendant accepted 4,800 pounds of the oil and refused to accept any more; that the oil manufactured to fill defendant's order was not resold; and that the value of the oil to the plaintiff was 29 cents per pound. The difference of 7 cents per pound for the unaccepted part of the oil ordered was claimed as damages, according to the measure fixed by section 3311, Civil Code. The trial court found that the value of the oil to the plaintiff was 31 cents per pound, and calculated damages accordingly at 5 cents per pound. Upon defendant's part, the answer alleged that the oil was sold under representations that it was suitable for canning fish and sardines for human consumption, and that for such purpose it was equal to the "best grades of imported olive oil." Under this allegation defendant claimed an express warranty was made. In this connection, and as supporting that defense, there was testimony tending to show that some of the oil delivered contained stearine, which, expressed in ordinary terms, was congealed vegetable fat appearing as white particles in the oil. The appellant insists that the defense of a particular warranty was completely made out by the evidence.

We will refer first to the evidence as to the circumstances under which contract was made, and the terms of the latter. It may be stated that it must be taken as established under all the evidence that peach kernel oil, of fair quality and free from stearine, is fit for human consumption and altogether suitable for use in the packing of sardines, which was the use to which the defendant intended to put it. The presence of stearine would be detrimental only as it affected the appearance of the oil. On August 7, 1918, the agent of the plaintiff, in response to previous inquiry, wired to the defendant a quotation of 36 cents per pound on peach kernel oil. On the same day the same agent addressed a letter to the defendant, confirming the quotation made in the telegram, and adding the following statement:

> "Peach kernel oil or fruit kernel oil, as some of the packers call it, is the same as the sample I left with your Mr. Van Camp last year, and on which I quoted him. This is being used very successfully by a large number of the fish packers, and while we have been compelled to raise our price some on account of the price of raw material advancing, when you take into consideration the quality of the oil, which I believe for your purpose is equal to the best grades of imported olive oil, it is still low."

On August 9th the defendant wired to plaintiff's agent as follows:

> "Enter our order fifty thousand pounds peach kernel oil price terms your wire August seventh confirm."

This order was acknowledged and confirmed by letter from plaintiff's agent dated August 9th, in which it was stated:

> "As per your instructions I have entered your order for 50,000 lbs. or 125 drums at 400 lbs. each, to be taken as wanted up to January, 1919, terms to be net cash in 10 days. * * * You will note that I have given you until January to draw this oil. I believe the factory can deliver it all at once if you so wish."

A letter from the defendant was received by the plaintiff in response to the last communication, in which defendant requested that a contract be forwarded covering the order. Such a contract was prepared under date of August 15, 1918, providing for deliveries to end December 31, 1918, and stating the price to be 36 cents per pound for 50,000 pounds, describing the merchandise simply as "oil peach kernels." Referring first to the claim that there was a representation and, consequently, a warranty that the oil to be furnished would be equal to the best grades of imported olive oil: We think the conditions surrounding the transaction do not justify this claim. The letter of the agent which followed the telegram quoting the price referred to a sample of oil left with Mr. Van Camp the preceding year, and expressed the opinion of the writer only that the oil for the purpose intended was equal to the best grades of olive oil. This opinion was expressed in connection with the statement as to an advance in price of the commodity. The statement was made, too, with the qualification that the oil was of the kind shown by sample previously left with Van Camp, who was at the head of defendant's establishment. Defendant, in the evidence furnished by it, made no denial as to its having been furnished a sample of kernel oil as stated in the letter. If it did in fact receive such a sample, then, irrespective of other considerations, it would have not the slightest ground for relying upon the opinion of the plaintiff's agent that the oil was equal to the best grade of olive oil for fish packing purposes. The packing of fish was the business of the defendant, and it was better able to determine the suitability of oil for its purposes than was the plaintiff.

[1] However, even without reference to the statement concerning the sample having been furnished, the expression comparing the product to olive oil expressed a mere opinion, and could by no means be relied upon as a warranty. The trial court then had to determine, first, as to whether the peach kernel oil offered to be furnished by the plaintiff under its contract with the defendant was of reasonably good quality. In the manufacture of that oil it was common to find congealed portions which showed white in the liquid. A filtering process was used in connection with the production of the oil and, as the testimony showed, the greater part of the congealed portions was capable of being taken out. The filtering process was shown to have been made use of by the plaintiff, although it was admitted that occasionally a defective filter might permit some of the oil to retain a greater amount of stearine than other portions. Up to nearly the end of the year 1918 the defendant had required but little of the oil which it had contracted should be all delivered by the end of December of that year. The fact is made clear by letters written by the defendant to plaintiff that the run of sardines had been sparse and consequently the cannery of the defendant had had little occasion for use of the oil. Some few drums had been furnished and accepted. On the 16th of November, 1918, the defendant wrote to the plaintiff as follows:

> "Referring to our contract of August 15th for peach kernel oil, we are inclined to think that it will be necessary for us to either cancel or materially reduce the quantity as the season is now far advanced and we are not receiving any sardines at all. We therefore suggest that you make an effort to sell elsewhere at least half or two-thirds of the quantity covered by our contract."

To this letter the plaintiff replied, stating that in order to be prepared to fill the order given by the defendant it had purchased many tons of kernels and that the greater part of the oil was then ready to be shipped, adding:

> "We regret therefore that we cannot cancel the order or reduce the quantity we have to deliver to you. We might also add that we have a large stock of our own oil to dispose of."

On December 12th the defendant wrote to the plaintiff, stating that the fish had been "running in a small way for the past week," and that it might be able to use the oil during the winter and spring if plaintiff would carry the stock for it. On December 31st plaintiff wrote to the defendant as follows:

> "We beg to inclose herewith invoice for 48,000 lbs. of oil which we are holding at our factory at National City and shall be glad to have your shipping instructions for same. This is in completion of contract dated August 15, 1918."

In January defendant requested 5,000 pounds of oil to be shipped, and on February 5th began to complain about the quality, stating that the appearance of stearine made it unsuitable for the intended use. From this time on the defendant continued to insist that the oil was not of good quality nor in accordance with the terms of the contract, and refused to accept the same, and expressed its rescission of the contract for that cause. A number of drums of oil which defendant returned to the plaintiff as containing a large amount of stearine, according to the testimony of the plaintiff's witness, contained but little, and that in certain of the drums only. The plaintiff at no time refused to furnish clear oil in lieu of oil in which an excessive amount of stearine was present. This according to its testimony, which the court had before it in making up a decision.

[2] We have suggested enough as to the situation respecting the testimony to show that there was a fair conflict of the evidence upon the question as to whether the oil furnished was of reasonably good quality. The trial judge resolved the question of fact in favor of the plaintiff as to that matter, and with that determination the defendant must be content. Nor are we inclined to agree with appellant that the amount of damage for which judgment was allowed is not supported by the evidence. There was testimony to show that the plaintiff was the only business concern engaged in manufacturing kernel oil

in the United States; that there was no regular or constant market for the product. It was shown that plaintiff purchased raw material in anticipation of its requirements in order to fill the order of the defendant, and that at the time of the refusal of the defendant to accept more oil it had on hand a great deal more than enough oil to complete this order. There was testimony from which the court could reasonably conclude that this oil manufactured for the defendant could not readily be disposed of at the time of the attempted rescission. Plaintiff certainly was not called upon to dispose of oil contracted for by the defendant in preference to other oil in stock and which it had intended for the general market. Without narrating any considerable part of the testimony to the point, we think it sufficient to state further that, in our opinion, there was enough evidence as to conditions and circumstances concerned in the manufacture of kernel oil and as to the market to warrant the trial judge in deducing, as he did, that the value of the oil to the plaintiff was the sum of 31 cents per pound. Agreeing with that conclusion, it follows that the amount of damage was correctly estimated at the sum which is fixed by the judgment. At to whether there was error in the admission of any of the testimony is not important to be discussed, because on the whole case we are well satisfied that any such error as is complained of was not so prejudicial as to have produced in this case a miscarriage of justice. Section 4½, art. 6, Const. Cal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

55 Cal. App. 260

HIND et al. v. UCHIDA TRADING CO., Limited. (Civ. 4019.)

(District Court of Appeal, First District, Division 2, California. Nov. 18, 1921. Hearing Denied by Supreme Court Jan. 16, 1922.)

1. Partnership ⚷64—Affidavit of publication of certificate received without objection sufficient evidence thereof.

Under Civ. Code, §§ 2466, 2468, requiring partners doing business under a fictitious name to file and publish a certificate where an affidavit showing a publication of the certificate with the county clerk's filing mark thereon was received in evidence, and no objection was made to the proof of publication, it may be taken for granted that this was a full compliance with the statute.

2. Partnership ⚷64—Not necessary that copy of certificate offered to show publication should contain acknowledgment.

Under Civ. Code, §§ 2466, 2468, requiring partners doing business under a fictitious name to file and publish a certificate, it was not necessary that a copy of the certificate offered in evidence for the purpose of showing publication should contain the acknowledgment; that being no part of the certificate and not being required to be published.

3. Evidence ⚷83(4)—Presumed that county clerk did not accept partnership certificate for filing unless acknowledged.

Where an affidavit showing a publication of the certificate required by Civ. Code, §§ 2466, 2468, in the case of partnership using a fictitious name, with the county clerk's filing mark thereon, was received in evidence, the presumption is justified, in the absence of any evidence to the contrary, that the county clerk regularly performed his duty and did not accept for filing a certificate not acknowledged as required by the Code.

4. Evidence ⚷450(8), 461(1) New trial ⚷89—Evidence properly admitted as to intention of parties when contract uncertain, and such evidence was no basis for surprise.

A contract for the sale of tin plate to be packed in tin-lined boxes, strapped for export for "$9.60 per base box * * * cost, insurance and freight to Kobe, Japan," was uncertain as to whether cost, insurance, and freight to Japan included the cost of tin lining and strapping, or whether the seller was entitled to charge extra therefor, and evidence to ascertain the intent of the parties were admissible, and defendant could not have been surprised by its admission.

5. Interest ⚷19(2)—Recoverable on overpayments when time of payments but not amount was in dispute.

In an action to recover overpayments on a contract where there had never been any dispute as to the amount of the payments, the only dispute being as to whether they were due, interest was recoverable under the general rule that interest is allowable from the time a sum becomes due if it is certain or can be made certain by mere calculation.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by George U. Hind and another, copartners doing business as Hind, Rolph & Co., against the Uchida Trading Company, Limited. From a judgment for plaintiffs, defendant appeals. Affirmed.

Crabbe, Webster & Mayer, of San Francisco, for appellant.

Ira S. Lillick, of San Francisco, for respondents.

NOURSE, J. Plaintiff sued on a complaint setting forth two causes of action: (1) An action for money paid to defendant under a mistake; and (2) a common count for money had and received. Judgment was given plaintiffs in the sum of $2,520 and defendant appeals. The judgment is attacked upon the ground that the evidence is insufficient to support the findings. Error is also assigned in the admission of certain evidence and in the denial of the motion for a new trial.

As to the sufficiency of the evidence, two assignments require consideration: (1) the finding on the question of respondents' legal capacity to sue, and (2) the finding that the money was inadvertently paid to appellant.

[1-3] As to the first, the complaint alleged compliance with the provisions of sections 2466 and 2468 of the Civil Code. This was denied by the defendant. An affidavit showing a publication of the certificate with the county clerk's filing mark thereon was received in evidence. No objection was made to the proof of publication and it may be taken for granted that this was a full compliance with the terms of the statute. It is, however, argued that the certificate itself is insufficient because it does not show an acknowledgment, and also that it was not shown to have been filed. The proof was that the original certificate was filed in the office of the county clerk of San Francisco in 1898 and that the original was destroyed in the fire of 1906. It is true that the copy of the certificate which was offered in evidence did not contain the acknowledgment by the parties. It was not necessary that it should do so for the purposes of publication as the acknowledgment is no part of the certificate and the certificate alone is required to be published under section 2468. Proof might well have been offered that the original certificate was duly acknowledged, but in the absence of any evidence to the contrary the trial court was justified in invoking the presumption that the county clerk regularly performed his duty, and that therefore he did not accept for filing a certificate which was not acknowledged as required by the Code.

[4] As to the finding on inadvertent payment, the evidence presents a clear conflict which the trial court was called upon to determine. The finding of the court on that issue cannot be disturbed upon appeal. The case of respondents was that, having entered into a written contract with appellant for the purchase of a large quantity of tin plate, they had paid four separate invoices on the request of appellant before they discovered that these invoices included charges for extras which they claim were included in the contract price. Their protest and demand for the return of these overpayments was refused by appellant, and it is these overpayments which are the subject-matter of this litigation. The contract contained specifications that the boxes in which the tin plate was to be packed should be tin lined and strapped for export. The price was designated as "$9.60 per base box (112 sheets —14x20—100 lbs.) cost, insurance and freight to Kobe, Japan." The dispute between the parties arose over the question whether cost, insurance, and freight to Japan included the cost of tin lining and strapping specified in the contract, or whether the seller was entitled to charge extra for that work. That the contract was uncertain in this respect admits of no doubt. The trial court received evidence for the purpose of ascertaining the intention of the parties. This evidence was in conflict, and the trial court resolved the doubt in favor of respondents. No error was committed by the trial court in receiving this evidence and appellant could not have been taken by surprise when it was admitted.

As to the denial of appellant's motion for a new trial it is sufficient to say that the showing on the motion added nothing to what had been before the court at the trial, and no error was committed in this respect.

[5] Appellant also attacks that portion of the judgment which allows interest on the amounts recovered from the date of the so-called overpayment. There had never been any dispute as to the amounts of these respective payments, and this was admitted at the time of the trial. The only dispute between the parties was whether the amounts so paid were due. "The general rule is that interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation." Gray v. Bekins, 199 Pac. 767.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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55 Cal. App. 541

KEARNEY v. CASTELLOTTI. (Civ. 3997.)

(District Court of Appeal, First District, Division 1, California. Dec. 6, 1921. Hearing Denied by Supreme Court Feb. 2, 1922.)

1. Municipal corporations 🔑706(5)—Finding of negligence of driver cutting corner at speed of 15 miles an hour held warranted.

Evidence that the driver of a motor truck turned into a heavily traveled thoroughfare at an obstructed corner at a speed of 15 miles an hour, without passing beyond and to the right of the intersection, warranted a finding that he was guilty of negligence.

2. Municipal corporations 🔑706(7)—Motorcycle rider not negligent as matter of law in not adopting best means of avoiding collision.

Where the driver of a motor truck turned into a street at a speed of 15 miles an hour without passing beyond and to the right of the intersection, and was thus on the left-hand side of the street, a motorcycle rider meeting the truck was not negligent as a matter of law in veering to the left and proceeding approximately parallel with the truck in an attempt to avert a collision instead of turning into the intersecting street which would have proved to be the better alternative.

3. Negligence ⚿72—Care required in emergency.

One in great peril, when immediate action is necessary to avoid it, is not required to exercise all the presence of mind and carefulness justly required of a careful and prudent man under ordinary circumstances, but is only required to do what seems reasonable under the circumstances known to him.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by William J. Kearney, by S. Kearney, his guardian ad litem, against J. B. Castellotti. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles E. Snook and Snook & Brown, all of Oakland (F. P. Tuttle, Jr., of Auburn, of counsel), for appellant.

Augustin Donovan and Homer R. Spence, both of Alameda, for respondent.

TYLER, P. J. This is an appeal by defendant from a judgment in favor of plaintiff for the sum of $3,000, in a case brought to recover damages for personal injuries sustained as the result of a collision between the motorcycle ridden by plaintiff and a motor truck driven by the defendant. The case was tried by the court sitting without a jury. The injuries to plaintiff were of a serious nature, consisting of a cerebral concussion, a fracture of the skull, lacerations and severe contusions of the face and mouth, loss of teeth, and internal and permanent injuries.

The collision occurred at or about the intersection of Forty-Seventh street and Telegraph avenue in Oakland. The first-named street runs in a general easterly and westerly direction terminating in Telegraph avenue, and is 36 feet wide from curb to curb. Telegraph avenue pursues a general northerly and southerly course, and has a width of 60 feet. Constructed upon it are two street car tracks, the nearer of which to the westerly curb of the avenue is about 20 feet therefrom. At the northwest corner of the intersection of these two thoroughfares there is a two-story building adjacent to other structures, and the district generally is fairly closely built up.

On the 21st day of July, 1919, in the morning, the defendant was driving an empty auto truck in an easterly direction on the south side of Forty-Seventh street and turned into Telegraph avenue, intending to proceed northerly thereon. At the same time the plaintiff was proceeding down Telegraph avenue in a southerly direction upon his motorcycle, pursuing a course about 9 feet from its westerly curb. The driver of the truck, in turning into Telegraph avenue, gave no signal of his intention so to do, and he also failed to pass to the right of and beyond the center of the intersection of the two streets before making the turn to the left; in other words, "cut the corner." In this respect the testimony is uncontradicted. He himself said that he went to the left of the center because it was hard to go straight through on the south side of the intersection and then turn the truck abruptly. He testified: "I swung to the left because it was the easiest to go in" on Telegraph avenue. The collision occurred at a point about 20 feet north of the center of the intersection (being about 3 feet north of the north line of Forty-Seventh street projected), and about 5½ feet west of the median line of the avenue. When the truck came out of Forty-Seventh street it was traveling, according to the testimony of the plaintiff, at the rate of about 15 miles an hour, he himself at that moment being from 45 to 70 feet north of the intersection and proceeding at a speed, as variously estimated by witnesses, of 8, 12, or 15 to 17 miles an hour. Both drivers, appreciating the danger, applied their brakes; but neither succeeded in coming to a stop before the impact. The plaintiff also testified that there was no sufficient room to pass to the rear of the truck, so he veered to the left; that his motorcycle did not skid and fall under the truck, but that he was struck in the rear by some part of the front of the truck.

[1-3] To recapitulate, according to the evidence introduced by plaintiff, defendant entered a heavily traveled thoroughfare at an obstructed corner from the left-hand (wrong) side of Forty-Seventh street at a speed of 15 miles an hour. It is clear, we think, that this evidence sustains the finding of the court that defendant was guilty of negligence. Indeed, he does not contend to the contrary, but claims that from the uncontradicted evidence it is established as a matter of law that the plaintiff was guilty of contributory negligence which should bar his recovery. This contention is based upon the theory that respondent was traveling at an excessive rate of speed in approaching the crossing, and upon the further contention that plaintiff had abundant time to have slowed down sufficiently to have passed to the rear of the truck or to have turned to the right into Forty-Seventh street, and have thus avoided the collision. We think under all the circumstances of the case that these were questions of fact for the trial court to determine. The evidence in regard to speed was conflicting, but it is sufficient to sustain the finding of the trial court that respondent was traveling at a moderate rate of speed. It may be that the wiser course would have been for the plaintiff, if he could not have stopped his motorcycle in time to avoid the collision, to have turned into Forty-Seventh street; but he was not bound at his peril to adopt what

later would have proved to be the better alternative, and whether or not he was guilty of negligence in veering to the left and proceeding approximately parallel with the truck for a short distance in an attempt to avert the collision was not a question of law, but, as before stated, a question of fact for the court or jury. One in great peril, when immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. Tousley v. Pacific Electric Railway Co., 166 Cal. 457, 137 Pac. 31.

In such a situation plaintiff was only required to do what seemed reasonable under the circumstances known to him, and the reasonableness of his effort to avoid the injury after discovery of the danger is a question of fact. It follows, in our opinion, that the judgment should be, and it is, hereby affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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55 Cal. App. 425

FINKLE v. TAIT et al. (Civ. 3726; L. A. 6755.)

(District Court of Appeal, Second District, Division 1, California. Nov. 29, 1921. Hearing Denied by Supreme Court Jan. 26, 1922.)

1. Municipal corporations 🔑706(6)—Evidence held insufficient to take negligence of automobilist to jury.

In an action for death of a pedestrian struck by automobile at a street intersection, evidence *held* insufficient to take to jury question of negligence of driver.

2. Trial 🔑171—Right to direct verdict in case tried by jury.

If, on the conclusion of the taking of the evidence, it appears to a trial judge that a case for the plaintiff has not been made out, it is his duty to direct a verdict, unless it reasonably appears that on another trial the plaintiff may be able to secure better evidence, under Code Civ. Proc. § 2061.

On Hearing in Supreme Court.

3. Municipal corporations 🔑705(10)—Pedestrian, killed by automobile, held guilty of negligence.

A pedestrian, carrying a box of raisins, run down and killed at a street intersection by an automobile in the nighttime, with proper lights, while going at a speed of 15 miles an hour, was negligent, since he either failed to look for automobiles, or saw the automobile and carelessly walked in front of it, or carried the box of raisins so that it obscured his vision.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Charlotte Finkle, as administratrix of the estate of Nathan Finkle, deceased, against Jessie Tait and others. Judgment for defendants, and plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Turnbull, Heffron & Kelley, of Los Angeles, for appellant.

Chandler P. Ward and Stephens & Stephens, all of Los Angeles, for respondents.

JAMES, J. The husband of Charlotte Finkle was struck by an automobile which was being operated by Georgia Tait, receiving injuries from which he died almost immediately. The administratrix of his estate brought this action to recover damages, alleging that the automobile which caused the death of Finkle was at the time being operated in a negligent manner and at a dangerous and excessive rate of speed. After hearing the testimony of the witnesses for plaintiff and defendants, the trial judge advised the jury to return a verdict in favor of the defendants, which verdict was thereafter recorded and judgment entered thereon. The plaintiff has appealed, and the question presented is as to whether the action of the trial court in requiring the verdict to be rendered as indicated was error. It is insisted that there was substantial evidence tending to show negligence on the part of the operator of the automobile and that the evidence did not show that the injuries received by Finkle were produced or contributed to by any careless or incautious conduct on his part. The position of the defendants, as contended for, is that the evidence failed to establish negligence on the part of the driver, and did show that the accident was produced through the contributory negligence of Finkle. Mrs. Jessie Tait is the mother of Georgia Tait, and it was admitted that she would be legally responsible for any damage which might be shown to have been caused by her daughter Georgia through the operation of the automobile which collided with Finkle. For convenience we will hereinafter, when discussing the evidence affecting the operation of the automobile, refer to Georgia Tait as though she were sole defendant.

[1, 2] Hollywood boulevard, in the city of Los Angeles, is a wide street extending in an easterly and westerly direction. On the northerly side of it Ivor street emerges, but is not cut through the southerly line of the boulevard. The accident happened at a point on Hollywood boulevard on the southerly side thereof, and about in the space which would be occupied by the westerly sidewalk of Ivor street, had it been projected across the boulevard. The testimony of Georgia Tait, who was operating the car on the night in question, shows that on the 26th

day of November, 1919, at about the hour of 5:30 or 6 o'clock p. m., she was driving a touring car, accompanied by a young lady friend, easterly along Hollywood boulevard; that she was on the right-hand side of the street, between the car tracks and the curb; that it had been raining that afternoon, and that portions of the street were dry and portions wet; that it was fairly dark; that her car was equipped with headlights of usual character, and that they were lighted. The witness stated, in answer to a question, that the headlights illuminated the street ahead of her car for more than 10 feet. In that connection she said, "I know that my headlights were very good, and I could see a great distance"; that she had, after crossing a street at the westward of the point where the accident occurred, shifted her machine into high gear, and that she noticed ahead of her a white object, which was shown to be a box carried upon the shoulders of Finkle; that at the time she saw the man and box they were directly in front of her machine, and that almost at the same instant the automobile struck the man. The witness said, "It was just a second before I hit him." In order to show what attention the driver of the automobile was giving to the roadway ahead of her, the witness was asked as to whether she looked down at the time she shifted gears, and replied that she did not; that she made the shift, as she was accustomed to do, without looking down. She further made replies to questions asked as follows:

> "A. I looked up, and the first thing I saw was this great white object. Q. You looked up from where? A. I looked ahead of me, and this great white object was in front of me. Q. Were you looking somewhere else before you looked up? A. No; but it was very dark, and it just seemed that he appeared right in front of my car."

The witness further stated that she had driven the automobile since January of 1919, which was a period of more than ten months preceding the day of the accident; that she was accustomed to drive in the dark, and that she was the only member of her family who operated the machine. She stated, further, that immediately after the automobile collided with Finkle she threw on both brakes and brought the car to a standstill within a space not exceeding its length; that at the suggestion of a bystander, who had arrived to assist, she drove the car forward and to the curb about 100 feet and remained there until she was again told to back the car up where the injured man was, when he was placed in the car and taken to a place where medical help was obtained. She further stated that at the time the accident occurred her machine was traveling at a rate of speed between 12 and 15 miles per hour. The witness Constance Rimpau, who was riding with Georgia Tait at the time of the accident, corroborated the driver's statement as to all of the circumstances testified to by the latter. No other witness was produced who saw Finkle on the street at that place before he was struck by the automobile, so that, except for the testimony of the young women, the court was not advised as to what the actions of Finkle had been up to the moment when the automobile collided with him. All of the other testimony, as referring to the immediate occurrence, illustrates only what certain witnesses saw after their attention had been attracted to the point upon hearing the sound of the collision between the automobile and the man and box.

Taking the case as its facts were illustrated by the testimony of the two young women alone, it must at once be apparent that not only was there a failure on the part of the plaintiff to establish the negligence of the driver of the automobile, but that such testimony showed in an affirmative manner that the machine was being operated with reasonable caution. Nor are we able to find, summing up all of the circumstances shown by the testimony of those who observed the situation after the accident, that the jury, had the case been submitted to it, would have been authorized to draw an inference of negligence as against the defendant. Gorham and McKelvey were two witnesses who made certain observations from points across the street after they heard the noise of the collision. The claim is made that, from testimony of these two witnesses particularly, supplemented by that of a witness Page, who made certain measurements, to which we will later refer, the jury would have been entitled to infer that the automobile did not come to a stop after the collision with Finkle until it had traveled approximately one hundred feet easterly. Neither of the first-named two witnesses testified that the automobile did not stop, as the driver and her companion had stated it did, before proceeding onward and to the curb. Gorham was on the opposite side of the street, and he said that, after hearing the noise of the collision, and seeing a box flying in the air, he heard the brakes go on squeaking and "heard the skidding process of the machine that I supposed hit him, which proved later to be the one." He stated, however, that when he saw the automobile in question it was approximately 100 feet from where the man was lying. McKelvey was at another point diagonally across the street when he heard the noise of the collision, and, looking across, saw the man and box fall. He testified in part as follows, referring to the automobile:

> "Q. Did you see it before it came to a stop? A. I seen it while it was running; yes. Q. Did you see it after it came to a stop? A. Yes, sir; I seen it pull over to the curb. I seen the tail

light. It was about 100 or 125 feet from where the man was lying when it stopped."

Contrary to the observation of Gorham, this witness, when asked the question, stated that he did not hear any noise of scraping of brakes. Page, a police officer who arrived just as the injured man was being taken away, testified that he noticed "skid" marks which showed on the street, commencing at what would be the east line of Ivor street if the same were produced across Hollywood boulevard, 9 feet from the south curb of the boulevard, and extending for a distance of 65 feet east and to the curb. This question was asked and answer made:

> "Q. These skid marks ran parallel one with the other? A. Yes, sir; they swerved a little to one side."

By all the testimony it appeared that the collision occurred at what would be the west line of Ivor street, and from the diagram shown in the record the width of Ivor street appears to have been 33 feet; hence the so-called "skid" marks did not commence until the automobile had gone 35 feet past the point of the accident. The evidence of these conditions, to our mind, in no wise presented a substantial conflict as to the facts in opposition to the testimony of the two occupants of the automobile. Without some informative evidence as to the conditions under which the automobile in question might make marks which the witnesses term "skid tracks," we can attach no significance to that testimony. It might as well be inferred that the driver had allowed her brakes to make contact while she proceeded to conduct the automobile to the curb after the accident, as to infer that the marks were due to an opposite cause, to wit, the resistance offered by the application of brakes to the momentum of the machine, and, if the latter is to be assumed, there is utterly no means by which the rate of speed can be deduced from the fact. To add to the factors which would have to be taken into consideration is the wet and dry condition of the street; the evidence being that the surface was damp and slippery in spots. The evidence showed that there was considerable traffic to and fro on either side of Hollywood boulevard at the time the accident happened, and approximately two-thirds of the width of the street intervened between the points from which the observations of Gorham and McKelvey were made and the place of the accident. The statements of these witnesses as to the automobile having moved forward after the noise of the impact was heard by them were wholly consistent with the statements of the driver and her companion. An inference that they observed closely enough to be able to know that the automobile did not, in fact, stop immediately after the collision, and intended to so express themselves, would be speculative.

The trial judge, we may conclude from oral observations made during the argument of counsel on the question as to whether an instruction to the jury to find for the defendant was proper, was of the opinion that Finkle had been shown to have been guilty of negligence on his part, which contributed to produce his injuries. If the judgment to be determined upon here depended upon the correctness of that view, we would not be inclined to agree with the trial judge's conclusion; but we are required to determine whether the instruction was proper to be given under any aspect of the evidence. In reaching the opinion indicated on the question of contributory negligence, the judge was undoubtedly making application of decisions which we do not believe were appropriate to the situation here. Those decisions are more particularly applicable to cases where a person is approaching a situation which threatens danger to him, and where it is easy to apprise himself of the danger by looking. It will be presumed in such circumstances, upon injury being received by him, that he did not look and was hence negligent. We think here that, before any inference of negligence could be drawn as against the injured party, the whole situation as to the condition of the street traffic, number of vehicles passing, and the actual movements of Finkle would necessarily have to be illustrated in the evidence. In a congested condition of traffic a person might, without negligence, get himself into a position of great danger. If he acted in the emergency of the situation as a reasonable man might, then such conduct would not bar recovery, where negligence was proved against the driver of an automobile colliding with him. From all that can be gleaned from the record presented to us, we are unable to conclude that the evidence produced before the trial judge and jury established either negligence on the part of the driver of the automobile or of Finkle, now deceased.

A trial by jury, under the practice established in this state, does not mean that the party calling for the jury has the right to its verdict, irrespective of any control on the part of the trial judge. On the contrary, the jury's determination as to questions of fact, when made, is no more conclusive upon a trial court, as against motions for a new trial, than are the findings of the trial judge, where the case is tried without a jury. It is not only the right, but it is the duty, of the trial judge to grant a new trial, whenever he is of the opinion that the verdict of the jury or his own findings of fact are not sustained by the weight of the evidence. Section 2061, Code Civ. Proc.; Drathman v. Cohen et al., 139 Cal. 310, 73 Pac. 181; In re Martin, 113 Cal. 479, 45 Pac. 813; Weringer v. Rutledge, 180 Cal. 566, 182 Pac. 31. And if, upon the conclusion of the taking of the evidence, it appears to a trial judge that a case for the plaintiff has not been made out, it is likewise his duty to give direction for a verdict, unless it reasonably appears that, upon another trial, the plaintiff may be able to secure better evidence. In the case of Lacey v. Porter, 103 Cal. 597, 37 Pac. 635, the court was considering the claim of error for the giving of an instruction similar to that shown to have been given in this case, and it was there said:

> "The general rule undoubtedly is that these questions should be submitted to the jury where the evidence is conflicting; but it is equally well settled that the court may within certain limits control the verdict, either by such an instruction as was here given, or by setting it aside and granting a new trial, either upon motion of the defeated party or upon its own motion. To justify the court in directing a verdict it is not necessary that there should be no conflict in the evidence; but where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper, unless the circumstances of the case indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had. But in either case the decision of the court below will be sustained, unless the appellate court can clearly see that its conclusion is wrong upon the facts."

Again, in Jacobson v. Northwestern Pac. R. R. Co., 175 Cal. 468, 166 Pac. 3, the court said, quoting from the Estate of Baldwin, 162 Cal. 471, 123 Pac. 267:

> "To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

See, also, Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38; Davis v. Cal. St. C. R. R. Co., 105 Cal. 131, 38 Pac. 647; Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; Kalish v. White, 36 Cal. App. 604, 173 Pac. 494.

No conditions are indicated, from all that is disclosed by the record before us, that upon another trial the evidence would be different.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a rehearing of this cause in the Supreme Court is denied.

[3] We deem it proper to say that, upon looking into the evidence in the record, we are of the opinion that the direction to the jury to return a verdict for the defendant was warranted, on the ground that the negligence of the decedent, Nathan Finkle, was a proximate cause of the collision with the defendant's automobile. It occurred after dark on a public street; the headlights of the automobile were lighted, and would have been plainly visible to him, if he had looked. The automobile was going at a speed not exceeding 15 miles an hour. He was crossing the street at the time, and it was a part of his duty to use such reasonable ordinary care as the conditions demanded to see passing vehicles and avoid colliding with them. Niosi v. Empire Steam Laundry, 117 Cal. 260, 49 Pac. 185; Scott v. San B., etc., Co., 152 Cal. 610, 93 Pac. 677. A failure by him to exercise such ordinary care would be negligence on his part. The only evidence on the subject shows that the headlight was in good order, and that it was clearly visible at a considerable distance. It follows, therefore, that he either failed to take the trouble to look for automobiles on that side of the street as he crossed, or that he saw the automobile and carelessly walked in front of it. There was evidence that he was carrying a box of raisins 23 inches long, 13 inches wide, and 10 inches thick on his shoulder, in such a position that it may have obscured his vision. If that was the case, then it was negligence for him to attempt to cross the street with his vision obstructed in that manner. Hence, under either theory as to his conduct, he failed to use due care, and that failure was one of the proximate causes, if not the only one, of his injury and death.

SHAW, C. J., and LENNON, SHURTLEFF, WASTE, WILBUR, LAWLOR, and SLOANE, JJ., concur.

55 Cal. App. 664

MARKS et al. v. HOWKINS et al.
(Civ. 2382.)

(District Court of Appeal, Third District, California. Dec. 15, 1921. Hearing Denied by Supreme Court Feb. 9, 1922.)

Exchange of property ⇨8(1)—Judgment on rescission of exchange in alternative.

In an action for rescission of contract for exchange of property on the ground of fraud of defendant, judgment may be in the alternative, either for a reconveyance of the property or for the payment of money; as, where the return of the property might not be effectual or adequate to restore possession in the same condition in which it was obtained, a writ of assistance is not an exclusive remedy.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Seraphim Marks and another against Alfred Howkins and others. From an order of execution on judgment for plaintiffs, defendants appeal. Affirmed.

James Carter, of Oakland, and Elston, Clark & Nichols, of Berkeley, for appellants.
W. E. Rode, of Oakland, for respondents.

HART, J. This action was brought by the plaintiffs for the purpose of securing a decree rescinding a certain transaction involving a contract in writing, whereby the plaintiff Seraphim Marks and the defendant Alfred Howkins mutually agreed to exchange certain real properties of which they were the respective owners, and also certain deeds of conveyance passing between the parties under the terms of said agreement. The agreement was entered into on the 13th day of June, 1919. The property of the plaintiffs involved in the agreement consists of a house and two lots situated in Emeryville, Alameda county, and of the value of $2,500, and the property of the defendant is situated in Solano county, and consists of 106 acres of agricultural land, with improvements thereon, and of the alleged value of $17,000. The agreement was that the defendants would exchange their property for that of the plaintiffs upon the payment by the latter in addition to the conveyance of their property to the defendants, of the sum of $14,500, of which $1,000 was to be paid in cash and the balance, $13,500, to "be paid at any time that the party of the second part (plaintiff Seraphim Marks) desires to pay it in full." At the time of the execution of said agreement the plaintiff Seraphim Marks paid to the defendants $50 of the $1,000 which was to be paid in cash upon the execution of said agreement.

The amended complaint alleges and the court found that an exchange of the properties was consummated by the execution of deeds of conveyance by the respective parties; that thereupon the plaintiffs paid to the defendants the balance of the sum of $1,000, which was to be the cash payment on the transaction, and assumed the payment of the sum of $5,600, which was secured by a certain trust deed to the lands of the defendants, and gave their note for the balance and a trust deed to the Solano county property to secure the same. The said complaint further alleges and the court found that the plaintiffs were induced to enter into said contract and to consummate the same by certain false representations which are specifically set out in the complaint. These alleged false representations pertain to the quality and productivity and value of the land of the defendants. It is alleged and found that the defendants falsely represented to the plaintiffs that the land of the former and the improvements thereon were of the value of $17,000, but the court found that said land and improvements were of value not to exceed $7,500 or thereabouts. It is further alleged and also found that at the time of the execution of the agreement for the exchange of their properties the defendants assured the plaintiffs that they could procure an extension of the time for the payment of the $5,600 secured by the trust deed on the lands of defendants; that the defendants after the contract was made failed, neglected, and refused to procure the extension of time for the payment of said money and "by reason thereof the consideration for the consummation of said agreement as to plaintiffs has failed, and that said plaintiffs would not have entered into said agreement or the consummation thereof but for the agreement of said defendants to procure such extension"; that after discovering that the defendants had made the false representations regarding the productive capacity and value of their land, and discovering the defendants had failed and refused to procure an extension of the time at which the note secured by the trust deed should be paid, the plaintiffs immediately rescinded said contract and "then and there tendered to said defendants Howkins a deed and bill of sale executed and acknowledged by plaintiffs, reconveying to said defendants said 106 acres of land and said personal property, and also tendered said defendants possession of said land and personal property, and tendered them everything else of value received by plaintiffs under said contract, or under said consummation thereof, and made said tender on condition that said defendants should reconvey to plaintiffs said Alameda county real property, and should repay to plaintiffs said sum of $1,000, and should pay plaintiffs the further sum of $100 for the value of work done and improvements made on said premises by said plaintiffs while so in possession of said Solano county property, * * * and should surrender said note and second deed of trust executed by plaintiff on said 106 acres, but said defendants Howkins then and there absolutely refused and rejected said demand, but made no objections whatsoever to said tender, or to any part thereof, or to the mode thereof; that plaintiffs then were, ever since have been, and now are ready, willing and able to restore to said defendants Howkins whatever of value plaintiffs, or either of them, received from defendants Howkins, or either of them, in said exchange." The complaint further alleges and the court found that subsequently to the date of the rescission of said agreement by the plaintiffs and in order to avoid the effect of the same, the defendants Howkins made a pretended sale and conveyance of said Alameda county property, but without consideration, to defendant H. H. Bayliss and with full knowledge on the part of said Bayliss that plaintiffs had rescinded said contract and said consummation thereof as aforesaid; that at all times herein mentioned the value of said Alameda county property was and is $2,500, and has at all times herein mentioned had a rental value of $25 per month and at all of said times the reasonable value of the use and occupation of said Alameda county property was and is the sum of $25 per month; that said defendants Alfred Howkins and Christine Volina Howkins, his wife, have been in the sole and exclusive possession of said Alameda county property ever since June 20, 1919, and are now in the possession thereof; that at all times herein mentioned said Alfred Howkins and Christine Volina Howkins were and are husband and wife. The prayer of the complaint is for a decree rescinding the contract and for the restoration of the real and personal property conveyed by the plaintiffs to the defendants and for the repayment of the sum of $1,000 which was paid in cash by the former to the latter and for such other relief as the complaint may warrant.

The defendants, answering, deny specifically each and every of the material allegations of the complaint and further allege that each of said plaintiffs, prior to the making of the contract for exchange of the properties, visited the land of the defendants and fully and thoroughly inspected the same, and also that they obtained and inspected the search of title of said land, which showed the boundaries thereof, and also that the same was subject to said deed of trust of $5,600.

The defendant Bayliss filed an answer to the original complaint and therein denied all the vital averments thereof, and it was stipulated at the trial that said answer to said original complaint should stand as an answer to the amended complaint.

The court concluded as a matter of law that the plaintiffs were entitled to a decree against said defendants rescinding and setting aside the agreement, and the consummation thereof, as the same were alleged in the complaint; that the plaintiffs were entitled to the return of the $1,000 cash payment made upon the execution of the transaction, with interest thereon at the rate of 7 per cent. per annum from August 10, 1919, and for the sum of $90 as rental value of said Alameda county property for five months; that plaintiffs are entitled to a further decree against all of said defendants that plaintiffs are the owners of the Alameda county property, describing the same, free from all claims of said defendants or any of them; that the conveyance of said property by the defendants Howkins to the defendant Bayliss be set aside; that said defendants "do deliver possession of said premises in the same condition in which they were received by them from plaintiffs to said plaintiffs within 60 days after the entry of judgment herein, and in the event that said defendants do not, within such time, deliver up such possession of said property to plaintiffs, then plaintiffs are entitled, in lieu of the foregoing decree determining them to be the owners of said property in the town of Emeryville, Alameda county, to a further judgment against said defendants, Alfred Howkins and Christine Volina Howkins, in the sum of $2,500, the value of said property"; that defendants Alfred Howkins and Christine Volina Howkins are entitled to a decree that they are the owners of the Solano county property involved herein, together with certain agricultural implements and other personal property. It is further concluded as a matter of law that the plaintiffs are entitled to a lien upon the Solano county property to secure the payment of the judgment in their favor for the sum of $1,090 and interest, and to secure the further judgment of $2,500 against said defendants Alfred Howkins and Christine Volina Howkins, in the event that said defendants do not deliver the possession of said Emeryville (Alameda county) property to said plaintiffs, as above provided. The judgment was in accord with the findings and the conclusions of law, and, among other things, adjudges as follows:

> "It is further ordered, adjudged, and decreed against said defendants Alfred Howkins and Christine Volina Howkins and H. H. Bayliss, that plaintiffs are the owners of said real property in the town of Emeryville, county of Alameda, state of California, described as follows, to wit" (describing said property), and "* * * that defendants, Alfred Howkins and Christine Volina Howkins, are the owners of that certain real property in the county of Solano, state of California, described as follows" (describing said property).

The decree then proceeds:

> "That said defendants do deliver possession of said real property last herein described (the

Emeryville property) to plaintiffs within 60 days after the entry of judgment herein in the same condition in which said premises were received by said defendants from plaintiffs. It is further ordered, adjudged and decreed that in the event that said defendants do not deliver up such possession of said property to plaintiffs accordingly, then plaintiffs, in lieu of the foregoing decree determining them to be the owners of said real property, have a further judgment against said defendants Alfred Howkins and Christine Volina Howkins in the sum of $2,500, the value of said real property."

Upon the expiration of the 60 days within which the defendants were required by the judgment to deliver possession of the Alameda county property to the plaintiffs, the court made an order directing execution to issue, said order containing a recital of the provisions of the judgment, and further proceeding thus:

> "And it further appearing that said defendants did not at any time within sixty days after the entry of said judgment herein, or at all, deliver or tender possession of said real property to plaintiffs, and that plaintiffs' said judgment is unsatisfied in whole, and good cause appearing therefor,
>
> "It is ordered, adjudged and decreed that the Clerk of said court issue a writ of execution against said defendants Alfred Howkins and Christine Volina Howkins, in the sum of $1,000 and interest thereon at the rate of 7 per cent. per annum from August 10, 1919, and for the sum of $90 and $2,500 and $108.25 costs and interest on said sum from the date of entry of judgment herein."

The appeal is from the said order and is supported by the judgment roll alone.

A motion to dismiss the appeal is pending and urged here by the respondents; but, in view of the peculiar character of the decree, it is conceived preferable to consider the appeal upon its merits, from which, as the sequel hereof will show, the respondents will suffer no injury.

The principal objection to the order involves a complaint against the character of the decree entered herein, it being the contention of the appellants that the court was without the power to make an alternative judgment in this case. In other words, the position of the defendants is that the decree itself operated as a reconveyance of the Alameda county property to the plaintiffs and that all that was necessary to be done to carry out the terms of the decree was for the plaintiffs to sue out a writ of assistance and thus secure possession of the property.

It is admitted that an appeal was taken by the appellants here from the judgment, but that said appeal was dismissed by agreement of the parties. The judgment, thus becoming final, was, of course, conclusive upon the parties, and the attack here upon the same is collateral. Obviously the order appealed from cannot be disturbed unless we can say that the judgment is void upon its face. This we cannot say. We can conceive of no reason why a judgment, in a case of this character, may not legally be in the alternative; that is, that a party to an agreement for the exchange of properties, where said agreement is set aside on the ground of fraud upon the part of one of the parties thereto, may not be adjudged to be entitled either to a reconveyance of the property or to the payment to him by the other party of the value of said property as found by the court. There are cases (not, as to the facts, precisely this case, it is true) in which alternative judgments have been entered. Indeed, even the appellate courts have often rendered and entered a judgment in the alternative; that is, a judgment to the effect that the same will stand reversed or affirmed according to whether a party to the action complies with a certain condition contained therein. See Durkee v. Garvey, 84 Cal. 590, 24 Pac. 929; Messer v. Hibernia Savings & Loan Society, 149 Cal. 122, 84 Pac. 835; Armstrong v. Sacramento Valley Realty Co., 198 Pac. 217; Minneapolis Threshing Mach. Co. v. Currey, 75 Kan. 365, 89 Pac. 688; Murkowski v. Murkowski, 61 Wash. 103, 112 Pac. 92; Witham v. Walsh, 156 Mich. 582, 121 N. W. 309; Kornblum v. Arthurs, 154 Cal. 246, 249, 97 Pac. 420. What is said in Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066, as to the power and duty of a court of equity in an action to set aside a bill of sale of personal property is strikingly pertinent to the course pursued in this case, although there the property involved was personal and the property here involved is realty. We can, however, see no distinction, so far as the principle applicable is concerned, between the two cases. It must be assumed, and in truth presumed, since all intendments favorable to the support of the judgment must be indulged in the absence of a record of the evidence before this court, that there was substantial reason for the making of the judgment in this case in the alternative. Valid reasons for such a judgment in a case of this character may readily be conceived or conjectured. A court of equity possesses broad and extensive powers and may in a given case before it so frame its decree, within the issues, of course, as to adjust the equities of the case according to the just rights of the parties. It may be that the court had reason for concluding that the property conveyed to the defendants by the plaintiffs might, if possession thereof was not returned to the latter within 60 days, greatly depreciate in value; or, since no lis pendens was filed until September 27, 1919, almost a month after the institution of this action by the plaintiffs, it may be that prior to the filing of the lis pendens the defendants had leased or transferred the Emeryville property to an innocent lessor or purchaser for a valuable consideration and so were without ability to deliver possession thereof to the plaintiffs within the time required by the decree or at all. Certainly, in either of the supposititious cases, the plaintiffs would be entitled to be paid, in lieu of the delivery to them of the possession of the property, the value thereof at the time of the consummation of the agreement of exchange. Moreover, while the court was without authority to require the defendants to purchase the Emeryville property (as is the practical effect of enforcing the alternative provided by the decree) by way of a penalty, still since the transaction was, as we must assume, brought about by the fraud of the defendants, and, furthermore, since they refused to deliver to plaintiffs possession of the property within the time limit fixed by the decree, the former have no just ground for complaining against the terms of the judgment or of the order from which they have appealed.

No complications can follow from the fact that the decree is in the alternative or from the fact that the decree is lacking in certain particulars in specificness. As we have seen, the court adjudged that the Emeryville property was the property of the plaintiffs and that the Solano county property was the property of the defendants, and while it did not specifically decree a reconveyance, the adjudication that these properties belonged to the respective parties vested in them absolute title thereto, and all that was necessary to complete the rights of the parties under the decree was to effect a delivery of the possession of the properties, one to the other as the decree ordered. The court found, as also seen, that the plaintiffs, upon notifying defendants of the rescission of the transaction, tendered to the latter a deed conveying back to the defendants the Solano county property, and, of course, they are under the decree entitled to such reconveyance. The defendants still have the record title to the Alameda county property in them, and the rational and just interpretation of the judgment is that the absolute title thereto will remain in them upon the satisfaction of the judgment under and by virtue of the order of execution from which this appeal is prosecuted. Indeed, there could be no other interpretation given the judgment without working manifest injustice to the defendants.

As to the contention of the appellants that the plaintiffs are limited to the remedy by a writ of assistance to obtain possession of the property which they exchanged to the defendants, it is to be said that, while certainly they could have invoked that writ for the purpose stated, such writ is not always the exclusive remedy in such a case as this. Trope v. Kerns, 83 Cal. 553, 23 Pac. 691; Miller v. Bate, 56 Cal. 135. As above pointed out, the mere return of possession of the property to the plaintiffs might not have been effectual or adequate, since the defendants might not be able to restore possession of the property, if at all, in the same condition in which they obtained possession thereof as is required by the decree.

Our conclusion is that the order appealed from is impregnable against successful attack, and it is therefore affirmed.

We concur: FINCH, P. J.; BURNETT, J.

55 Cal. App. 620

JOSEPH HERSPRING CO. v. JONES. (Civ. 2361.)

(District Court of Appeal, Third District, California. Dec. 13, 1921.)

1. Fraudulent conveyances ⚷150—No valid sale of automobile to corporation by its president, where there was no change in possession.

Where owner of personal property organized a corporation, was elected its president, and made no change whatever in the control of an automobile, which he claimed to have sold to the corporation, and made no transfer in the office of the state automobile department, he could not claim that his possession became that of the corporation, in view of Civ. Code, § 3440, relating to transfers.

2. Fraudulent conveyances ⚷132(3)—Notice to creditor held not substitute for delivery and change of possession.

On failure to comply with Civ. Code, § 3440 which requires an immediate delivery and continuous change of possession, the fact that one who is a creditor at the time of the attempted transfer may otherwise have notice of such transfer does not make it valid as to him.

Appeal from the Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Joseph Herspring Company against Ellis Jones. Judgment for defendant, and plaintiff appeals. Affirmed.

Arthur C. Huston, of Woodland, and Robert H. Schwab, of Sacramento, for appellant.

Aaron Sapiro and Milton D. Sapiro, both of San Francisco, and Lawrence L. Levy, of New York City, for respondent.

BURNETT, J. The action was brought to recover possession of an automobile seized by the sheriff of Sacramento county under a writ of execution issued against Joseph Herspring upon a judgment in favor of California Pear Growers' Association. Prior to August 19, 1919, Joseph Herspring was doing business under the name of Joseph Herspring & Co. On that day he organized a corporation under the same name composed of himself, his wife, and his brother, which continued the same business. On August 23, 1919, he executed a bill of sale purporting to transfer to plaintiff the title to said automobile. At that time said association had a claim against Herspring for goods sold and delivered, which was subsequently reduced to judgment, upon which said execution was issued. At the trial these facts were stipulated:

> "At the time of the execution of the bill of sale Joseph Herspring as an individual was the owner and in possession of the Paige car; that at that time the car was kept by Joseph Herspring in his garage, and that his garage was located at Joseph Herspring's residence; that ever since that time the car has been kept in Joseph Herspring's garage by him, and that since the time of the transfer he has continued to keep it in the same garage, and that since the time of the transfer he continued to drive it and use it for his own personal use; that since the time of the transfer he was the only one who drove the car; that at the time of the transfer—no transfer was made in the office of the state automobile department—there was no registration of any automobile under the name of Joseph Herspring Company; that at no time during the year 1919 was there any transfer made on the records of the motor vehicle department, nor was the transfer slip which is provided by the Motor Vehicle Act filled out, and in the year 1920 the registered owner of the car was Joseph Herspring."

[1] There is a controversy between the parties as to certain other facts, but the foregoing is sufficient to show that the case falls clearly within the provisions of section 3440 of the Civil Code. The stipulation shows that there was no delivery whatever of the automobile to the corporation and no change of possession. The stipulation that the automobile remained all the time in the possession of the vendor is, of course, entirely inconsistent with the theory that it was for a moment in the possession of any one else. It can make no difference that the vendor became the president of the corporation. The law cannot be evaded by a device like that. To hold that an owner of personal property may organize a corporation, have himself elected its president, make no change whatever in the actual custody or control of the property, and that it may then by virtue of these facts be successfully claimed that there was a delivery to the corporation and that his possession became its possession, would be to nullify the plain provisions of the statute and multiply the opportunities for fraud. The language of the law is clear and its purpose is manifest. As is well known to the profession this section has been considered in many decisions of the higher courts of the state, a few of which have been cited by counsel. It is not necessary to review these authorities, as they illustrate an admitted principle and present a somewhat different state of facts from the case before us.

We may add, however, two instructive decisions that may well invite consideration: McKee Stair Building Co. v. Martin, 126 Cal. 557, 58 Pac. 1044, and Sequeira v. Collins, 153 Cal. 426, 95 Pac. 876. In the former John McKee had been the owner of the property for years, but respondent corporation claimed to have succeeded to his title by virtue of a bill of sale. Appellant relied upon said section 3440 of the Civil Code. For nine years prior to said sale McKee had carried on the business of stair builder, and had used said personal property therein at a certain place in San Francisco. He also had in his employ in said business his three sons, one of whom, Thomas W., had been his foreman during this period. Annie McKee, the daughter, held as assignee of the mortgagee a chattel mortgage for $500 against the property. She was advised by an attorney to incorporate a company and purchase the property from her father, so as to get her money out of it. She then had the plaintiff corporation formed; the stockholders being herself, her father, her sister, and her said three brothers. After the alleged sale to the corporation the father and the three brothers continued down to the time of the levy of the execution to carry on the business with this same property, at the same place, and in the same way as before such sale, the son Thomas still acting as foreman; the only difference being that before the sale the "father went out and figured upon work, and made bids for it, and told the foreman what to do," but after the sale the foreman did this work and the father was under his orders receiving the sum of $50 per month. Prior to the sale the sign on the building where the business was carried on was: "John McKee, Stair Builder." After the sale the name "John McKee" was removed. After reciting the foregoing facts, the Supreme Court said:

> "It would seem from this evidence that there was no delivery of the property to the vendee, and that the possession of the personal property here in controversy, leaving out of consideration the business of the concern, remained after the sale in the same persons that it had previously rested in."

That case was stronger for the respondent than this for appellant, in that the father, after the purported sale, was subject to the orders of the foreman who "did the figuring and bidding and looked after the work and also acted as manager" while before the sale the father had been in complete control. Herein, Herspring continued to run the business in the same manner after as before the purported transfer. It is to be understood, also, that therein the finding of the lower court was in favor of the validity of the transfer while herein the trial court held that the attempted transfer was void as against creditors. The effect of the decision therein was therefore that only one rational inference could be drawn from the evidence, that is, the transfer was invalid; but herein if there is any ground for a reasonable inference that the attempted sale was invalid under said section 3440, the judgment must be affirmed. The fact is, however, that we are entirely satisfied that no other conclusion than the one reached would be supported by the evidence.

Some contention is made by appellant that respondent had notice of the sale and therefore the purpose of said statute was accomplished. The only evidence as to that is found in the transcript as follows:

> "Mr. Schwab: Mr. Sapiro, I want to ask you if it is not a fact that you have known that the corporation was in existence, known that Joseph Herspring individually transferred to the corporation all this property at the time of the meeting in San Francisco, at which you were not present, at which Mr. Downey was present—
>
> "Mr. Sapiro: All I know—
>
> "Mr. Schwab: That the Pear Growers' Association had known of this situation all during this time.
>
> "Mr. Sapiro: I cannot say it is a fact.
>
> "Mr. Schwab: I will have to produce Mr. Downey, then.
>
> "Mr. Schwab: Q. Is not that the fact, Mr. Herspring? A. That is a fact."

It is apparent that Mr. Herspring's statement is a mere conclusion but, at any rate, the matter is entirely immaterial.

[2] The purpose of the statute and the terms of the statute are two distinct considerations. The main reason for requiring an immediate delivery and a continuous change of possession may be to give notice to creditors, but the fact that one who is a creditor at the time of the attempted transfer may otherwise have notice of such transfer does not make it valid as to him when there is no such delivery and change of possession. In the case of one becoming a creditor after such notice the consideration might have some bearing upon the question of estoppel or of good faith, but it is of no significance herein.

Respondent claims that the judgment should be affirmed upon two other grounds, but we see no necessity for discussing them.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

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55 Cal. App. 585

ANDRESON CO. v. LOS ANGELES COUNTY.
(Civ. 3735.)

(District Court of Appeal, Second District, Division 1, California. Dec. 9, 1921. Hearing Denied by Supreme Court Feb. 6, 1922.)

Taxation ⚷709(3)—Amount to represent tax which might have been chargeable against property for years after date of tax deed to state may be included in computing redemption charges.

Under Pol. Code, § 3817, providing for redemption of land sold to state for delinquent taxes and not disposed of by state by payment, in addition to other amounts, of "unpaid taxes of every description assessed against the property for each year since the sale; or, if not so assessed, then upon the value of the property as assessed in the year nearest the time of such redemption," and in view of sections 3771 et seq., 3785, 3813, 3817, and 3897, an amount to represent a tax which might have been chargeable against the property for the years subsequent to the date of the deed to the state may be included in computing redemption charges.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Andreson Company, a corporation, against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

A. D. Laughlin and George W. Crouch, both of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

JAMES, J. This action was brought by the plaintiff to recover money which it alleged had been paid to the county of Los Angeles on account of redemption charges affecting a tax sale made against the property of plaintiff. A general demurrer interposed to the complaint was sustained and judgment followed in favor of the defendant, from which judgment plaintiff has appealed.

The single question is presented as to whether, in computing redemption charges against a property owner, any amount to represent a tax which might have been chargeable against the property for the years subsequent to the date of the deed to the state may be included. Section 3817, Political Code, requires a redemptioner, in addition to other amounts, to pay—

> "unpaid taxes of every description assessed against the property for each year since the sale; or, if not so assessed, then upon the value of the property as assessed in the year nearest the time of such redemption, with interest from the first day of July following each of said years, respectively at the same rate, to the time of redemption."

After property has been sold to the state agreeable to the provisions of section 3771 et seq., Political Code, the redemption period commences to run, and, if at the expiration of five years from the date of sale no redemption is made, it is provided that a deed shall be made to the state. Section 3785. Upon such a deed being made, the state may proceed to sell the property to a private purchaser and may, at such sale, convey the whole fee. However, until the state is divested of title in such manner the original owner may still redeem by paying the required sums of money specified in section 3817. During the period of five years succeeding the date of sale, and until the state has conveyed to it the legal title, the land is to be assessed. Section 3813, Political Code, provides that the land "shall be assessed each subsequent year for taxes until a deed is made to the state therefor in the same manner as if it had not been so purchased." Hence it appears that, after the state obtains title to the land, subject only to the privilege given the original owner to redeem, the property is not to be assessed.

Appellant argues that in the statement of tax charges to be paid upon redemption, which we have quoted, it is not the intention of the Legislature to require the redeeming owner to pay any amount in lieu of taxes except for the years subsequent to the date of the sale and prior to the issuance of a deed to the state. It is argued that the use of the word "taxes" refers to the taxes provided to be assessed for years prior to the date of the deed and that the next phrase in the statute, "if not so assessed," refers to those same years wherever there may be an omission to assess. Reference is made to other conditions affecting lands of special character, which we do not think add to the force of the argument, and we do not agree with appellant that the statute should be construed according to its view. The provisions of section 3817 furnish the only measure for computation of the charges which the redemptioner must pay, whether he redeem before or after deed has passed to the state. In our opinion, it was the intention of the legislators to require of a redeeming owner, as a condition that title to his property be restored to him, that he pay an amount to be computed as indicated to represent a tax charge for each year during which he has been in default. During the running of the five years subsequent to the date of sale the amount is ascertained easily by reference to the assessment list which is required to be made. When title has been passed to the state by deed there is good reason for the provision that there shall be no further assessment made by the state or its agencies against its own property. Section 3817 provides a mode by which charges in lieu of taxes assessed may be computed for the year subsequent to the date of the deed. The property owner who has allowed his property to be sold to the state and has allowed the period of five years fixed for redemption to pass, and a deed to be made, possesses no longer any rights in that property, except such as the statute may permit him to exercise. And it is undoubtedly competent for the Legislature to fix the precise terms upon which the owner may be entitled to have his property restored to him. No valid objection can be urged against such a statute because those terms may be onerous, or the penalties required to be paid be large in amount. Even though such objections were valid, they could not be urged against the statute here considered, which only designs to exact from the redemptioner an amount equivalent to the taxes which he would have paid had he not allowed delinquent sale to be made and his title thus divested, with interest.

The argument is also used that it could not have been the intention of the Legislature to require the making of these payments, because there is exacted less from a purchaser who bids at a sale of the property where the state proposes to dispose of the same after receiving its deed. For reasons which have already been indicated, we think there is no ground for comparing the requirement of the redemptioner with that which is imposed upon an individual purchasing at a state sale. It is true that such a proposed purchaser is not required to bid an amount sufficient to cover any equivalent of taxes not assessed subsequent to the date of the state's deed. He is, however, required to bid not less than the amount of all charges, penalties, and taxes assessed up to the date of the deed to the state, and other expenses subsequently accruing. Section 3897, Pol. Code. The provisions expressed in that section determine merely the minimum amount which the state is authorized to accept in exchange for the property. It may accept a lesser amount only if the board of supervisors determines that the value of the property is not great enough to cover the charges enumerated. Under appellant's argument the property owner might, after any number of years had elapsed subsequent to the date of the deed to the state (assuming that the state had not disposed of its title in the meantime), effect a redemption of his property and escape making payment of any amount as an equivalent of taxes which would have been assessed against him had he not defaulted and tax sale proceedings intervened. We think that the statute does not admit of the construction contended for.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

188 Cal. 33

PACIFIC GAS & ELECTRIC CO. v. DEVLIN et al. (S. F. 9824.)

(Supreme Court of California. Jan. 30, 1922. Rehearing Denied Feb. 27, 1922.)

1. Waters and water courses 🔑183(5)—Matters to be considered by Railroad Commission in fixing value of water system taken over by city.

In a proceeding before the Railroad Commission by a city to take over a water plant, under Public Utilities Act, § 47, as amended by St. 1917, p. 261, the water company is entitled to a finding for the just value of its plant as of the date of the filing of the application by the city, which was the actual or fair market value in its then condition, and such commission must consider every element of the plant actually required for the distribution of water to the city on such date, and which entered into the cost of its construction, and also resort to reasonable and recognized measures of value to each constituent element of value.

2. Constitutional law 🔑280—Eminent domain 🔑69—Waters and water courses 🔑182—Municipality taking over water plant without proper appraisal unconstitutional.

If any constituent element of value was omitted in appraising a water plant to be taken over by a city, or any illegitimate measure of value was applied, to that extent the water company would be deprived of its property without compensation or due process of law.

3. Waters and water courses 🔑183(5)—Presumed that items were not ignored by Railroad Commission in determining value of water system taken over by city.

On certiorari to review an order of the Railroad Commission, in a hearing under Public Utilities Act, § 47, as amended by St. 1917, p. 261, on application by city desiring to take over a water system, it will be presumed that the commission, in making a finding as to value in a lump sum, considered every proper item, although the amount determined as the value equaled the estimate of its engineer which ignored certain necessary items, and that it reached the same result by incorporating valuations at different prices, and on other elements of the system gathered from the estimates of other engineers, the general finding of the commission not being open to attack for insufficiency, if supported by any reasonable construction of the evidence.

4. Waters and water courses 🔑183(5)—Railroad Commission may accept report of own engineer as to value of water system taken over by city.

In a proceeding by a city to acquire a water system, the Railroad Commission, on a hearing under Public Utilities Act, § 47, as amended by St. 1917, p. 261, can call a witness, even against the will of the owner of the utility, on the subject of the value of the property, and may accept as true the report of its own engineer, unless he has omitted some material element of valuation, or introduced some erroneous measure of appraisement.

5. Waters and water courses 🔑183(5)—Burden on water company to show affirmative error in decision of Railroad Commission, valuing property taken over by city.

On certiorari by water company to review a decision of the Railroad Commission in a hearing under Public Utilities Act, § 47, as amended by St. 1917, p. 261, fixing the value of a water system taken over by a city, it is not enough that the record does not affirmatively show that certain items of property were properly accounted for, but the water company must affirmatively and satisfactorily show that such items were not included.

6. Waters and water courses 🔑183(5)—Report of engineer, considered as evidence in fixing value of water system, need not use uniform classification of Railroad Commission.

Estimate and report of engineer of the Railroad Commission in a hearing under Public Utilities Act, § 47, as amended by St. 1917, p. 261, to determine the value of a water system taken over by a city, need not comply with a rule of the commission as established in its "Uniform Classification of Accounts for Water Corporation," in order to be considered as evidence by the commission, as it is privileged to get out of the estimates whatever he may have put into them, under whatever classification he may have used.

7. Waters and water courses 🔑183(5)—"Straight-line method" and "sinking-fund method," in estimating deterioration, distinguished.

The "straight-line method" in estimating deterioration in a plant consists in calculating from examination and experience in like constructions the total life period of the constituent parts of the plant, and then deducting from their value that proportion of decrease represented by the ratio of the years which it has been in use in relation to the entire life period, while the "sinking-fund method" consists in charging for depreciation an annual sum, which, with compounding interest thereon, will at the termination of the estimated life of the investment replace the original cost, and if cut off at any given period the accumulation will represent the depreciated value to that date.

8. Waters and water courses 🔑183(5)—No error in using straight-line method in estimating deterioration.

In a hearing before the Railroad Commission under Public Utilities Act, § 47, as amended by St. 1917, p. 261, to determine the value of a water system taken over by a city, *held*, that it could not be said that the commission erred in using the straight-line method, and not the sinking-fund method, in estimating deterioration.

9. Waters and water courses 🔑183(5)—Error of Railroad Commission in not allowing for going concern value held not shown.

In a proceeding by a city to acquire a water system, a finding of value of the system by the Railroad Commission in a hearing pursuant to Public Utilities Act, § 47, as amended by St. 1917, p. 261, *held* not shown to be erroneous, in that the city made no allowance for going concern value.

In Bank.

Application by the Pacific Gas & Electric Company for certiorari to review an order of Frank R. Devlin and others, as members of and constituting the Railroad Commission. Order affirmed.

Charles P. Cutten and R. W. Du Val, both of San Francisco, for petitioner.

Hugh Gordon, of Los Angeles, and Wm. W. Clary, of San Francisco, for respondents.

F. P. Tuttle, of Oakland, and F. P. Tuttle, Jr., of Auburn, for city of Auburn.

SLOANE, J. This is a proceeding to review a ruling of the Railroad Commission of the state of California, fixing the amount of compensation to be paid to the petitioner, Pacific Gas & Electric Company, by the city of Auburn, a municipal corporation, in Placer county, Cal., for a water plant consisting of reservoir and distributing system, owned and operated in said city by the petitioner.

The hearing before the Railroad Commission was had pursuant to the provisions of section 47 of the Public Utilities Act (St. 1915, p. 139, as amended by St. 1917, p. 261). The only questions raised are as to whether or not the commission in arriving at its valuation of the water property regularly pursued its authority under the act, and granted to the petitioner its constitutional right to just compensation.

The decision complained of followed a hearing on the application of the city of Auburn filed on the 10th of May, 1918. After hearings the commission on September 27, 1920, announced and filed its opinion, findings of fact, and decision in which it determined the "just compensation to be paid by the city of Auburn to Pacific Gas & Electric Company for its public utility water system supplying water to consumers in said city * * * in the sum of $52,000." It is recited in the opinion that the valuation was reached upon hearings had at which all interested parties were given an opportunity to appear and be heard and in which appraisals were filed by engineers representing the city of Auburn, the Pacific Gas & Electric Company, and the Railroad Commission. It is further stated in the opinion as follows:

> "Two appraisals were filed by the engineers for the commission; one based upon prices of labor and material prevailing during the five-year period from 1913 to 1917, inclusive; the second appraisal being based upon prices prevailing during a six-month construction period ending May 10, 1918, the date of the filing of the application. Thus the principles heretofore established have been adhered to; i. e., the date of the valuation is as of the date of the filing of the application, and prices of labor and material prevailing over a reasonable construction period prior to the date of the appraisal have been used in estimating unit costs. All factors relating to the condition of the properties in question were taken into consideration in arriving at an estimate of reproduction cost less depreciation.
>
> "Inasmuch as it was stipulated at the hearing in this matter that the Commission might add to its findings of value the value of any additions, betterments and improvements of the system which were made a part of the system subsequent to May 10, 1918, the date as of which the valuation was submitted, in accordance therewith the net expenditures of the company for betterments and improvements during the period May 10, 1918, to April 30, 1920, are included in the findings herein."

Upon an application for rehearing demanded by the petitioner on the alleged ground, among others, that contrary to the requirements of subdivision 4 of section 47 of the act, the valuation was fixed as of the date April 30, 1920, instead of May 10, 1918, the date of the filing of the original application of the city of Auburn, and without the taking of further testimony, the commission on March 31, 1921, made its amended findings and order, in which it fixed the valuation of the plant as of May 10, 1918, at the same figure as in the original order, namely, $52,000. The amended decision contains the following recital:

> "Inasmuch as technical objection has been made to this course of procedure, it appears that a finding of just compensation should be made as of May 10, 1918, the date of filing of the original application, and after a careful consideration of all of the elements pertinent to a final conclusion herein, and all of the items going to make up the value of the properties sought to be acquired by the city of Auburn in this proceeding, including all matters presented in the application for rehearing, it appears that the just compensation to be paid by city of Auburn to Pacific Gas & Electric Company for said properties is the sum of $52,000, and that the application for rehearing should be denied."

We do not understand that petitioner is relying upon the objection that the commission exceeded its jurisdiction in amending its decision, but rests upon the contention that in the matter of allowing compensation the commission did not "regularly pursue its authority," or protect the petitioner in its constitutional guaranties, by fixing a "just compensation." It is not questioned that both parties to the proceeding before the commission were allowed full scope in the introduction of evidence, and no objections are made as to either the introduction or exclusion of evidence.

Petitioner's case is presented under the following heads:

> "(1) The commission found that the estimated reproduction cost new of the Auburn City Reservoir, on May 10, 1918, amounted to the sum of $10,822 (Commission Ex. No. 2, p. 8), whereas the evidence shows the reproduction cost new to be $11,131.75.
>
> "(2) The commission failed and refused to find or allow any value or compensation for 68

fire hydrant connections, in the face of uncontradicted evidence of a reproduction cost of said property of $367.36.

"(3) The commission failed and refused to find or allow any value, or compensation, for the preliminary and organization expenses, in the face of uncontradicted evidence of a cost or value of $5,150.

"(4) The commission adopted and employed the theoretical 'straight line method' of depreciation in determining the depreciated value of petitioner's depreciable property in the face of undisputed evidence that a depreciated value arrived at in this manner bore no relationship to the actual depreciated value of the physical properties, nor the amount of depreciation that had actually accrued.

"(5) The commission found that the depreciated value of petitioner's entire physical properties and lands, as of May 10, 1918, amounted to $51,063 in the face of undisputed evidence that the depreciated value of said properties and lands determined from a consideration of the actual physical condition of the properties, as evidenced by inspection, and the use of the tables adopted by the Railroad Commission for the identical properties, was the sum of $75,736.

"(6) The commission failed and refused to find or allow any value in excess of the sum of $937 for petitioner's business or going concern in the face of evidence presented by petitioner of a special value, in addition to the value of the tangible properties, of $12,500 and in the face of evidence presented by the city of Auburn of a going concern value of $3,000."

[1, 2] It may be at once conceded that petitioner in this proceeding before the Railroad Commission was entitled to a finding for the just value of its water plant as of the date of the filing of the application by the city of Auburn, and that a just value was the actual or fair market value of the property in its then condition; that to arrive at such valuation it was the duty of the Railroad Commission to take into account every element of the plant which was actually used and reasonably required for the storage and distribution of water to the city of Auburn and its inhabitants, on May 10, 1918, and which entered into and remained a part of the cost of its construction; and also to resort to and apply reasonable and recognized measures of value to each constituent element going to make up such water system. And it follows that, if in such appraisement any constituent element of value was omitted, or any illegitimate measure of value applied, to that extent petitioner would be deprived of his property without compensation, or due process of law, and by a process in excess of the jurisdiction of the Railroad Commission.

Returning to petitioner's specifications, it may be said generally that there is nothing in the record to show that the commission did not regularly pursue its authority, or that its decision was not supported by the evidence.

The only finding provided for on such a hearing, as declared in subdivision 4 of section 47 of the act, is that—

> "When the proceeding has been submitted, the commission shall make and file its written finding fixing, in a single sum, the just compensation to be paid by the political subdivision for said lands, property and rights, or said part or portion thereof: provided, that if the commission finds that severance damages should be paid, the just compensation for such damages shall be found and stated separately."

There was no finding for severance damages, and it does not appear that any was demanded. The commission made its findings in a single sum to include the valuation of the entire plant. It is not disputed that competent evidence covering every element of value claimed by petitioner was introduced and argued before the commission. Its finding was in a lump sum for $52,000. How can it be said that any constituent element going to make up the market value of the property was left out of the appraisement or improperly measured? The record shows and the opinion of the commission recites that:

> "The city's appraisal was based upon prices of labor and material prevailing during the six-year period from 1911 to 1916, inclusive. The appraisal presented by the Pacific Gas & Electric Company was based upon prices of labor and material prevailing on May 10, 1918, the date of filing the application herein. The Engineering Department of the Railroad Commission made extensive field investigation of the water system in question, and based its appraisals upon the data thus secured and from an inspection of the company's records."

The various engineers testified fully in support of their separate estimates. There was considerable variance in these estimates. That of the engineer for the city of Auburn aggregated a present value of $28,838, that of the engineer for the commission aggregated $51,063, and that of petitioner's engineer aggregated the sum of $86,236. Each estimate was made on a basis of the cost of reproduction, less the accrued depreciation. Between the valuations testified to under the lowest and highest estimates there was room to include every item claimed by petitioner within the valuation of $52,000 adopted by the commission.

Petitioner, however, contends that the commission adopted in toto the estimates of its own engineer, which aggregated $51,063, and that such estimates entirely omitted the item of preliminary organization and administration expenses incident to constructing such a water system, and but partially covered outlays in the production of the plant.

[3] If the record discloses that the commission acted solely on the data contained in the schedule of its engineer, and that this failed to incorporate some of the elements of proper valuation disclosed by other competent evidence, the decision of the commission should be set aside. It does not follow, however, from the fact that the total valuation found by the commission is closely identified with the estimate of its engineer, that the commission followed in detail the schedule of items and values set out in such estimate. It may have reached the same result by incorporating valuations at different prices, and on other elements of the system, gathered from the estimates of the other engineers. Union Hollywood Water Co. v. City of Los Angeles, 195 Pac. 55. The law will presume that such was the fact, rather than indulge the inference that matters presented and supported by competent evidence were ignored.

It may be true that the analysis of the items and figures of the report of the commission's engineer would be persuasive evidence in support of petitioner's contention on a trial, but they are not sufficient to impeach a judgment. This general finding of the commission is like the general verdict of a jury, not open to attack for insufficiency if supported by any reasonable construction of the evidence. It is doubly fortified in this respect, as the Public Utilities Act in the section authorizing the procedure here under review expressly provides that—

> "The finding of the commission [as to just compensation] shall be final and shall not be subject to modification, alteration, reversal or review by any court of this state."

This is subject, of course, to the qualification that the commission must have regularly pursued its authority, and have acted upon competent evidence, and as corollary to this, that it has not ignored or failed to consider any competent evidence; but any ground of attack upon the regularity of its proceedings must be clearly established. If the decision is regular on the face of the record it will be supported by every presumption that follows a judgment of a court of record. Clemmons v. R. R. Commission, 173 Cal. 254, 159 Pac. 713; Marin Water Co. v. R. R. Commission, 171 Cal. 706, 154 Pac. 864, Ann. Cas. 1917C, 114; Pac. Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. "An appellate court will not interfere with the report of commissioners [in the assessment of damages to correct the amounts reported] except in case of gross error showing prejudice, corruption, or plain mistake." Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

[4] Even if, however, as petitioner claims, the commission adopted and followed the estimates and evidence of its own engineer, its decision is not necessarily open to attack on that account. The commission engineer was a competent witness, he had made a special investigation of the water system under consideration, and the Public Utilities Act makes provision that upon such hearing "evidence may be presented by the political subdivision, by each owner as claimant named in the petition, and by the commission," and the commission has authority to call a witness at its own instance and even against the will of the owner of the utility, on the subject of the value of the property. Marin Water & Power Co. v. R. R. Commission, supra. Unless, then, its engineer omitted some material element of valuation or introduced some erroneous measure of appraisement into his report and testimony, the Railroad Commission had a right to accept such evidence as the basis of its finding, to the exclusion of other evidence that it may have considered less satisfactory.

Petitioner claims, first, that, in appraising the reproduction cost of the Auburn city reservoir, the estimate of $10,822 of the commission's engineer was but tentative, whereas other undisputed evidence fixed the reproduction cost at $11,131.75. The variance in these valuations arose from a difference in the estimates of the yardage of excavation under the embankments of the reservoir, or stripping of the surface soil, in preparing a foundation for the embankments.

No actual inspection or measurement could be made. The estimates of all the witnesses were largely a matter of deduction and opinion. Mr. Givan, the engineer of the city of Auburn, testified that after as complete an investigation as he could make he could find no evidence of any such stripping excavation, and gave reasons why he thought it was not there. Mr. Ryan, the engineer for petitioner, estimated the excavation at 3,350 cubic yards, allowing 15 feet of stripping under the embankments. Mr. Faude, the commission's engineer, estimated 3,200 cubic yards, with an allowance of 8 feet of stripping. He testified that on account of the other engineers not being able to agree on yardage of reservoir he adopted 3,200 cubic yards as tentative, that he did not do this altogether as adopting the medium between the other estimates, but that he made some computations, not accepting the quantities of either side. If the commission had adopted the conclusion reached by Mr. Givan and made no allowance at all for the stripping excavation, we do not see how its finding could be impeached.

The next specification by petitioner is the alleged failure to include in the valuation 68 fire-hydrant connections of the value of $367.67. This item was included in Engineer Ryan's estimates, but not in those of either Engineer Givan or Engineer Faude, at least not specifically. There are two elements of uncertainty as to the legitimacy of this claim. One is that there was some ground for inference that the city had previously paid for these connections when the hydrants were installed, the hydrants having been paid for by the city; the other is the contention of respondent that allowance of the amount due, if any, on this item, may have been included as an allowance for contingencies in Engineer Faude's estimate for overhead costs.

[5] In any event, it does not sufficiently appear that petitioner has in this particular been denied any just compensation. It is not enough that the record does not affirmatively show that this item is properly accounted for. It must, in order to avoid the decision, be affirmatively and satisfactorily shown that it is not included.

It is conceded that if the petitioner corporation owns these hydrant connections it is entitled to have their value computed in the commission's valuation, irrespective of who paid for them.

A more important contention of petitioner is that under Engineer Faude's estimate no allowance was made for preliminary and organization expenses, which appear upon Engineer Ryan's estimate as supported by the evidence, in the sum of $5,150. It is conceded by respondents that the reasonable cost of such preliminary work of preparing for the construction of such a water system is a proper charge in estimating its reconstruction value. No specific allowance is made for this cost in the report of Engineer Faude for the commission. Such report, however, contains an estimate under the caption of overhead expense, for administration, engineering, interest, and incidentals. If there is room for reasonable allowance on this claim for preliminary expenses in this overhead estimate—and there appears to be—it will be presumed in support of the finding of the commission that it was so included.

[6] Petitioner argues that such a method of classification is contrary to the rule of the commission as established in its "Uniform Classification of Accounts for Water Corporation," and quotes from such classification that organization charges shall be charged to "intangible capital." It must be remembered, however, that this estimate and report of the engineer is not a finding of the commission, but evidence that was before it, and in construing his report it was privileged to get out of his estimates whatever he may have put into them under whatever classification he may have used. It is claimed by respondents that it is customary practice to include preliminary organization costs as overhead expenses in such estimates as this, citing Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244, where the master in chancery who heard the case says that time and money expended in the promotion of the enterprise, the organization of the company, legal expenses, preparing plans and specifications, etc., are properly termed "overhead charges."

[7, 8] The most urgent objection to the valuation of property arrived at in this proceeding is on the alleged ground that the commission resorted to an unfair and unauthorized method of fixing the amount of depreciation in the value of this water system. As has been stated, the value as of the date of May 10, 1918, was reached by all of the engineers by estimating the cost of reproduction of the plant and deducting from the amount the deterioration in value suffered during the life of the system up to such date. Engineers Faude and Givan, in their estimates, used what is known as the straight-line method, while Engineer Ryan, for the petitioner, used what is known as the sinking fund method in estimating deterioration. The straight-line method consists in calculating from examination and experience in like constructions the total life period of the constituent parts of the plant, and then deducting from their value that proportion of decrease represented by the ratio of the years it has been in use in relation to the entire life period. For example, if the estimated life is 50 years and 25 years of that time has elapsed, it is assumed that the value has depreciated 50 per cent. The sinking fund method is more complicated and consists, as we understand it, in charging for depreciation an annual sum which with compounding interest thereon will at the termination of the estimated life of the investment replace the original cost, and if cut off at any given period the accumulation will represent the depreciated value to that date.

It is not important, however, in this instance to determine just how the results are attained, as it seems to be conceded that the amount that would be allowed for depreciation in the present case is less by the sinking fund than by the straight-line method, and it is claimed that the commission has erroneously followed the straight-line method, in its appraisement under consideration, to petitioner's prejudice.

Assuming that the Railroad Commission reached its conclusions by the straight-line method, which assumption rests in turn upon the claim that the commission followed the method of its own engineer rather than that of petitioner's engineer in this respect, which is not clear from the record, was it an error in the exercise of its jurisdiction? The law has not settled the question, and the expert witnesses seem to disagree. Two of the engineers used the straight-line method, and supported their actions by their expert opinion that the method was proper and fair. Counsel for petitioner cites instances from other investigations of public utility values where the commission adopted the sinking fund method, and quote from an opinion of Commissioner Thelen, in the matter of the application of the City of Palo Alto, etc., 11 C. R. C. R. 209, which was a proceeding under section 47 of the Public Utilities Act, as follows:

> "I have been much impressed by the gas company's argument that in view of the fact that in a rate case the depreciation annuity in this state must be estimated on the sinking fund basis (section 49, Public Utilities Act; Town of Antioch v. Pacific Gas & Electric Company, vol. 5, Opinion and Orders of the Railroad Commission of California, pp. 19, 39, 40), the same basis should be applied, in depreciating the property, in an eminent domain proceeding. While not intending to lay down any rule which must be uniformly followed hereafter by this commission, I have given due weight to the gas company's contention on this point."

It will be noticed that the learned commissioner does not attempt to announce any rule of law or established method of engineering computation as governing this method of determining depreciated value, and it is not apparent whether the use of one or the other of these recognized methods should be governed by physical conditions of the public utility which the evidence in the particular case might develop.

It is obvious that this matter of depreciation, particularly in a property which is mostly underground and not open to careful inspection, must be largely a matter of estimate and speculation, based upon common observation and experience under similar conditions. It is a matter of approximation at the best, and to the lay mind it would appear that the straight-line method, based upon the proportionate part of the estimated life of the system which has expired rather than the sinking fund method or any of its modifications, is the appropriate basis for fixing depreciation for the purpose of determining present value of the utility.

A distinction may be drawn and has been frequently recognized between a rate-paying appraisement of a public utility and an appraisement of value to determine its worth in condemnation proceedings, in the application of one or the other of these methods of fixing the depreciation. In rate fixing the end sought is a reasonable return to the public utility for its use in the public service. Such reasonable return logically should be upon a basis that will pay a certain profit and replace the property at the end of its life. The sinking fund method is commonly used in such connection. In condemnation proceedings a different end is sought. Past costs or future replacements are only pertinent as a means to the end of determining present value in such proceedings.

If the actual physical condition could be determined by actual test and inspection, that, of course, would give the most satisfactory results; but, in the absence of such direct appraisement, the natural method would seem to be to ascertain from the life tables of such utilities and from such examination as can be made the prospective life of the commodity, and apportion the depreciation according to its age. The following California public utility cases are cited as upholding the straight-line method: Southern California Edison Co. Case, 11 C. R. C. D. 83; Marin Water & Power Company v. Railroad Comn., 6 C. R. C. D. 507, 520; Northern California Power Co. Case, 17 C. R. C. D. 98. Respondents also quote from the case of National Telephone Company, Ltd., v. Postmaster General, 16 A. T. & T. Co. Com. L. 491, Jan. 13, 1913; 2 Whitten's Valuation of Public Service Corporations, page 1112, as follows:

> "Two methods of depreciation have been put before us, and two different ways of regarding the life of the plant. The two methods have been described as the sinking fund method, which has been put forward by the company, and the straight-line method, which has been put forward by the Postmaster General.
>
> "The sinking fund method is based upon the effect of compound interest. * * * This seems to me to be purely a revenue question, and to have nothing to do directly with the value of the plant as between a vendor and a vendee. It was admitted by the very eminent witnesses called for the company upon this point that this method had never in their experience been applied as between a buyer and a seller. I admit this method will give you a perfectly correct arithmetical result, but it does not take into consideration those matters which properly affect the mind of a buyer. * * * I come to the conclusion, therefore, that the Postmaster General's method of depreciation, which is the ordinary straight-line method, is that which should be applied. In this method the value is reduced in the ratio which the age bears to the life of the plant."

[9] As to the final objection discussed by petitioner, the alleged failure of the commission to follow the evidence as to going concern value, it is conceded that some allowance was made on this claim. As has been said of all other segregated items, we find nothing in the record to determine what portion of the $52,000 appraisement was allotted to this claim under the general finding of the commission. Engineer Faude did not make any allowance for going concern value in his estimate, and under petitioner's theory that the $52,000 total allowed in the findings was made up of the items specified by Mr. Faude aggregating $51,063, and an additional amount of $937 thrown in for good measure, it is assumed, that the going concern value, if any, was confined to all or part of this latter amount. Conceding this to be the fact, the commission must necessarily have considered the matter, and reached a conclusion thereon. It cannot be said that there was no evidence to sustain this allowance, even if confined to the amount conceded.

It is true that Mr. Ryan, for the petitioner, estimated the going concern value at $13,500, and Mr. Givan estimated it at $3,000, but Mr. Faude made no allowance for this item, and stated in his testimony: "My investigations did not convince me there was very much going concern value there." It seems to have been conceded that the plant had not been on a profitable basis, and Mr. Ryan, in explaining his views in that particular, stated that he felt "that the company should not be at this time barred from any hope of ever realizing any going concern value by condemnation proceedings," and that "the effect of condemnation would be to deprive the company of the expectation of ever realizing anything from the money expended."

Going concern value is speculative enough when based upon past achievements, but when it depends upon future developments it becomes largely conjectural. The city of Auburn is a small town with no great realization in growth of population in the past, nor expectation for the future. Its water distribution must be more or less of fixed quantity with no great hope of expansion. Even if the commission fixed the going concern value of this plant within the $967 allowance, we cannot say that it "has not regularly pursued its authority" in this respect.

All of this discussion of the items of valuation covered by the general finding of the commission has been predicated upon the assumption that the commission accepted and followed the estimate of Engineer Faude as to the elements of valuation placed upon the concomitant parts of the plant. As already suggested, the only foundation for such a conclusion is the fact that the appraisement of the commission adopts approximately the same valuation as is reached by the aggregate of the estimates of separate elements of the system by the engineer. In support of this theory counsel for petitioner produce in their brief a memorandum prepared by Mr. Faude, which they state was handed to them subsequent to the original decision, by one of the commissioners, and which it is asserted shows in detail the manner in which the finding of the sum of $52,000 was reached. This memorandum adds nothing to the explanation of the commission's appraisement which was not already obvious, namely, that the commission added a certain sum to Mr. Faude's totals of $51,353, which, as the report states, was then "rounded off to $52,000," as a "reasonable value for sale purposes, including going concern value and all intangibles as of April 30, 1920." This was by the amended decision adopted as the value as of the date May 10, 1918. As to how the various elements of value were considered and distributed by the commission to make up this total does not appear. Even accepting this report as part of the record.

It may be properly assumed in support of the decision of the Railroad Commission, which is entitled to every presumption in its favor, that without accepting the appraisements in detail of each item of cost and depreciation of its own engineer, the commission may have concluded in the light of all the evidence that he had reached in the aggregate a fair valuation for the entire plant, and, as the report quoted by petitioner says, by adding a few hundred dollars rounded it to $52,000 as the just value of the entire system.

The order and decision of the Railroad Commission is affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; WILBUR, J.

55 Cal. App. 415

MEMORANDUM DECISIONS

Ex parte DEL BONO. (Cr. 596.) (District Court of Appeal, Third District, California. Nov. 29, 1921.) Application by Victor Del Bono for a writ of habeas corpus, prayed to be directed to the Sheriff of Madera County to secure release of petitioner from custody under a charge of murder. Writ denied. Joseph Barcroft, of Madera, for petitioner.

PER CURIAM. The petitioner was arrested on a charge of murder, and at the conclusion of his preliminary examination the magistrate before whom such examination was had made an order holding him to answer and committing him to the custody of the sheriff. This proceeding is prosecuted on the ground that the evidence taken at the preliminary examination does not show reasonable or probable cause for holding the defendant to answer the charge in the superior court. In view of the trial to be had in the superior court, it is thought proper not to discuss the evidence. A careful examination of all the evidence taken at the preliminary examination satisfactorily shows that there is reasonable and probable cause for holding the defendant to answer. The petition for the writ is denied.

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187 Cal. 724

FRAZIER v. DAVID et al. (L. A. 6937.)

(Supreme Court of California. Jan. 5, 1922.)

1. Bills and notes 🔑527(1) — Evidence held not to show payment.

In action on a renewal note, evidence including the fact that defendants for several years after its execution paid interest on the note *held* to support finding that the note had not been paid.

2. Appeal and error 🔑1047(3)—Refusal to strike out answer as conclusion held harmless.

Where a portion of witness' answer, objected to as a conclusion, if it was a conclusion, was the only one that could be reached, and was a repetition of what the witness had already testified to, refusal to strike it out was harmless.

3. Trial 🔑89 — Failure to strike out testimony as not best evidence held not error.

In action on note, where defendants claimed the note was settled and paid by a transaction in which another larger note was settled and paid, and on cross-examination of plaintiff's witness it developed that at the time of settlement the witness prepared some sort of instrument in writing, but it was not made to appear what was the nature of the writing, whether it embodied the terms of the agreement or was signed by the parties, nor that the witness had testified to the contents of the writing, it was not error to deny defendants' motion to strike out all of the witness' testimony pertaining to the settlement as not being the best evidence.

4. Appeal and error 🔑761 — Points urged without citation of authority not considered.

Where the only argument in appellants' brief in support of the contention that a certain ruling was erroneous was a reference to the incident, followed by the assertion that "it required no citation of authorities to establish the error," the point would not be considered.

In Bank.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by W. W. Frazier against V. W. David and another. From judgment for plaintiff, defendants appeal. Affirmed.

Kaye, Siemon & Abel, of Bakersfield, for appellants.

J. W. Wiley and R. B. Lambert, both of Bakersfield, for respondent.

WASTE, J. The plaintiff brought this action to recover on a promissory note for the sum of $1,337.10 executed in renewal of one about to become barred by the statute of limitations. He recovered judgment for the amount of the note, unpaid interest and costs, and the defendants have appealed.

The original transaction between these parties grew out of the purchase of a tract of land belonging to the Kern County Land Company by the defendant V. W. David. Roland Greene held a contract of purchase of the land, which he had assigned to the plaintiff as security for the payment of a promissory note for the sum of $1,600. Greene sold his interest in the contract and in the land and in certain personal property to V. W. David for the sum of $6,000. That sum was agreed to be paid in several items, one of which was a promissory note for $1,300, executed by the defendant to plaintiff, and another a promissory note for $1,600, also executed to the plaintiff by V. W. David and Roland Greene. The note for $1,300 not being paid, and the statute of limitations being about to run against its collection, the defendants executed the note here sued upon, and delivered it to the plaintiff. There was at that time some contention on the part of the defendants that the old note had been paid, and the renewal note was executed with the understanding and agreement between the parties that it was subject to any defense which might be asserted by the defendants to the original obligation. In due time the plaintiff brought this action to enforce payment. The only question in the case was whether or not the note had been paid. There was a very decided conflict in the evidence on that point, and the lower court found that the obligation had not been discharged. It entered judgment for the plaintiff accordingly.

[1] We find no reason for disturbing the judgment of the lower court. There is testimony in the record, including evidence of the fact that for several years after its execution the defendants regularly paid the interest on the renewal note, which sufficiently supports the decision below. The record of the examination of the witnesses is not as clear as it might be, but the findings are full and explicit, and appear to correctly disclose the nature of the whole transaction between the parties.

[2] The appellants complain of certain rulings of the trial court relating to the admission of evidence. The objections are more technical than effective. The one most urgently stressed concerns the testimony of the witness J. W. Wiley, a witness for the plaintiff. V. W. David and Roland Greene secured a discharge from the $1,600 note held by the plaintiff by the execution of certain quitclaim deeds. The defendants claimed that the $1,300 note here in suit was settled and paid by the same transaction. Mr. Wiley, the attorney who arranged the details of the settlement, was called as a witness by the plaintiff, and testified as to what took place in his office. On cross-examination by appellants' counsel he was asked if "both these men" (Mr. David and Mr. Greene) were in his office at the same time. His answer was:

> "If I testify they were together and reached an agreement with them, I wouldn't be positive about that, but I know that I went into the matter with each of them, and the only thing to be settled was that they were giving these quitclaim deeds in consideration of the $1,600 note of which Mr. Frazier took the assignment."

Appellants' counsel asked that the answer be stricken out on the ground that it was the statement of a conclusion of the witness. The motion was denied. Appellants assign the ruling of the court as prejudical error, arguing that the "conclusion" of the witness "that the only thing to be settled" by the giving of the quitclaim deeds was the $1,600 note is the only evidence in the record to the effect that the $1,300 was not paid, and that consequently it must follow that the trial court decided the case in favor of the respondent on this answer alone. We do not think it is necessary to discuss the question whether or not the portion of the answer objected to was or was not the statement of a conclusion. If a conclusion, it was the only one that could be reached, and the fact remains that it was a repetition of what the witness had already testified to, and no conceivable harm could have resulted to appellants by the refusal of the court to strike it out. People v. Hatch, 163 Cal. 368–378, 125 Pac. 907. Laying the answer aside from all consideration, the evidence in the case supports the finding and conclusion of the lower court.

[3, 4] On the cross-examination of the witness Wiley, it developed that at the time of the settlement arrived at between the plaintiff, V. W. David and Roland Greene, Mr. Wiley prepared some sort of an instrument in writing. Counsel for appellants thereupon moved to strike out all of Wiley's testimony pertaining to the subject of the settlement as not being the best evidence. The motion was denied. It was not made to appear then or now what was the nature of the writing, whether it embodied the terms of the agreement or was signed by the parties. Neither does it appear that the witness had testified to the contents of the writing. On the face of the record the ruling of the trial court was correct. Furthermore, the only argument in appellants' brief in support of the contention that the ruling was erroneous is a reference to the incident followed by the assertion "it requires no citation of authorities to establish the error." Points thus made will not be considered.

The judgment is affirmed.

We concur: SHAW, C. J.; RICHARDS, Justice pro tem.; LENNON, J.; SHURTLEFF, J.; SLOANE, J.; WILBUR, J.

(187 Cal. 557)

GOSLINER v. BRIONES et al. (S. F. 9031.)

(Supreme Court of California. Dec. 14, 1921. Modified Jan. 13, 1922.)

1. Appeal and error 🔑501(5)—Bill of exceptions must specify wherein evidence failed to sustain findings.

Where the bill of exceptions does not specify wherein the evidence failed to sustain the findings the contention that the findings were not supported by the evidence cannot be considered.

2. Fixtures 🔑35(3)—Whether buildings permanently affixed to soil question of fact.

Civ. Code, §§ 658, 660, 663, relating to real and personal property are concerned more with ultimate than probative facts, and whether a building is permanently resting on the soil, so as to be deemed "affixed to the land" is a question of fact.

3. Fixtures 🔑4—Intention of parties criterion whether property permanently attached to land.

The intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to land or retains its identity as personalty.

4. Fixtures 🔑35(2)—Licensee, erecting structures on another's land, consent presumed that structures remain property of licensee.

Where structures are erected on land by a licensee, consent on the part of the landowner that the structures remain the property of the licensee will be implied, in the absence of facts showing a different intention.

5. Licenses 🔑49—Erection of house on another's land held by license.

In an action for destruction of plaintiff's house and windmill erected on defendant's land, plaintiff's possession of the land from 1862 to 1916, and the erection of buildings in 1906, which remained on the land till 1915, with other facts found, *held* to justify the finding that plaintiff's possession was as a licensee, and not as a trespasser.

6. Venue 🔑5(5)—Action for destruction of personalty on another's land, not within Code, regulating situs of real actions.

An action for the destruction of a house and windmill erected on another's land was based on the destruction of personal property, and was not within Code Civ. Proc. § 392, subd. 1, relating to actions for the recovery of real property, etc., being tried in the county in which the subject of the action is situated.

7. Judgment 🔑590(4) — Determining ownership of improvements in suit to quiet title not defense to action for destroying plaintiff's buildings on defendant's land prior to suit.

Action for the destruction of plaintiff's house and windmill on defendant's land in 1916 was not barred by judgment, in a suit to quiet title begun in 1917, that defendants were the owners of the land, "together with the improvements thereon;" the building having been destroyed prior to the suit.

8. Torts 🔑22—Rule as to tort-feasors stated.

In actions ex delicto, all persons concerned in the commission of the tort may be joined as defendants, or either sued severally.

9. Master and servant 🔑313—Liability for tort joint.

Where an employer and an employee have participated in a tortious act against a third person, such as the destruction of his building, they may be jointly sued.

10. Damages 🔑105—Measure for destruction of plaintiff's buildings on defendant's land stated.

In an action for destruction of plaintiff's buildings erected on defendant's land, the measure of damages is the value of the buildings, less the cost of removal to another site.

In Bank.

Appeal from Superior Court, City and County of San Francisco; W. N. Thomas, Judge.

Action by Edward S. Gosliner against Frank Briones and others. From a judgment for plaintiff, defendants appeal. Affirmed as modified.

George H. Harlan, of San Rafael, for appellants.

Arnold C. Lackenbach, of San Francisco, for respondent.

LENNON, J. [1] Plaintiff, Edward S. Gosliner, instituted the present action against defendants, Frank Briones, William Latter, and Belle Latter, for the purpose of recovering damages for the destruction of a certain dwelling house and windmill alleged to have belonged to said plaintiff. Judgment was rendered in favor of plaintiff in the sum of $2,500, the reasonable value of the demolished structures, and defendants appeal, relying upon a record consisting of the judgment-roll and a bill of exceptions. Since the bill of exceptions contains nothing which even purports to specify wherein the evidence fails to sustain any of the findings, the contention that the findings are not supported by the evidence cannot be considered. Carter v. Canty, 181 Cal. 749, 752, 186 Pac. 346.

Summarizing the findings, then, we have the following facts before us on this appeal: In the year 1860 Charles A. Lauff sold to Pablo Briones an acre of land in Marin county, Cal.; the deed being recorded at the time of the sale. Upon the death of Pablo Briones this land passed to his wife, Rafaela Briones, who, on January 25, 1915, deeded it to her son-in-law, defendant William Latter. In 1862, shortly after the sale of the land to Briones, Charles Lauff re-entered the said acre of land, and from that year until May, 1916, it remained in the open, notorious, and continuous possession of the said Charles Lauff and various members of his family. In 1906 plaintiff, Gosliner, the son-in-law of Charles Lauff, erected upon this land a five-room dwelling house and a large windmill. Neither of these buildings were firmly imbedded in the soil; both were built upon heavy redwood mudsills, placed upon the surface of the ground. Charles Lauff and his children consented to the erection of the buildings, and it was agreed between them and the plaintiff that the buildings were not to remain permanently upon the land, but were to be left there only for a temporary period, until plaintiff was in a position to remove them to a nearby parcel of land which he owned. In the year 1915 defendant William Latter for the first time asserted his ownership in the aforesaid acre of land. A dispute concerning the title to the dwelling house and windmill ensued, and ultimately, in September, 1916, defendants, without previous notice to plaintiff, entered the property and totally demolished and razed the said buildings. The trial court held that the buildings were personalty and the property of the plaintiff, and accordingly adjudged defendants liable for damages for their destruction.

[2, 3] Vital error was committed, defendants contend, in holding that the buildings did not pass as real property to the owner of the land upon which they rested, but continued to be personalty and remained the property of the person by whom they were erected.

> "Real or immovable property consists of: 1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law." Civ. Code, § 658.
>
> "Every kind of property that is not real is personal." Civ. Code, § 663.

Consequently the buildings in question were personalty unless they were "affixed to the land," for, obviously, only in that sense can they be brought within the above classification of real property.

> "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." Civ. Code, § 660.

This section of the Code is simply a rule for general guidance, concerning itself more with ultimate than with probative facts. Whether or not in any case a building is "permanently resting upon" the soil, so as to be deemed "affixed to the land" within the meaning of the section, remains a question of fact to be determined upon the evidence of that case. Pennybecker v. McDougal, 48 Cal. 160; Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680.

As a general rule the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to the land or retains its identity as personalty; the character of the annexation to the land or other realty and the use made of the property are important considerations, but in most cases are subsidiarily employed for the purpose of testing the intention of the parties. Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 Pac. 184, 13 Am. St. Rep. 147; Jordan v. Myres, 126 Cal. 565, 58 Pac. 1061; Western, etc., Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 665, 87 Pac. 190, 9 Ann. Cas. 1190; Dutton v. Ensley, 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. Rep. 340. In the present case the trial court found that the buildings were not imbedded in the soil, but were constructed on mudsills placed upon the surface of the ground and that the plaintiff had no intention of permitting the buildings to remain on the land, but placed them there pursuant to an understanding that they should be removed therefrom. From these circumstances surrounding the erection of the buildings the trial court concluded that plaintiff never intended that his buildings should permanently rest upon the defendants' land, and this determination cannot be disturbed. Miller v. Waddingham, supra.

Defendants claim, however, that the intent of the plaintiff in placing the buildings upon the land is of no importance in the instant case, for the reason that there is no finding that the owners of the land agreed that they should remain personal property. It is claimed that the rule applies that improvements placed upon land by a stranger without an agreement permitting their removal follow the tenure of the soil on which they are erected. Civ. Code, § 1013; Collins v. Bartlett, 44 Cal. 371; McKiernan v. Hesse, 51 Cal. 594; Prescott & A. C. Ry. Co. v. Rees, 3 Ariz. 317, 28 Pac. 1134; Crest v. Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353. But in the cases last cited there is no clear showing that the person placing the improvements upon the land intended that they should continue separate and distinct from the realty; they are, for the most part, instances where a person has caused personal property to be annexed to real property of another without the latter's consent, with the intent that it should be permanently attached thereto but under a mistaken belief as to the ownership of the real property. In the present case there was, it is true, a mistaken belief concerning the ownership of the land, but, in addition to that, there was an intent that in any event the buildings should not remain upon or become a part of the realty, and therefore, in view of this intent, it is doubtful whether, even under the rule relied upon by defendants, the buildings would be deemed to have become affixed to the land so as to pass to the owner of the soil.

[4] It is, however, unnecessary to decide that question, for the facts of this case bring it within a well-settled exception to the above-mentioned rule. Whatever the rights of a trespasser or entire stranger may be, the rule is that, where structures are erected upon land by a person who occupies the land with the permission or license of the owner, but who has no estate in the land, that is to say, by a mere licensee, consent on the part of the owner of the land that the structures shall remain the property of the person erecting them will be implied in the absence of any other facts or circumstances tending to show a different intention. Bank v. Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491; Joplin Supply Co. v. West, 149 Mo. App. 78, 130 S. W. 156, 161; Fischer v. Johnson, 106 Iowa, 181, 76 N. W. 658. There is no finding that the owner of the land granted Lauff or the plaintiff express permission to occupy the land, but a direct authorization is not essential to establish an occupancy by virtue of permission or acquiescence of the owner; a license may result from circumstances, as, for instance, where a person has continued in possession for such a length of time and under such circumstances that objection might well have been expected had there been no assent. Fischer v. Johnson, supra; McCann v. Thilemann, 36 Misc. Rep. 145, 72 N. Y. Supp. 1076.

[5] The trial court found that Charles Lauff and members of his family had been in open, notorious, and continuous possession of the land from 1862 until 1916, and that the buildings erected by plaintiff remained on the property without objection from 1906 until 1915. These findings, when considered in connection with the other facts found, are tantamount to a finding that Charles Lauff and his family were licensees, and not mere trespassers, and since the findings do not show any facts or circumstances revealing a different intent upon the part of the owner of the land, the court below was correct in holding that the buildings did not become affixed to the land irrespective of plaintiff's intention that they should remain separate.

[6] Our determination of this point in effect disposes of the defendant's objection to the overruling of a demurrer to the complaint for lack of jurisdiction. The present action was brought in the superior court of the city and county of San Francisco which defendants claim was without jurisdiction to try the case by reason of the fact that the land upon which the buildings were erected is situated in Marin county and that the present action involves the right to the use of that land. Section 5 of article 6 of the Constitution of California provides that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated," and section 392 of subdivision 1 of the Code of Civil Procedure requires that actions "for the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property," shall be tried in the county in which the subject of the action, or some part thereof, is situated. The present action, however, is based upon plaintiff's right to the buildings as personal property, and it was solely upon that theory that he recovered judgment. The complaint practically alleged all title and interest in the land to be in defendant William Latter. It is true that there were allegations of facts tending to show that plaintiff was in the position of a licensee in erecting the buildings, but a mere licensee is but one remove from a trespasser and possesses no estate or interest in the land itself. Norfolk, etc., Ry. Co. v. Denny's Adm'r, 106 Va. 383, 56 S. E. 321; Brown v. Boston & M. R. R., 73 N. H. 568, 64 Atl. 194, 199; Fischer v. Johnson, supra. It was, therefore, not improper to bring and try the action in the city and county of San Francisco, where two of the defendants resided. Code Civ. Proc. § 395.

[7] It appears from the findings that in 1917 Charles Lauff and his children instituted an action against defendants William and Belle Latter and others for the purpose of quieting title to the acre of land upon which the buildings here in controversy were erected, "together with the improvements thereon." The judgment in that action, which is set forth in the findings in the present case, decrees that William and Belle Latter are the owners of the said land, "together with the improvements thereon." Defendants contend that plaintiff claims through Charles Lauff, and that he is therefore bound by the judgment against the said Lauff and his children and in favor of the said defendants. Assuming that plaintiff does claim through Lauff and his family, he is not prevented from suing for the value of the buildings he erected because of the judgment against Lauff. The findings of the present case disclose that the two buildings in controversy were totally destroyed in September, 1916, prior to the suit to quiet title. It is, therefore, evident that the words "improvements thereon," in the judgment in the suit to quiet title, do not refer to the two buildings erected by plaintiff, which were not in existence at the time of that suit.

[8, 9] The fact that defendant Frank Briones was an employee of defendants Wil-

liam and Belle Latter in removing the house and windmill does not relieve him from liability for his acts. The court found that defendant Briones joined with the other defendants in demolishing the buildings, with full knowledge that they belonged to and were the personal property of the plaintiff. In the prosecution of actions for causes ex delicto all persons concerned in the commission of the tort may be joined as defendants, or either or any of them may be sued severally, and where an employer and an employee have participated in a tortious act against a third person, they may be jointly sued for damages. Rogers v. Ponet, 21 Cal. App. 577, 581, 132 Pac. 851.

[10] In one particular, however, error prejudicial to defendants was committed, namely, in a ruling respecting evidence concerning the amount of damages sustained by the plaintiff. The trial court found:

> "That the reasonable value of said dwelling house at the time it was demolished by said defendants was the sum of twenty-two hundred and fifty ($2,250) dollars; that the reasonable value of the said windmill at the time it was demolished by said defendants was the sum of two hundred and fifty ($250) dollars"

—and rendered judgment against defendants in the sum of $2,500. The bill of exceptions shows that counsel for defendants made a formal offer to prove that it would have cost the sum of $1,000 to move said buildings from the acre of land upon which they were built to the land owned by plaintiff, Gosliner; but the trial court refused to permit the introduction of this evidence, and sustained plaintiff's objection thereto, upon the ground that it was incompetent, irrelevant, and immaterial. The following evidence as to the value of the buildings is contained in the bill of exceptions:

> Plaintiff testified: "I paid for all of the work and all of the materials. The entire cost of the house and windmill to me was about $2,500."
>
> A carpenter who worked on the house stated: "The value of this particular house was about $2,500."

Assuming that it cost $2,500 to build the house and windmill, nevertheless plaintiff had no right to maintain them on the premises where they were located. The agreement under which he built required him to remove the structures from the land on which they were erected to his own lots, a mile away. The difference between the cost of erecting similar buildings upon his own lots and the amount it would have cost to remove the old buildings from defendant's land to his own lots, assuming the buildings to be equally valuable on both pieces of land, would represent the measure of the damages sustained by plaintiff as a result of the destruction. If the cost of construction is $2,500, and the cost of removal would have been $1,000, then plaintiff should not have been allowed more than $1,500 damages. If the plaintiff had undertaken to establish the market value of the house as personal property subject to removal, evidence of the cost of removing the house to a particular lot would have been immaterial. But where he sought to establish the value of the house merely by proof of the cost of construction, or its value where located, it was proper to show the cost of removal of the house to the lot to which the plaintiff claimed he intended to remove it. Pennybecker v. McDougal, 48 Cal. 160, 164.

It is clear that the finding of the court that the destruction of the buildings damaged plaintiff to the extent of $2,500 cannot be sustained, in view of the showing in the record that the court refused to take into consideration the fact that the utilization of the buildings by plaintiff would have necessitated an expenditure by him of $1,000. Defendants were entitled to introduce evidence upon the question of the cost of removing the buildings for the purpose of mitigating damages, and since the fact appears affirmatively in the bill of exceptions that the court made a ruling excluding material and competent evidence on this question, the judgment must be reversed.

The judgment is reversed.

We concur: SHAW, C. J.; SHURTLEFF, J.; WILBUR, J.; SLOANE, J.

Modification of Judgment.

PER CURIAM. The judgment of $2,500 as damages for the destruction of a certain dwelling house and windmill belonging to the plaintiff having heretofore been reversed because of the erroneous ruling of the trial court refusing to permit the defendants to show in evidence, in diminution of damages, that it would have cost the plaintiff the sum of $1,000 to move the said buildings from the land upon which they were situated; and the plaintiff having, on the 20th day of September, 1921, filed with his petition for a modification of the judgment a remission of the said sum of $1,000, and an agreement that the judgment be modified by striking therefrom the sum of $1,000, and, as so modified, stand affirmed—it is therefore ordered that the judgment of the superior court be modified, by striking therefrom the sum of $1,000, and, as so modified, that it stand affirmed, the plaintiff, however, to have his costs on appeal.

SHAW, C. J., and LENNON, WASTE, SHURTLEFF, SLOANE, LAWLOR, and WILBUR, JJ., concur.

55 Cal. App. 681

NELSON v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2402.)

(District Court of Appeal, Third District, California. Dec. 16, 1921.)

1. Master and servant 🔑405(4)—Evidence of compensable disability held insufficient.

In proceedings under Workmen's Compensation Act for compensation for disability consisting of abscesses on employee's knees caused by streptococcus infection, where the only expert witness sworn for him testified that injuries by a fall were not contributing causes of the abscesses, the Industrial Accident Commission's conclusion that the evidence was insufficient to show that the disability was proximately caused by such fall was justified.

2. Master and servant 🔑414—Compensation claimant required to produce own witnesses.

While the Industrial Accident Commission can summon witnesses of its own motion, this is only done where the Commission finds the parties unable or unwilling to produce testimony necessary to a decision; and where a party claiming compensation has full opportunity to produce his own witnesses, he cannot complain because the Commission did not relieve him from the burden of producing them.

3. Master and servant 🔑414—Rehearing for absence of witnesses as to compensable disability held properly denied.

In proceedings under Workmen's Compensation Act, in which employer denied that employee's injuries caused the disability complained of, the Industrial Accident Commission's denial of petition for rehearing for absence of witnesses was proper where the materiality of their testimony was not shown, and none of them could qualify as expert witnesses.

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831) by Charles Nelson, for compensation for injuries, opposed by the Yosemite Lumber Company, employer, and the Manufacturers' Indemnity Exchange, insurer. Claim for compensation denied by the Industrial Accident Commission, and petitioner brings certiorari to review the Commission's order. Order affirmed.

Henry F. Price, of Merced, for petitioner.

A. E. Graupner and Warren H. Pillsbury, both of San Francisco, for respondents.

FINCH, P. J. This is an application to review the decision of the Industrial Accident Commission denying the petitioner's claim for compensation for disability alleged to have been caused by two accidents to his knees arising out of and in the course of his employment by the Yosemite Lumber Company.

The petition alleges:

"1. That the Commission acted without and in excess of its powers; (2) that the order and decision was unreasonable; (3) that the findings of fact do not support the order, decision and award under review."

The Commission found:

"That * * * applicant fell from a pile of lumber while in the course of his employment, but the evidence is insufficient to establish as a fact that the disability complained of was proximately caused by said fall."

[1] Dr. H. Jalmer Kyleberg, a contract surgeon for the Yosemite Lumber Company, who gave applicant professional treatment for the injuries resulting from the alleged accidents, was sworn as a witness for the applicant, and testified that the alleged disability consisted of abscesses on both knees caused by streptococcus infection; that the accidents alleged were slight, and, in the opinion of the witness, were not contributing causes of the abscesses. No other expert witness testified. The abscesses developed about three weeks after the last accident, the applicant having been engaged in his usual employment in the meantime. The application for compensation was not contested in the sense in which the word "contest" is usually understood. R. C. Dracey, manager of the lumber company, and who represented the defendants at the hearing, being called as a witness for the petitioner, stated:

"I think there is no disposition on the part of the company to avoid any issue raised by the man, or meet any condition that the man is entitled to."

Neither party was represented by an attorney. The referee conducted the examination in a manner eminently fair to both parties, and the conclusion reached is the only one which could reasonably be drawn from the evidence.

[2, 3] Attorneys for the Industrial Accident Commission fairly state the facts and the law bearing upon the further contentions of petitioner as follows:

"Two hearings were held in the case, of which petitioner concedes he had notice and full opportunity to present all the testimony he desired to offer. He does not complain that any testimony offered by him was ruled out, that he was misled by erroneous advice into omitting to secure necessary testimony, or that any reasonable request for continuance for the purpose of producing such testimony was refused. His only complaint is that the Commission did not itself subpœna and produce the witnesses named by him. Obviously this is not a valid ground. While the Industrial Accident Commission, as pointed out by petitioner, can summon witnesses of its own motion, the fee to be paid by the state, it is not required to do so, and very seldom does so. The state has not appropriated sufficient funds to permit this to be done in routine cases. This is only done where the Commission itself finds the parties unable or unwilling to produce testimony necessary to the decision of the case, and the Commission deems the testimony of such witnesses to be vitally necessary to the decision. As in all other civil actions, the burden is primarily upon each party to produce his own witnesses to establish his case, and where the party has full opportunity to produce his own witnesses he cannot complain because the Commission did not relieve him from the burden.

"Furthermore, respondent Commission found and determined in its order denying petition for rehearing, that such testimony, if received, would not be sufficient to affect the decision. It will be noted that petitioner has at no time indicated what these witnesses would testify to if called. The burden is upon petitioner to show the materiality of their testimony, which petitioner has failed to do. And, judging from the facts as shown by the record, it seems impossible to see any materiality to their testimony.

"It will be noted from the Commission's findings and award that decision was in favor of applicant as to the occurrence of the injuries alleged by petitioner, and as to the fact that such injuries occurred in the course of and arose out of his employment. Further testimony on behalf of petitioner was therefore unnecessary to establish these contentions. The point upon which compensation was denied was that petitioner had failed to show that his injuries were the cause of the later abscesses in his knees. Neither of the witnesses whom petitioner wished produced could testify upon this point, as this is purely a medical question, and neither of the witnesses could qualify as physicians or expert witnesses."

The decision of the Commission is affirmed.

We concur: BURNETT, J.; HART, J.

(55 Cal. App. 588)

BUSH v. WEED LUMBER CO. (Civ. 2370.)

(District Court of Appeal, Third District, California. Dec. 12, 1921. Hearing Denied by Supreme Court Feb. 9, 1922.)

1. Trial 🔑165—Motion for nonsuit admits truth of evidence and legitimate inferences of fact.

A motion for nonsuit admits the truth of the evidence, and every legitimate inference of fact therefrom.

2. Trial 🔑165—Court cannot go beyond limits of motion for nonsuit in rendering decision.

In rendering its decision on a motion for nonsuit, the court cannot go beyond the limits of the motion.

3. Trial 🔑139(1)—If doubtful, court must let case go to jury.

On a motion for nonsuit, it is the court's duty, if there be any doubt, to let the case go to the jury.

4. Trial 🔑165—On motion for nonsuit, evidence most strongly interpreted against defendant.

On a motion for nonsuit, the evidence should be most strongly interpreted against defendant.

5. Negligence 🔑32(2)—Well digger searching for water held an invitee entitled to ordinary care.

Where a lumber company employing plaintiff to bore a well offered a reward any one finding a spring of water, and plaintiff, while waiting for repairs on his outfit, went in search of a spring, the offer was an invitation to go on the company's premises for the purpose of the search, and while so engaged he was entitled to the protection of ordinary care by the company.

6. Negligence 🔑136(15, 26)—Crane operator's negligence and contributory negligence of invitee held for jury.

Where defendant lumber company employing plaintiff to bore a well offered a reward to any one finding a spring of water, and plaintiff, while waiting for repairs on his outfit, went in search of a spring, and in returning from the search sat down 30 or 40 feet from a crane, which fell on him as he was watching a crew using it in unloading logs from cars, *held*, on the evidence, that the issues of negligence and contributory negligence were for the jury.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by P. W. Bush against the Weed Lumber Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Collier & McNamara, of Yreka, for appellant.

Taylor & Tebbe, of Yreka, for respondent.

BURNETT, J. The appeal is from a judgment of nonsuit. The nature of the action may be seen from the following allegations of the complaint:

"That on and prior to the 9th day of June, 1919, plaintiff was employed by said Weed Lumber Company to bore a well for said company on its premises near camp 3, at Morrison, in the county of Siskiyou, state of California; that on said 9th day of June, 1919, while plaintiff was employed as aforesaid, his said well-boring outfit broke down, and, while waiting for same to be repaired, plaintiff, at the solicitation of C. W. Murphy, general superintendent for said Weed Lumber Company, and further induced by a reward offered by said Weed Lumber Company to any one finding water for the supply of said company's camp, went in search of a certain spring of water reputed to be above said camp 3, and after making said search, while returning to said camp, where he was staying, plaintiff necessarily passed along said company's railroad track and by a crew of men employed by said company unloading logs from flat cars by means of a certain mechanical contrivance called a 'merry crane'; that when plaintiff was opposite the said crane the foreman of said crane requested plaintiff to hand him a block of wood, which plaintiff did, and thereupon plaintiff withdrew a distance of 30 or 40 feet in the rear of said crane to await transportation back to camp, and, while waiting and watching said crane in operation, the said crane, owing to its careless and negligent operation by defendant's said employees, and owing to the gross negligence and carelessness of said employees in not causing same to be anchored down, and owing to the negligent and careless manner in which said company's railroad track was constructed and maintained, on which said track said crane was standing, the said crane, without fault on the part of this plaintiff, toppled over backwards and inflicted on plaintiff the injuries hereinafter set forth and described."

[1-4] There is no controversy as to the principles that must govern in the determination of a motion for nonsuit. It admits the truth of the evidence produced, and every legitimate inference of fact that may be legitimately drawn therefrom (Estate of Daly, 15 Cal. App. 329, 114 Pac. 787); the court cannot go beyond the limits of the motion in rendering its decision (Daley v. Russ, 86 Cal. 114, 24 Pac. 867); it is the duty of the court, if there be any doubt, to let the case go to the jury (Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426), and the evidence should be most strongly interpreted against the defendant (Hoff v. Los Angeles, etc., Co., 158 Cal. 596, 112 Pac. 53).

No contention is made that the plaintiff was not seriously injured or that there was no evidence that it was due to the faulty construction of the "crane," but the claim of respondent is that the defendant owed the plaintiff no duty to protect him, and therefore there was no actionable negligence on the part of respondent. It is declared that the case is governed by the decisions of the Supreme Court in Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580, Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153, and Grundel v. Union Iron Works, 141 Cal. 564, 75 Pac. 184, in pursuance of the doctrine that—

> "The duty of a master to furnish his servant with a reasonably safe place in which to work is limited to the premises where the employee is required to be for the purposes of his employment, and does not extend to his protection while upon private excursions outside those limits."

The vital question is whether the case falls necessarily within the principle of those decisions, or is there any ground for holding that defendant did owe plaintiff the legal duty of exercising ordinary care for his protection?

Plaintiff testified:

> That he had been employed to dig a well for defendant, and, while upon the latter's premises, "about the 7th day of June I was telling Mr. Murphy I had been down to Charlie Phelps', and he was telling me that himself and Frank Mills had found water coming down of the gulch at the foot of Mt. Shasta, and Mr. Murphy told me, while I was waiting for the tools, to go and hunt for it, and I also told him that Mr. Hall that was scaling lumber there told me, he says he had found some water seeping out of the 'whaleback' there, and Mr. Murphy told me to go to the barn and get a horse and go on horseback, and I told him it hurt me to ride horseback, that I would go on the train, and I would go as far as I could on the train; then I would go on foot the balance of the way. And on the 7th, that was the day I went up around the foot of Mt. Shasta, up to the snow line, and I couldn't find no water; everything was dry below the snow and I came back; and the next day I was kind of tired and didn't go out, and on the 9th I went out on the train again to the foot of 'whaleback' and walked around there hunting water."

[5] He further testified that Mr. Murphy told him that if he could find a spring that would supply the camp with water there would be $100 in it for him, and that there was posted on the premises a sign or notice that a reward of $100 would be paid by the company to any one who would find a spring from which water could be piped to the camp. The offer through the notice or through Mr. Murphy did not, of course, bind respondent to pay anything to plaintiff unless he found the water, but it was a clear invitation to go upon the premises for the purpose of searching for such a spring. It could not be found without a search, and the search could not be made without going upon the premises. Plaintiff was therefore undertaking a mission in pursuance of the request and invitation of defendant, and while engaged in that task he was entitled to the legal protection of ordinary care on the part of respondent. Meyers v. Syndicate Heat & Power Co., 47 Wash. 48, 91 Pac. 549; Bennett v. Louisville & N. R. R. Co., 102 U. S. 577, 26 L. Ed. 235; Roseberry v. Niehaus & Co., 166 Cal. 481, 137 Pac. 232.

[6] The question then arises whether plaintiff, when injured, was acting within the limits and while in the pursuit of this search for water. In its consideration there would be, manifestly, no difference whether he was going or returning if he was not making an "excursion" beyond the limits of the purpose for which he was invited upon the premises.

After stating that he had gone to the foot of "whaleback mountain," and hunted there for water, he started to return and came down to where they were working with the crane; that in accordance with the request of one of the workmen he handed him a chunk of wood to block a log; that he then walked to the side of the track and sat down on a stump, "and they were working the crane that way (indicating), and I looked up and see the crane kind of dip that way a little, and I got up and came back over this side, right opposite from where they was working back of the crane, and sat down straddle of a log about 30 or 40 feet from the crane, and so I sat there maybe about 5 minutes—maybe ten"—when he looked at his watch and started to put it back in his pocket, and "I looked up and the crane was coming right for me, and I jumped off and run; and I throwed my eyes up and I see that the crane was coupled to the two cars. I thought that the coupling would hold and it would throw the crane around this way, but it didn't; it just lifted it right off, the top did, and it came right over this way (indicating), and came down this way, and hit me and knocked me down and laid across me here." When asked what he was doing there, he said he sat down to rest.

> "I was very tired. I had been walking in loose sand and gravel about thirty hours. I had asked them about the train, and I was going to rest for a few minutes. The train wasn't there and I was going to hike down to camp."

The record shows furthermore the following:

> "Q. As I understand it, when you came out in the morning, you got off the crane, where the crane was spotted and walked over to 'whaleback'? A. Yes; I got off the engine and walked over to 'whaleback.'
>
> "Q. When you returned, you returned by the same way—in other words, by the crane, and then to go on down to the camp? A. Yes.
>
> "Q. Was that the nearest and most direct route? A. It would be pretty near a straight line from where I was, straight through to the camp."

We fail to see any difference in principle between the facts herein and those in the Roseberry Case, supra. Therein the plaintiff was sent by his employers, Poetsch & Peterson, to the premises of defendant to see that everything properly appertaining to a boiler, which had been purchased by them, should be brought away. As stated by the Supreme Court:

> "The boiler was loaded upon a truck at the rear of a gangway opening on Brannan street. Mr. Niehaus had left plaintiff, and later plaintiff started to depart from the premises, but stopped to converse with a friend. He then went to the office to say good-bye to Mr. Niehaus, but, not finding him, turned in the door to leave when he saw the loaded truck starting out by the gangway leading to Brannan street. He waited for the truck to pass, and then walked behind the men who were following it. Before he reached the open gate a pile of lumber fell upon him, broke his leg, and inflicted other serious injuries."

The Supreme Court held that it was proper to submit to the jury the question as to the negligence of the defendant as well as the contributory negligence of the plaintiff.

[6] Respondent urges that the distinguishing feature of that case is that therein the plaintiff was an "invitee," and therefore the defendant owed him the duty of ordinary care. But it is difficult to discern any difference in principle between the implied invitation in that case for the owner to come and get his boiler and the express invitation in this case for plaintiff to come upon the premises to seek for water. In neither case was the plaintiff a trespasser or mere licensee, and, as we understand it, the legal obligation was the same in both instances. In each, also, the plaintiff was returning after having gone upon the premises for a certain definite purpose, and was not departing from the course that might be considered direct and opportune. The only difference is that herein the plaintiff sat down 30 or 40 feet from the dangerous instrumentality, while therein the plaintiff was walking past the lumber when it fell. His sitting down near the crane might present a question of contributory negligence, but in view of his explanation of the circumstances surrounding the affair, it was a matter to be submitted to the determination of the jury.

In the Schmidt Case, supra, cited by respondent, the plaintiff entered the private residence of the defendant without an invitation, and was injured by falling into a cellar. It was held that, since he was not invited nor allured into said building, he was thereby the mere licensee of the owner, and for that reason the latter owed him no duty, "and he went there subject to all the risks attending his going."

In Kennedy v. Chase, supra, "the servant made a private excursion upon the deck of the vessel, upon his own account and for his own convenience, to place his coat upon a main hatchway, unnecessarily remote from the place of his employment," and it was in view of such circumstance that the Supreme Court held that the employer was not liable. In other words, the employee, when injured, was beyond the limits of the place where he was required to be for the purpose of his employment. The employee was manifestly acting outside the scope of his employment, since he was on a part of the vessel where he was neither required nor invited to go. If herein the plaintiff on his return had departed from the direct route to visit the crane on his own account, and thus had been injured, the Kennedy Case might be in point.

So in Grundel v. Union Iron Works, supra, the deceased was not employed by the defendant, nor was he invited to go upon the vessel. He was either a trespasser or a mere licensee, and hence the defendant owed him no duty to keep its gangplank in safe condition.

In Means v. Southern California Ry. Co., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206, not cited by either party, many authorities are collated which distinguished between the case of one invited upon the premises and a trespasser or mere licensee. Of course, it is true, as therein pointed out, that in case of a licensee the landowner is liable for intentional or wanton injury, but not for the lack of ordinary care. The court assumed, though, that the rule is well settled that such care must be exercised toward one who is invited to the premises, and we understand that the legal proposition is not disputed by respondent.

It is probably unnecessary to state that the situation would be different if the case had been submitted upon the evidence introduced and the jury had rendered a verdict for the defendant, but, as we view it, the trial court erred in refusing to submit the issues to the determination of the jury.

The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

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55 Cal. App. 661

MATHEWS v. MATHEWS. (Civ. 4022.)

(District Court of Appeal, First District, Division 2. California. Dec. 15. 1921. Hearing Denied by Supreme Court Feb. 9, 1922.)

1. Divorce 🔑245(1)—Defendant's stipulation for "permanent alimony" of $30 per month did not prevent modification reducing amount.

Under Civ. Code, §§ 137, 139, stipulation of defendant husband for decree of $30 per month against him, "as and for permanent alimony" for plaintiff, did not prevent modification of the decree reducing the amount.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Permanent Alimony.]

2. Divorce 🔑245(1)—Modifying alimony discretionary.

The modification of a decree as to alimony because of changed circumstances rests in the discretion of the trial court, under Civ. Code, § 139.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Ada E. Mathews against William H. Mathews. From an order modifying interlocutory decree of divorce as to payment of alimony, plaintiff appeals. Affirmed.

H. W. Glensor, and Glensor, Cleve & Van Dine, all of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondent.

NOURSE, J. [1] This is an appeal from a special order made after final judgment modifying the provisions of an interlocutory decree of divorce respecting the payment of alimony. The case was before the first division of this court on a former appeal. Mathews v. Mathews, 193 Pac. 586. The order there under consideration modified the interlocutory decree on the ground that the final decree did not contain any direction as to the payment of alimony. The court held that this ground was not sufficient to warrant the modification of the decree, and the order was therefore reversed. A new motion was thereafter made on the ground that the financial circumstances and conditions of both plaintiff and defendant had materially changed since the entry of the interlocutory decree, and that it was not necessary or equitable for the defendant to be required to continue to pay to plaintiff the alimony awarded in the interlocutory decree.

Prior to the trial of the action the parties stipulated that the sum of $30 a month "as and for permanent alimony" might be awarded to plaintiff by the court. The interlocutory decree does not show that the stipulation was before the court or that it was considered by it, but does recite that proofs were taken of the matters alleged in the complaint, and makes the same award as and for permanent alimony as is mentioned in the stipulation. The complaint alleged that $30 per month was "a reasonable sum as and for alimony for the support and maintenance of plaintiff."

There was nothing in the complaint to apprise defendant of the fact that plaintiff was seeking something else than the ordinary alimony authorized by sections 137 and 139 of the Civil Code. When the stipulation was drawn waiving counsel fees and suit money and fixing the amount to be allowed as "permanent" alimony, the defendant was justified in assuming that such alimony was subject to the power of the court to modify as conferred by section 139.

The words "permanent alimony" as used in the stipulation and in the interlocutory decree refer to the alimony awarded after suit under section 139, as distinguished from the suit money awarded during the pendency of the action and usually termed "temporary alimony." The section of the Code must be read into the decree, and as the stipulation is not different from the decree it cannot mean more than that the trial court was authorized to award plaintiff $30 a month as permanent alimony on the completion of the trial, but that such award was subject to the power of the court to modify as provided in that section.

The grounds of the motion to modify the decree were that the financial circumstances of both parties had materially changed and that it was not necessary or equitable to require defendant to continue to pay the alimony to plaintiff. The showing was that plaintiff was in a much better position financially than defendant and was in receipt of a very much larger income than he.

[2] The modification of a decree in respect to the award of alimony is a matter which rests in the sound discretion of the trial court. The original award under section 139, Civil Code, is to be made with "regard to the circumstances of the parties respectively." When the circumstances change the court may in its discretion modify the award. The notice of motion assigned a legal ground for the modification of the decree, and the showing was sufficient to support the order.

The order is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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55 Cal. App. 678

CHILBERG v. CROSS LAND CO.

(Civ. 3557.)

(District Court of Appeal, Second District, Division 2, California. Dec. 15, 1921. Hearing Denied by Supreme Court Feb. 9, 1922.)

1. Corporations 🔑82—Agreement in certificate of corporation to purchasers of stock held invalid.

Where purchasers of stock at par from corporation dealing in land received certificates aggregating the same amount, wherein the corporation agreed to set aside a certain part of the proceeds of sales of land of the corporation in payment of the certificates without interest, the promise to refund was void under Civ. Code, § 309, providing that dividends may be made only from surplus profits arising from the business.

2. Corporations 🔑566(5)—Rights of creditors superior to stockholders under refund agreement.

Rights of creditors of a corporation dealing in land were superior to any rights obtained by stockholders under an agreement of the corporation to refund the amount paid for the stock without interest out of the proceeds of sales of land.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Andrew Chilberg against the Cross Land Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. W. Bell, of Los Angeles (Wm. A. Gilmore, of Seattle, Wash., of counsel), for appellant.

Benjamin E. Page, Arthur C. Hurt, Eugene D. Williams, Horace S. Wilson and Constan Jensen, all of Los Angeles, for respondent.

WORKS, J. Plaintiff, an assignee, brought suit against defendant to recover the sum of $10,000. His predecessor in interest had bought shares of the capital stock of defendant, paying therefor the amount mentioned, at par, and there were issued to him by defendant at the same time certain obligations or certificates aggregating the same amount. These papers, each entitled "Refunding Certificate," were in the following form:

"The Cross Land Company, a corporation organized and existing under and by virtue of the laws of the state of California, certify [hereby?] certifies and agrees:

"That Eugene Chilberg has paid into the treasury of said corporation the sum of $1,000.00, for the purpose of carrying out the present project of said corporation, to subdivide and sell in small tracts, a portion of the rancho La Puente; that as a partial consideration for said money so paid, ten shares of the fully paid up capital stock of said corporation have been issued to said Eugene Chilberg.

"As a further consideration for the payment of said money, the Cross Land Company hereby agrees that it will refund said $1,000.00, so paid, to Eugene Chilberg, his heirs, executors, administrators, or assigns, without interest, in the following manner to wit:

"Thirty-three and one-third per cent. (33⅓%) of all the moneys received by said corporation from the sale of two thousand sixty-six acres, more or less, of said rancho La Puente, more particularly described in a certain deed from Purcell, Gray & Gale, Incorporated, to said Cross Land Company, except that portion of said land to be conveyed to a water company for the purpose of placing water upon said land, shall be placed in a separate fund by said corporation for the purpose of refunding said above amount and other sums due to subscribers of stock holding like certificates. All certificate holders shall be paid from said funds in proportion to the amount set forth in their respective certificates, and said payments shall be made on the 1st day of July, 1912, and every six months thereafter.

"Said Cross Land Company agrees that it will not issue certificates to subscribers of stock in an amount in excess of one hundred fifty-five thousand dollars ($155,000.00) and that during the existence of this certificate and until the full amount thereof has been fully refunded that it will not cause any dividends to be declared or paid upon the capital stock of said corporation.

"No payments shall be made on this certificate unless the same is presented for the proper indorsement of the same on the back thereof, and when fully paid the same shall be canceled and surrendered to the Cross Land Company."

By his action plaintiff sought to recover as upon a breach by defendant of its alleged obligation to "refund" as expressed in the certificates. Defendant had judgment and plaintiff appeals.

[1, 2] It is contended by respondent that the agreement to refund is void under the terms of the Civil Code (section 309), to the effect that—

> "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; * * * nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock, except as herein specially provided."

The trial court determined that the refunding certificates were violative of the provisions of the section, and we do not see how the same conclusion is to be avoided by us. There is no claim made by appellant that the real property mentioned in the certificates represents "surplus profits arising from the business" of respondent, even if we should be so hardy as to attempt to view them as an effort to declare dividends. In fact, appellant, directing our attention to a certain finding of the trial court, says that the lands "were at all times the gross assets of the defendant corporation." It is not contended that any sections of the Civil Code, other than section 309, make provision for such a payment as is contemplated by the refunding certificates. Appellant was clearly a stockholder of respondent, and not a lender of money to it. This much appears from the face of the certificates; and appellant himself, placing that construction upon the transaction, alleges in his complaint that his assignor "purchased of the defendant 100 shares of its capital stock and paid therefor the sum of $10,000 and in consideration therefor the defendant issued to" the assignor "10 refunding certificates." It is equally apparent that the certificates contemplated the payment to appellant of proceeds to arise from a disposition of a part of the corporate capital stock. These circumstances are to be viewed in connection with the further fact that from a time prior to the commencement of the action respondent has been badly if not overwhelmingly indebted. In such a situation appellant's certificates are to be considered from the standpoint of their effect upon the rights of creditors, whose claims are surely superior to his, even if it be admitted that he holds obligations of any validity whatever. Schulte v. Boulevard Gardens Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 1156, Ann. Cas. 1914B, 1013. The view of the trial court that the refunding clause of the certificates was unenforceable was undoubtedly correct. In addition to the section of the Code, and as illustrating the conditions under which it has a proper application, we cite, out of the many cases on the subject, the following: Kohl v. Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; Tapscott v. Mexican Colorado R. L. Co., 153 Cal. 664, 96 Pac. 271; Hedges v. Frink, 174 Cal. 552, 163 Pac. 884; Talcott Land Co. v. Hershiser (Sup.) 195 Pac. 653.

Appellant, contending for the validity of the obligations, advances a variety of arguments, but their invalidity, when they are placed beside section 309, is so palpable to us that it does not appear worth while to discuss the specific arguments presented.

In view of the conclusion we have reached on the merits of the question presented, we do not find it necessary to pass upon the contention, made by respondent and sustained by the trial court, that appellant's alleged cause of action was barred by the statute of limitations.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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55 Cal. App. 644

PEOPLE v. ELDER. (Cr. 803.)

(District Court of Appeal, Second District, Division 2, California. Dec. 14, 1921. Rehearing Denied Jan. 13, 1922. Hearing Denied by Supreme Court Feb. 9, 1922.)

1. Criminal law 🔑406(1), 516—"Admission" distinguished from "confession."

An admission is distinguished from a confession by the fact that the term "admission" relates to matters of fact that do not involve a criminal intent, and a confession is an acknowledgment of guilt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Admission; Confession.]

2. Criminal law 🔑516—Statements of accused held admission of guilty conduct involving criminal intent.

Evidence of defendant's statements *held* admission of guilty conduct involving criminal intent, and hence a confession.

3. Criminal law 🔑406(1), 516—Statement of facts in excuse or not involving guilty intent are admissions, not confessions.

When the statement of guilty conduct is such that it does not involve a guilty intent, or where it constitutes facts amounting to justification or excuse for defendant's acts, it is admission rather than confession.

4. Criminal law 🔑531(4), 736(2)—Defendant can show that confession was not voluntary; whether defendant possessed his faculties when making confession a jury question.

Where on a trial for murder a witness testified that accused had made a confession freely and voluntarily, it was accused's right to call witnesses to show that he was coerced and unable to make a dependable statement, but where no request was made to do so the court properly admitted the evidence, and whether later evidence justified the conclusion that accused was not in possession of his faculties when he made the statements was for the jury in weighing the evidence.

5. Criminal law 🔑1173(2)—Failure to inform jury they should pass on question as to whether confession voluntary not prejudicial error.

In prosecution for murder *held* that defendant was not prejudiced by court's failure to inform the jury that it might pass upon the question as to whether the confession was voluntarily made.

6. Criminal law 🔑1186(4) — Refusal of instruction on weight to be given statements of victim held not reversible error.

In view of Const. art. 6, § 4½, where evidence of what accused's victim stated in his presence showing possible motive without response from accused was admitted, the refusal of an instruction that such statements were not evidence of facts related *held* not reversible error.

7. Homicide 🔑294(1) — Instruction on irresistible impulse as defense held justified.

In a prosecution for murder, where defendant made no defense that he did the shooting under the influence of an irresistible impulse, an instruction relating to irresistible impulse as a defense was not improper in view of testimony of state's witness that defendant said he "lost his head and lost complete control of himself."

8. Criminal law 🔑938(4)—No error in denying new trial for newly discovered evidence within knowledge of witness testifying at trial.

Where evidence could have been brought out by a witness who testified at trial, there was no error in overruling motion for new trial based on the ground of newly discovered evidence.

9. Homicide 🔑250—Testimony of eyewitness held to support verdict of murder.

In prosecution for homicide, where the evidence was conflicting if the jury believed the testimony of an eyewitness, it was ample to support a verdict of murder.

10. Criminal law 🔑1159(3)—Verdict on conflicting evidence not disturbed.

When the testimony is conflicting, the verdict will not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

James Elder was convicted of murder, and he appeals. Affirmed.

J. J. McMahon, Fred J. Spring, and C. W. Byrer, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CRAIG, J. This is an appeal taken from the judgment and sentence of life imprisonment, based upon the jury's verdict and from an order denying a motion for a new trial. The motion was made upon all of the statutory grounds. The defendant was convicted of murder in the first degree; he having been found guilty of the homicide of his wife. It appears without conflict that on the 22d day of September, 1920, he shot her with a 32-caliber revolver. She died 12 days later as a result of the wounds thus inflicted. The defendant saw his wife and one Clemmons standing under a tree in front of his residence. Defendant walked up to them and said, "Well, Ida, this is the Christian life you are leading." Mrs. Elder exclaimed, "My God! Jim Elder, my husband!" Defendant stepped back and fired at least two shots from his revolver. Ida M. Elder, the deceased, received two bullets. Upon the trial, these facts were not disputed by the defendant, but he claimed that before he shot, Clemmons had reached toward his pocket, and that the homicide was the result of the defendant's effort to lawfully defend himself and the accidental shooting of Mrs. Elder by reason of her having suddenly come forward as the shots were being fired. The jury, by its verdict, found against these contentions. The entire circumstances surrounding the homicide were before them, and, without here detailing them, it is sufficient to say that the record shows that there was ample evidence contradicting the defendant's version of the shooting to sustain the verdict of the jury.

The principal contention of the appellant has to do with the admission of an alleged confession, and instructions refused by the court on that subject.

[1, 2] The people insist that the evidence admitted of what the defendant is alleged to have said, and which appellants aver amounts to a confession, was in fact, only an admission. In this, we think they are mistaken. "An admission is distinguished from a confession by the fact that the term 'admission,' in criminal matters, relates to matters of fact that do not involve a criminal intent, and a confession is an acknowledgment of guilt." Wharton's Crim. Ev. § 622a.

Appellant does not indicate what part of the statement attributed to the defendant as a confession is regarded as objectionable; however, the salient points of it as related by Officer Taylor are:

> "Well it is a long story. We have been married over 20 years. In Pennsylvania I had lots of trouble with my wife. We had separated there, and I divided up my property with her, and gave her half of what I had."

Defendant is alleged to have said further that his wife was continually nagging at him, and about five weeks prior to September 22d she had left him and was running around with married men; that on the night of the shooting he saw her come out of the house and start talking to Clemmons. They were standing in the parking under a tree. He (Elder) went towards them, and when he got to them his wife turned around and shouted, "Murder!" Taylor testified:

> "He said he lost his head and complete control of himself, and so I asked him how many times he shot at her, and he said he thought twice. * * * He said he was very sorry for what had happened, and hoped his wife would get well."

[3] Some other but immaterial statements were contained in Taylor's version of the confession, but nothing is alleged to have been said by Elder that could be regarded as in the slightest degree a justification or excuse. This statement is an admission of guilty conduct which involves criminal intent. If the defendant had made this statement as a witness at the trial, no other evidence would have been necessary to have sustained the verdict which the jury returned. The specific intent to kill would have been presumed from the guilty conduct admitted by him. People v. Fowler, 178 Cal. 665, 174 Pac. 892, cited by respondent is not in point. There the defendant expressly negatived the idea that his conduct was accompanied by a criminal intent by declaring that he had acted in self-defense and by a further statement of facts which if true would have supported that plea. When the statement of guilty conduct is such that it does not involve a criminal intent, or where it constitutes facts amounting to justification or excuse for the defendant's acts, it is an admission rather than a confession. Such are the following cases cited by respondent: People v. Weston, 169 Cal. 393, 146 Pac. 871; People v. Fowler, 178 Cal. 657, 174 Pac. 892; People v. Wilkins, 158 Cal. 530, 111 Pac. 612; People v. Le Roy, 65 Cal. 613, 4 Pac. 649.

[4] However, the usual formal foundation was laid for the admission of the confession. Officer Taylor was the witness who related it. Before doing so he stated that it was given freely and voluntarily, without any promise of immunity or hope of reward having been offered or any violence having been used upon the defendant to induce him to make a statement. But appellant insists that Elder was in such a condition when he made the confession and had been so mistreated before then that what he said cannot be regarded as having been uttered freely and voluntarily.

The greater part of the occurrences which appellant claims transpired had not been testified to by any witness when the objections to the confession were overruled by the court and the confession admitted in evidence. It was the right of counsel to have offered evidence by calling the defendant or other witnesses to show that he had been coerced or was otherwise unable to make a voluntary or dependable statement, but no request was made to do this. The court could only rule upon defendant's objection in the light of the evidence as then contained in the record. The confession was said to have been made at about 11 o'clock on the 23d of September. The only violence which defendant had received as related by any witness who had testified was on the evening of the 22d of September at about 8 o'clock p. m. This happened at the time the officers arrested him. Officer Taylor testified that defendant resisted arrest, and that in the fight which occurred in subduing him, Elder had received a number of bruises and wounds, and had lost his glasses. Dr. Schiffbauer, the assistant police surgeon, had testified that at about 8 o'clock on the 22d of September he had dressed appellant's wounds; that the nose was broken, and there were three or four superficial scalp wounds. Both this witness and Officer Taylor had declared that Elder was not dazed. Officer Taylor had testified that before making the statement contained in the confession defendant had been taken to the receiving hospital three times to see his wife; that he had walked unassisted; that on these trips he made no statements, but did not say that he did not want to talk. In this state of the record we think the court properly overruled the objection to the question in response to which the confession was related. But if the evidence justified the conclusion that the defendant was not in full possession of his faculties when he made the statement in question, this did not result in its being inadmissible, but would be a matter to be considered by the jury in connection with their duty to weigh the evidence. People v. Miller, 135 Cal. 69, 67 Pac. 12.

[5] The defendant requested the following instruction:

> "In this case the prosecution was allowed to introduce as testimony in the case certain alleged statements of the defendant which the prosecution claims to be a confession of guilt on the part of the defendant. Before permitting this testimony to be introduced, the court required preliminary proof to establish the fact that such alleged statement or confession on the part of the defendant was voluntary, and was not made under threats or violence or because of promises or other improper inducements. The defendant has offered testimony to establish the fact that such alleged statement or confession was not voluntary, and was therefore not admissible as testimony in this case.
>
> "You are instructed that the action on the part of the court in admitting such alleged statement or confession into evidence does not bind you to accept the court's conclusion, and that the question as to whether such alleged confession or statement, if made, was voluntary or not is for you to decide. If you conclude that it was not made voluntarily, then you have the right to, and it is your duty to, disregard the same altogether. In other words, you have the right to reconsider the question as to whether the same was voluntary or not, and in this connection are the judges of the value and

effect of evidence, and of the credibility of the witnesses, as the same pertains to such alleged statement or alleged confession."

This the court refused to give. Undoubtedly the offered instruction contains a correct statement of the law to the effect that if there is a substantial conflict in the evidence the jury may reconsider the question as to whether or not the confession was voluntarily made. That matter is primarily for the court, for the purpose of determining the admissibility of the statement. Nevertheless, the jury should be instructed that it is still within its province to pass upon the matter and finally decide as to whether or not the confession was voluntarily made. People v. Fowler, 178 Cal. 657, 174 Pac. 892. The defendant's version of the treatment he had received did not show that any statement he made to Officer Taylor at 11 o'clock on the 23d of September was other than a voluntary one. He claimed that he did not remember making the statement related by Taylor. Defendant testified that—

> He was throwing cold water on his head to ease the pain, and an officer told him not to do that; that Officer Taylor and the witness got to talking, and that "Mr. Taylor said to me 'I am your friend, Jim,' and we got to talking about my home, and I was inferring about leaving the room unlocked, and that is about all the conversation that I can recall."

It is true that defendant alleged that on the night of the 22d and the one previous to the day he is said to have made the confession he had been struck by officers. This he said happened first in the fight with Officer Johnson, when the arrest was made; again he said other officers struck him in the jaw at the jail. He was taken to the hospital, where his wife was, but he does not say that he objected to going. He asserts that he was cross-examined before being taken to the hospital the first time. Further than this he does not claim that he was cross-examined, nor that his talk with Officer Taylor was forced or involuntary. The record does not support appellant's assertion that defendant had been "constantly surrounded" by officers. It appears that he had been left alone from about 2 o'clock of the 22d to shortly before 11 o'clock of the following day. Nor does the record show that "the sweating process was renewed the next morning." According to defendant he had received superficial scalp wounds and a broken nose. There is no evidence to indicate that he was not mentally clear or that any confession he may have made was in any way induced by the rough treatment received the night before. In the instant case, therefore, we cannot say that the defendant was prejudiced by the failure of the court to inform the jury that it might pass upon the question as to whether or not the confession was voluntarily made.

It will not be necessary to consider another instruction offered as defendant's No. 17, which was modified so as to strike out a sentence which involves the same principle of law as the one we have last discussed.

[6] A further instruction offered by the defendant was also refused. It reads:

> "Testimony has been introduced in this case as to certain statements made by Ida Elder in the presence of the defendant, while at the receiving hospital after the shooting occurred. You are instructed that such statements are not in themselves evidence of any fact narrated in such statement, and are admissible only for the purpose of showing that the defendant acquiesced in such statement either by express assent, or by silence, or by such conduct as fairly implied assent."

The witness Officer Taylor testified that the defendant was brought into the room at the receiving hospital, where his wife was lying on a cot, and in answer to questions that she there stated, among other things, in the presence of Elder:

> "He is my husband, James Elder. He shot me as I fell down," and "I do not remember anything else." "He wanted me to sign a quitclaim deed to some property, and I did not want to do it, and did not"

—and that Elder made no response. The instruction in question was an accurate and true statement of the law as applied to the circumstances in this part of the instant case. People v. Mallon, 103 Cal. 513, 37 Pac. 512. This error would require reversal if the refusal to give the instruction could reasonably be regarded as having affected the substantial rights of the defendant. Appellant insists that the reference to Mrs. Elder's refusal to sign the deed provided a motive otherwise lacking in the people's case, but proof of motive is not essential to a conviction. People v. Weston, 169 Cal. 393, 146 Pac. 871. Again no stronger motive could be required than that which might be inferred from the circumstances, established without contradiction, of the defendant finding his wife in company with Clemmons. With proper regard to the provisions of section 4½ of article 6 of the Constitution, the error here under consideration does not warrant this court in ordering a reversal.

[7] The court gave the following instruction:

> "The law does not recognize the plea of irresistible impulse as a defense to crime, but responsibility depends upon the question whether or not the accused was conscious of and knew the nature of the act committed, at the time of its commission, and whether it was wrong, and if he did thus know and appreciate the nature of the act committed, at the time of its commission and whether it was wrong, and if he did thus know and appreciate the nature of his act, then he did the act at his peril, and the plea of irresistible impulse will not avail him."
>
> . . . . . .

It is not claimed that the law is otherwise than as stated, but the ground upon which it is urged that error was committed in giving it is that the defendant did not plead or offer testimony to establish that he did the shooting under the influence of an irresistible impulse. Referring to defendant's version of what took place at the shooting, one witness referring to Elder, testified, "He said he lost his head and lost complete control of himself." We think this was sufficient to justify the giving of the instruction concerning which complaint is made. It is not material that this testimony was given by a witness called by the people. Unless informed as to the law the jury may have concluded that the defendant, if unable to control himself, should not be held legally responsible. The instruction does not assert or assume that the defendant had attempted to base a claim of innocence upon the proposition that he had been compelled to shoot by an irresistible impulse. It merely states an abstract principle of law which, as such, is clearly correct.

We now proceed to the assignment of error in regard to the testimony of the witness Dr. A. F. Wagner. It is the contention of appellant that the memorandum made by the doctor at the time of the performance by him of an autopsy upon the body of Ida M. Elder was read to the jury. However, the record fails to substantiate this claim, but instead indicates that the notes were used merely to refresh the memory of the witness. The question which called for the answer embodying the testimony to which objection is made was:

> "Q. State to the jury, refreshing your memory from your notes, if you desire to do so, the findings of your autopsy."

[8] The motion for a new trial was based upon the ground of newly discovered evidence. That which it is said was discovered after the trial is the alleged fact Clemmons, the man who was with Mrs. Elder as the time of the homicide, received one of the bullets. Clemmons was a witness at the trial. He was called by the people and cross-examined at length by defendant's counsel. Ample opportunity was afforded defendant to have learned that Clemmons was shot. The record does not show that any question was asked in response to which he should have stated that fact. No attempt is made to point out such a question or to call our attention to evidence by which defendant may have been mislead or given the idea that the witness was not shot. He did testify that he was shot two or three times. No questions were asked as to what the third shot struck or in which direction it was fired. Under these circumstances we cannot say that the trial court erred in refusing the motion for a new trial. This is a matter which is always largely in its discretion. People v. Sullivan, 3 Cal. App. 502, 86 Pac. 834.

[9] The last ground relied upon for reversal is that the verdict was not supported by the evidence. If the witness Clemmons' version of the tragedy was believed by the jury there can be no doubt but that the evidence was ample to support the verdict. He testified in substance that while Mrs. Elder and the witness were standing about four feet apart on the sidewalk the defendant, without the slightest warning, appeared and fired two or three shots, the first one of which struck the deceased. As she fell she said "Why, Jim Elder." These were the only words spoken. "It was like rain from a clear sky."

[10] Of course, the defendant gave evidence, contradicted, however, by Clemmons, which, if believed, would show that he shot in self-defense, but it needs no citation of authority to establish that where the testimony is conflicting the verdict of the jury will not be disturbed.

The judgment and order are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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55 Cal. App. 603

SOMMER et ux. v. MARTIN et al.
(Civ. 4044.)

(District Court of Appeal, First District, Division 2, California. Dec. 13, 1921. Hearing Denied by Supreme Court Feb. 9, 1922.)

1. Negligence ⟹119(6) — Defendant must prove contributory negligence.

Contributory negligence must be pleaded and proved by the defendants, unless it appears from the testimony given in the plaintiffs' case.

2. Municipal corporations ⟹706(7)—Evidence held not to show as matter of law that pedestrian failed to look before stepping into street.

In an action for injuries to a woman who was struck by an automobile while preparing to enter a street car, evidence that the woman did not look in either direction after she stepped into the street, but without showing that she failed to look before stepping from the curb, does not show, as a matter of law, contributory negligence.

3. Municipal corporations ⟹706(7)—Evidence held not to show contributory negligence as matter of law in stepping back against automobile.

Evidence that plaintiff, who was intending to board a street car, stepped to one side to permit a passenger to alight from the street car and was struck by defendant's automobile, does not show, as a matter of law, that she was contributorily negligent for stepping back against the automobile.

4. Appeal and error 🔑1004(2)—Verdict supported by testimony of plaintiff, though contradicted, not set aside as excessive.

Where the testimony on behalf of the plaintiff as to the severity of her injuries, the pain she suffered, and the expenditures caused thereby was sufficient to warrant the verdict, it will not be set aside as excessive, though such testimony was contradicted by the evidence on behalf of defendant.

5. Evidence 🔑471(17)—Question whether defendant could have done anything to avoid accident calls for conclusion.

In an action for injuries to a pedestrian struck by an automobile, a question asked the defendant driver whether there was anything he could have done that he did not do to avoid the accident was objectionable as calling for a conclusion.

6. Evidence 🔑492—Boy held qualified to testify as to speed of automobile.

A 14 year old boy who testified he had driven an automobile for a year and a half, that there was no speedometer on his car, but that he had driven other cars that had such appliances and had watched the speedometer to gauge his speed, and could estimate from his experience the speed of the automobile which struck plaintiff, was properly permitted to testify as to the speed.

7. Trial 🔑191(7)—Instruction in language of motor vehicle act held not to assume plaintiff was entering a street car.

An instruction following closely the rule stated in Motor Vehicle Act, § 12, was not objectionable as assuming that plaintiff was in the act of entering a street car, since it could be equally claimed that it assumed that she was leaving the street car or was a pedestrian in the street.

8. Appeal and error 🔑171(1)—Defendants' stipulation that ordinance could be read in evidence precludes objection to competency on appeal.

Where the parties stipulated at the trial that a city ordinance regulating the operation of motor vehicles could be considered as in evidence, and that either party might read therefrom any sections desired, and that the ordinance restricted the speed of automobiles to 20 miles an hour at the place of the accident, the defendant, having tried the case below on the theory that the ordinance was in effect, cannot seek reversal of the judgment on the ground that the ordinance has been superseded by the state law.

9. Negligence 🔑139(1) — Instruction using "only" in definition objectionable.

A requested instruction purporting to define ordinary care was of doubtful soundness, where it used in such definition the word "only," which tended to belittle the duty resting on defendant.

10. Trial 🔑260(1)—Requested instruction already covered need not be given.

It was not error to refuse a requested instruction, even if it was correct, where the subject-matter thereof had been fully covered by another instruction.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Henry Sommer and wife against J. A. Martin and others to recover damages for personal injuries to the wife. Judgment for the plaintiffs, and defendants appeal. Affirmed.

Mattison B. Jones, of Los Angeles, for appellants.

E. S. Williams, of Los Angeles, for respondents.

STURTEVANT, J. The plaintiffs, as husband and wife, commenced an action against the defendants to recover damages for injuries sustained by being struck by an automobile which one of the defendants was driving. The defendants answered, and a trial was had by the court sitting with a jury. The jury returned a verdict in favor of the plaintiffs; the defendants moved for a new trial; the motion was denied on condition that the plaintiffs would remit $1,000, which they did, and from the judgment as modified the defendants have appealed, bringing up the judgment roll and a bill of exceptions.

1. The first point made by the appellants in their brief is that the plaintiff wife was guilty of contributory negligence. Under this attack the appellants claim that Mrs. Sommer, immediately preceding the accident, stepped into the street without looking to her right or to her left. She testified in answer to certain questions as follows:

"Q. You went out—as you went out toward the street car there was an automobile or more to your left? A. I don't remember that.

"Q. Would you say there was not? A. I would not say because I don't remember."

In another place she testified as follows:

"Q. You say you went out into the roadbed with a view of getting this car and at that time you had not seen the automobile? A. No, sir.

"Q. You did not see it at all, but the first you knew was the gush of wind and the bump? A. Yes, sir. The car was stopped at the time. I do not know how long it had been stopped."

The defendant J. A. Martin testified:

"Q. When did you first see Mrs. Sommer? A. When she first emerged from in front of an automobile standing at the curb approximately opposite the telegraph pole indicated on the drawing. * * *

"Q. What did she do after emerging from behind the automobile? A. She ran or was in haste to hail this street car. She ran out there with her hand up like this, looking at the car, never stopping to look right or left."

Mrs. Hallie Barker, one of the defendants' witnesses testified:

"Q. How close was she to the car when you first passed her? A. She was coming to it; she was about middle way; just came in front of this automobile. She was still out in front of it in the street. * * * She was coming across in front of this car when I first seen her. I didn't see her leave the sidewalk at all."

Mrs. Nettie Sheoff, a witness called by the defendants, testified:

"As the car was slowing down, I saw through the open door, through the open door of the car, the back part of the car, a lady standing there, and as the car passed her she stepped back; I don't know what for; I thought she was going back to the sidewalk. Just at that instant when the car had passed and she was about the steps, I saw an automobile, and she hit the fender of the auto."

Mr. Overpeck, a witness called by the defendants, testified that he was employed in Ralph's grocery store. That store was located directly back of the plaintiff. The witness was, at the time of the accident, dressing a window of the store. He was facing the back of the plaintiff. Referring to the plaintiff, he testified:

"She left the curb and went out with her hand in the air. I think it was her right hand. She held her hand up to the height of her face. At that time she was looking directly at the electric car. I did not see her look to the right or left."

[1, 2] The plea of contributory negligence is an element that must be pleaded and proved by the defendants, unless the evidence appears from the testimony given in the plaintiff's case. The foregoing testimony shows to some extent what the plaintiff did while she was out in the street, but it does not show what she did before leaving the sidewalk in reference to looking up or down the street. We cannot say that, as a matter of law, respondent was guilty of contributory negligence, that is, that all the facts plainly and inevitably point to such negligence, leaving no room for argument or doubt. Mann v. Scott, 180 Cal. 550, 552, 182 Pac. 281.

[3] Regarding this same plea, the appellants contend that when the plaintiff was at the side of the electric car, and at the time that the defendant J. A. Martin drove his automobile alongside of the car, the plaintiff stepped back one step and collided with the automobile. On this same subject the plaintiff testified:

"When the street car came along I was standing in the street. I went out into the street before it came along to be there to get it. The car came to a stop. When it came to a stop I was right at the steps. A lady got off and I stepped aside to let her off. When she started to get off I was just a little ahead of the rear steps of the car. I was too close to her to let her off. I stepped aside so she could get down. All the rest I remember is just a big gush of wind and a bump."

From the foregoing testimony we are not inclined to hold that the plaintiff was guilty of contributory negligence.

2. We are not clear that the appellants are contending that the evidence was not sufficient to show that the defendant J. A. Martin was guilty of negligence. If such is their contention, it will suffice to state that on that element of the case the most that can be said is that the evidence was conflicting. There was an abundance of testimony which, if the jury believed it, would readily support a verdict in favor of the plaintiff.

[4] 3. The appellants contend that the verdict was excessive, but, under the facts shown by the record we are not at liberty to so hold. According to the testimony of the plaintiff and her witnesses, she was knocked down in the street and was, by the defendant J. A. Martin, or others, picked up, put in an automobile, conveyed to her home, and at that place she was lifted from one place to another and was compelled to be, and was, undressed by other persons. She was in such terrible pain and agony that she could not bear to have anybody touch her. She was hit and bruised on her body, on her left arm, and the whole of her left side. Both ankles were skinned and strained; she was hit all over. From one bed she was removed to another in a sheet because she could not stand to be touched. She remained in bed from a month to six weeks, and then went down to have some X-rays taken; at that time she was carried to the machine and into the office and back to the machine; after that she became worse; and she returned to her bed and remained there another month or six weeks. During the first month or six weeks the pain was terrible and it continued night and day—there was no let-up to it; during the first month or six weeks she did not sleep at all; she experienced pain all the time for at least a year and a half; it was that long before she could move her arm. She further testified that Dr. Abbott worked with her left arm until he got it into place. Before the accident the plaintiff did all her own work, including laundry, cooking, sweeping, and cleaning, but since the accident she has never been able to do this work. At the time of the trial she was able to do her cooking and a little work. She paid Dr. Abbott $75; for the first 23 weeks she was compelled to employ help at $3.20 for each week, and then for 28 weeks she was compelled to employ help to the extent of $2.60 for each week. She paid another doctor $29 and she paid $19.50 for medicines, etc. Her daughter, who had been employed at $18 a week, was compelled to remain at home to care for her mother for a period of nine weeks. As to many of the foregoing matters, it is but fair to the appellants to state, there is evidence tending to refute the seriousness of the pains and injuries which the plaintiff claims to have suffered. But,

if the jury believed the story as told by the plaintiff, its verdict was not excessive.

[5] 4. When the defendant J. A. Martin was on the stand as a witness his counsel asked him:

> "Q. Was there anything you could have done that you did not do to avoid the accident?"

Counsel for the plaintiff objected to the question as calling for the conclusion of the witness. The objection was sustained. There was no error in the ruling.

[6] 5. Ralph Kelly was called as a witness by the plaintiffs. At the time of the accident he was about 14 years of age. He testified that he had driven an automobile for about a year and a half. There was no speedometer on his car, but he had driven other cars that had such an appliance attached. He said he had watched speedometers to gauge his speed. He was asked the question:

> "And from that experience can you make an estimate as to how fast that automobile which struck the woman was traveling at the time that it struck her?"

Counsel for the defendants objected to the question on the ground that no foundation was laid. The court overruled the objection, and in so ruling the court did not commit an error. 22 C. J. 567, § 676. The witness answered the question that the automobile was traveling between 20 and 25 miles per hour.

[7] 6. The court gave an instruction to the jury that follows very closely the rule stated in the motor vehicle act approved May 10, 1915. Stats. 1915, c. 188, § 12. The appellants attack the instruction on the ground that it assumes that the plaintiff was in the act of entering a street car at the time of the collision. The attack is wholly without merit. It could equally be claimed that the instruction assumed that she was leaving the street car, or that she was neither entering nor leaving, but was a pedestrian in the street.

[8] 7. During the trial the plaintiffs introduced the traffic ordinance of the city of Los Angeles in effect on November 14, 1917. The defendants made no objections, but stipulated that the whole ordinance should be deemed in evidence and that either party might read such sections thereof as they desired. Counsel for the plaintiff read from the ordinance:

> "It shall be unlawful for the driver of any vehicle, upon overtaking any street car or interurban railway car which is stopped for the purpose of discharging or taking on any passengers, to fail, neglect, or refuse to stop such vehicle at least ten feet in the rear of such street car or interurban railway car and to keep such vehicle standing where so stopped until such passengers or intending passengers have safely alighted from or boarded said street or interurban railway car or until such street or interurban railway car shall have started."

It was also stipulated that paragraph 80 of said ordinance provided that speed limit of vehicles on Vermont avenue at the place the accident occurred, that is to say, along and upon Vermont avenue in the neighborhood of Thirty-fifth place, was 20 miles per hour, and that said traffic ordinance prohibited a speed in excess of 20 miles an hour on that part of Vermont avenue. Thereafter, on the request of the plaintiffs, the court gave two instructions based on the provisions of said ordinance. At no time was the attention of the lower court called to the question as to whether the state statute or the ordinance of Los Angeles was controlling. Since the instant case was tried in the lower court the Supreme Court has decided the case entitled Ex parte Daniels, 183 Cal. 636, 192 Pac. 442. The appellants at this time seek to apply to the instant case the doctrine announced in the Daniels Case. By reason of the foregoing facts, we think that they are not at this time entitled to make that contention. In the trial court both parties proceeded on the theory that the traffic ordinance of the city of Los Angeles was applicable to the trial of certain features of this case. The defendants did not raise the question in the lower court: they are not therefore entitled to raise the question in this court.

> "Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence. In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights, and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would, in most cases, be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." Hayne, New Trial and Appeal, vol. 1, § 103.

In the case of Horace F. Wood Transfer Co. v. Shelton, 180 Ind. 273, 279, 101 N. E. 718, 720, the court said:

> "In attacking instructions Nos. 7, 9, 13 and 14 given by the court on its own motion, appellant seeks to question the validity of an ordinance of the city of Indianapolis providing a speed limit for automobiles within a certain prescribed territory in said city. During the progress of the trial the attorney for appellees read in evidence the ordinance in question and asked 'There is no question about the validity and force of this?' To which one of the attorneys for appellant replied: 'Oh, no.' Later it was suggested that a subsequent attack might be made on the ordinance in case of appeal, to which the attorney stated: 'That is an immaterial point. We will let it go just the way it is.' It is a familiar rule that a party is restricted on appeal to the theory adopted at the trial and 'when a theory is thus adopted, and acted upon below, with the concurrence of both parties, a judgment ought not be reversed because the court instructs the jury in accord-

ance with it.' Carver v. Carver (1884) 97 Ind. 497, 516. See, also, Graham v. Nowlin (1876) 54 Ind. 389."

The case last cited dealt with a municipal ordinance. However, the rule seems to be general with reference to the law applicable to the case on trial. 3 C. J. 723, § 619.

[9, 10] 8. The defendants requested, and the trial court refused to give, two instructions; the appellants assign each refusal as error. The first proposed instruction purported to define ordinary care. The instruction was of doubtful soundness because of the use of the word "only." That word tended to belittle the duty resting on the defendant J. A. Martin. But, whether the instruction was correct or incorrect, the subject-matter was fully covered by an instruction which appears in the transcript (folios 371 and 372). The other instruction picked out a portion of the evidence and purported to be an instruction on the subject of contributory negligence. The court had covered that subject fully by giving the instructions which it did give and which are set forth in the transcript (folios 392–394, 430, 431).

An examination of the record shows that the trial court committed no error whatsoever.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

55 Cal. App. 469

CUDDY v. O'BRIEN et al. (Civ. 4038.)

(District Court of Appeal, First District, Division 2, California. Dec. 1, 1921. Rehearing Denied Dec. 23, 1921. Hearing Denied by Supreme Court Jan. 30, 1922.)

1. Quieting title 🔑44(1) — Lease of spring held not so uncertain as to be void, and burden was on plaintiff to offer evidence in avoidance.

A lease of a spring on land with right to develop and maintain a pipe line *held* not so uncertain as to be void, and assignee of lessee in action by lessor to quiet title was entitled to rest after proving the execution of the lease, and thereby cast the burden upon the plaintiff to offer evidence upon any defense in avoidance.

2. Quieting title 🔑44(2)—Testimony as to defendant's failure to pay rent held inadmissible in action to quiet title.

In action to quiet title, where defendant set up a lease of a spring with right to maintain pipes, and there was no attempt to show nonpayment of rent, or any rent, resulting in a forfeiture of the rights of the defendant under the lease, court did not err in sustaining an objection to question as to whether defendant paid the rent for a certain month.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by J. D. Cuddy against Thomas O'Brien and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. F. Brittan and Kaye & Siemon, all of Bakersfield, for appellant.

E. J. Emmons, of Bakersfield, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to obtain a judgment quieting his title to certain lands in Kern county. The defendants had judgment, and the plaintiff has appealed therefrom, bringing up the judgment roll and a bill of exceptions.

The plaintiff's complaint was in the ordinary form of a complaint to quiet title, and described the lands as being:

The "southeast quarter of southeast quarter of section 28, township 9 north, range 19 west, S. B. B. & M. north half of northeast quarter of section 33, township 9 north, range 19 west, S. B. B. & M."

The defendants Thomas O'Brien and N. C. Farnum appeared by their attorney and filed an answer, admitting that the defendant O'Brien claimed an interest and pleaded that the defendant O'Brien claimed such interest under and by virtue of a written instrument as follows:

"This indenture made this 12th day of April, 1917, between J. D. Cuddy, of Kern county, Cal., the party of the first part, and N. C. Farnum, of Alameda county, Cal., the party of the second part, witnesseth:

"That for and in consideration of $10 in hand paid, the receipt whereof is hereby acknowledged, the first party does by these presents lease and demise unto the said second party or his assigns, for the term of 50 years, at an annual rental of $10, payable in advance on the 1st day of May of each year, and other valuable considerations, that certain spring located on the northerly half of section 33, township 9 north, range 19 west, S. B. B. & M., Kern county, Cal., including a right of way across the above-described land, 8 feet wide, for the passing of conveyances, and a pipe line for the conveyance of water from a spring situate near the center of the north half of said section 33 to the easterly line thereof, with the right to improve the said spring by trying to produce more water, also the right to fence said springs, inclosing 50 feet square of land with a suitable fence, and improve the spring by building a dam, and covering the spring in any manner he may desire, and also to dig a trench on above-mentioned right of way, from said spring to the easterly line of said above-described section 33 to a depth of 2 feet to receive the water pipe above mentioned. The party of the second part agrees to lay a small iron pipe from above-described spring in a northeasterly direction to furnish water to the cattle of the first party. It is further agreed by and between the parties to this lease that should the above-mentioned spring fail from any cause to furnish the amount of water required by second party or his assigns, the first party hereby grants to second party or his assigns the right to develop two other springs belonging to first party to use the water as developed under the same conditions, rights, and privileges, as agreed on for first-mentioned spring; spring No. 2 is situate northerly of 1, and is said to be in N. E. ¼ of N. E. ¼ of section 33, T. 9 north, R. 19 west, S. B. B. & M.; spring 3 is situated to the northerly from spring No. 2, and is said to be located on the S. E. ¼ of section 28, T. 9 N., R. 19 west, S. B. B. & M. The party of the second part agrees to furnish enough water for the party of the first part to water cattle if the springs will supply same for both.

"In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

"J. D. Cuddy. [Seal.]
"Florence Louise Cuddy. [Seal.]
"N. C. Farnum. [Seal.]

"Signed, sealed, and delivered in the presence of witness: L. L. Bateman."

It was also alleged in the answer that, subsequent to its execution, said instrument was assigned to Thomas O'Brien, and he is now the owner and holder thereof. Thereafter, and in due time, the plaintiff filed an affidavit denying the due execution of said instrument by the lessor. The court, in finding 2, found the existence of said instrument, setting the same forth in hæc verba. In its judgment the court again set forth the said instrument.

[1] On the trial of the case, without introducing any evidence, the plaintiff rested because the allegations of his complaint were not denied. Thereupon the defendants produced from their possession the said written instrument and called witnesses to prove the due execution of the same. The plaintiff cross-examined such witnesses with reference to the due execution of the instrument. After the defendants had rested, the plaintiff called witnesses to rebut the due execution of the instrument and did not tender any other issue. The gravamen of the complaint of the plaintiff on this appeal is to the effect that said written instrument is uncertain, and that the findings and judgment do not tend to clarify the uncertainties therein contained. The written instrument is not so uncertain as to be void. To sustain this proposition we do not deem it necessary to do more than to refer to said instrument. The plaintiff contends that the written instrument, if enforceable at all, required parol evidence to explain its terms and to fix its application. Conceding, without deciding, that that proposition is correct, when the plaintiff follows with the next contention that the duty to offer such evidence rested on the defendants, we think that the plaintiff is in error. In this behalf plaintiff claims that the doctrine declared in Moore v. Copp, 119 Cal. 429, 51 Pac. 630, covers this case. The defendants do not dispute that contention. Following the doctrine as stated in that case, the plaintiff in the instant case was entitled to rest his case in chief without introducing any evidence. Furthermore, the defendants were entitled to prove the due execution of the indenture of lease, and to introduce the same, and thereupon to rest. Still following the doctrine in Moore v. Copp, the plaintiff was entitled, in rebuttal, to offer evidence upon any defense in avoidance; or, as stated in Wolf v. Gall, 176 Cal. 787, 790, 169 Pac. 1017, 1018:

> "It is abundantly settled that under issues framed as here, the plaintiffs could, as their attorney represented to the court, overcome the effect of the deed and so destroy its validity upon either equitable or legal ground. Moore v. Copp, 119 Cal. 436, 51 Pac. 630; Johnson v. Taylor, 150 Cal. 201, 119 Am. St. Rep. 181, 10 L. R. A. (N. S.) 818, 88 Pac. 903; Hermosa Beach Land, etc., Co. v. Law Credit Co., 175 Cal. 493, 166 Pac. 22."

However, the plaintiff did not see fit to introduce evidence (1) showing that spring No. 1 was not located on the north half of the northeast quarter of section 33, or (2) as to the exact amount of water that would be used by the appellant or the exact amount that was to be used by the lessee, or (3) that the lands described in the lease were different from the lands described in the complaint, or (4) as to the exact boundaries of the right of way referred to in said lease, or as to whether a right of way was already marked on the ground, or (5) that the leasehold described had been terminated, forfeited, or lost. During the trial, it appeared incidentally that before the said written instrument was reduced to writing the lessee and the lessor held long conversations regarding the terms of the lease, but the plaintiff made no attempt whatsoever to clarify any of the terms of the instrument in question. In this behalf, it is of importance to note that during the proceedings in the trial court every person who was present and heard the preliminary conversations, and every person who was familiar with any fact that would have tended to clarify the language of the lease, was present in the courtroom and was called as a witness with reference to some matters, but such persons were not questioned by the plaintiff on any matters which would have tended to clarify those subjects he now claims are obscure. Under these circumstances the plaintiff may not be heard to complain because the trial court did not make findings on issues which should have been tendered by the plaintiff if the plaintiff wanted a finding thereon.

[2] There was no error in the ruling of the trial court sustaining an objection to the question as to whether the respondent O'Brien paid any rent for the month of May, 1918. It was not an action for debt, neither was it an action on a contract, and there was no attempt to show that the nonpayment of a month's rent, or any rent, had resulted in

a forfeiture of all the rights of the lessee under the indenture of lease.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(55 Cal. App. 722)

EDWARDS v. WILSON. (Civ. 3576.)

(District Court of Appeal, Second District, Division 2, California. Dec. 21, 1921. Hearing Denied by Supreme Court Feb. 16, 1922.)

1. Appeal and error 🔑501(5)—Bill of exceptions must specify errors to be considered.

Where the bill of exceptions makes no specification of error or of insufficiency of evidence to support the findings, the record will not permit the court to consider these matters.

2. Appeal and error 🔑672—Whether findings support judgment may be determined by examining judgment roll.

Whether the findings support the judgment may be determined by an examination of the judgment roll.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by C. L. Edwards against John Floyd Wilson. From judgment for plaintiff, defendant appeals. Affirmed.

Joseph Musgrove, of Los Angeles, for appellant.

Arnold Praeger and William A. Sumner, both of Los Angeles, for respondent.

CRAIG, J. [1] The greater part of the appellant's brief is devoted to a consideration of the evidence and an attempt to point out wherein the evidence is insufficient to sustain the findings. As the bill of exceptions makes no specifications of error or of insufficiency of the evidence to support the findings, the record will not permit this court to consider these matters.

[2] The third ground urged is that the findings do not support the judgment. This, of course, may be determined by an examination of the judgment roll. Appellant has pointed out but one particular in which it is claimed that reversible error was committed as shown by the judgment roll alone. Finding 1, in referring to the status of the ownership of the property to be exchanged by Nelson used this language: "A certain other piece of real estate. * * * Being purchased by and to be owned by defendant John F. Nelson." It is asserted that this is inconsistent with that part of the judgment which directs that the acceptance be reformed to read: "This agreement witnesseth: That John F. Nelson is the owner of the second piece of property," etc. To recite in the judgment and "have the legal effect of the words." The acceptance thus worded represented that Nelson owned the property. This went beyond the contract providing for the payment of a commission on "procuring the acceptance by John F. Nelson to trade the property being purchased by and to be owned by defendant John F. Nelson." Nothing in the judgment roll shows that Nelson did not own the property. If he did appellant was not prejudiced by the fact that the contract between the real estate agent and defendant recited that it was only then being purchased by him.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

(55 Cal. App. 474

BALCOM v. F. A. SHIPLEY CO. et al. (Civ. 4032.)

(District Court of Appeal, First District, Division 2, California. Dec. 1, 1921. Hearing Denied by Supreme Court Jan. 30, 1922.)

1. Witnesses 🔑275(8)—Cross-examination of defendant's agent examined by plaintiff held proper.

In an action against warehouse for conversion of beans, where plaintiff placed officer of defendant corporation on stand and had him identify warehouse receipts and caused him to testify that none of the beans were delivered to plaintiff, but that they were delivered to plaintiff's selling agent, it was proper on cross-examination for defendant to show that certain tickets were not originals, and that all of the beans had been delivered to plaintiff's agent.

2. Trial 🔑49—Ruling on objection to hearsay held correct.

Where witness testified that another had told him certain facts and opposing counsel objected to the testimony as hearsay, a ruling of the court that what was told to witness would be simply hearsay, and that witness should refrain from telling what he did not know himself, was correct and as exact as the occasion permitted.

3. Appeal and error 🔑1047(1)—No prejudice in failing to limit evidence.

Where plaintiff's attorney testified as witness and defendant asked him questions concerning his contract of employment which provided for a contingent fee, and contract was produced and offered in evidence, and plaintiff's attorney objected to the introduction for any purpose other than to show his interest as it might affect his testimony, there was no prejudicial error in court's failure to limit the testimony, where there was nothing in the instrument pertinent for or against either of the parties litigant, except as showing interest of the witness.

On Hearing in Supreme Court.

4. Trial 🔑79, 90—Neither renewal of objection nor motion to strike necessary on repeating question.

When an objection to evidence has been overruled, it is not necessary for the party objecting to renew his objection when the question is repeated and answered by the witness, or to move to strike out the answer.

5. Appeal and error 🔑237(2)—Motion to strike out evidence objected to unnecessary.

Where objection is made to question and overruled and question is then answered by the witness, it is not necessary to a review on appeal that a motion be made to strike out the answer.

6. Trial 🔑412—Re-examination of witness not a waiver of objections to questions propounded by opponent on cross-examination.

Re-examination by plaintiff of witness on subjects on which he was questioned on cross-examination by the defendant over the objection of the plaintiff is not waiver of all objections made on the relevancy of the cross-examination.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Miles Balcom against the F. A. Shipley Company and another. Judgment for defendants, and the plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Earl E. Moss, of Los Angeles, for appellant.
Chas. F. Blackstock, of Oxnard, for respondents.

STURTEVANT, J. The plaintiff brought an action against the defendants which sounds in conversion. The case was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the defendants, and from the judgment entered thereon the plaintiff has appealed under section 953a of the Code of Civil Procedure. As we have stated, the plaintiff's complaint is in the ordinary form of an action for conversion. It charges the defendants with having converted 61,395 pounds of beans and 1,445 pounds of split beans. The defendants answered, denying all of the material allegations of the complaint. It may be stated at this point for the purpose of greatly clarifying the record that the plaintiff claimed the full weights stated in all of the warehouse receipts issued to him, whereas the defendants claimed that during the delivery season the plaintiff was not satisfied with the weight tags, requested the defendants to weigh the plaintiff's beans on two different scales, that the beans were so weighed, and that warehouse receipts in some instances were issued at one set of scales for a certain lot of beans, and when the same beans were weighed at the other set of scales another warehouse receipt was issued for the very same lot, and in this way six warehouse receipts thereafter known as "weights for comparison" were issued by the warehouse, notwithstanding that the warehouse did not receive the goods.

When the plaintiff commenced to introduce his case, he called F. A. Shipley, an officer of each of the defendant corporations. After the witness had been examined he was cross-examined. The appellant in his brief states:

> "His direct examination having been confined solely to an identification of receipts and documents, and the signatures thereon, the witness was then permitted to enter into a long explanation of his side of the case, which was made up of hearsay testimony from many sources."

In making the above statement the appellant is in error in the statement of the facts. Taking up these two matters in the order stated, we will address ourselves first to the charge that the cross-examination was not confined within proper bounds. Before we can determine the proper bounds of the cross-examination, it becomes necessary to ascertain what had been the direct examination. We will not attempt to state the whole of the direct examination, but it is sufficient to say that during the direct examination the witness Shipley was by the attorney for the appellant caused to testify that the appellant's beans—

> "were delivered to what is known as the Growers' Warehouse, and a portion was put in what is known as the Citrus Warehouse, a warehouse which I had leased to take care of the beans for which I did not have room in the Growers' Warehouse. These warehouses are operated by the Shipley Company. As those beans came into the warehouse, a scale ticket showing the weights, amount, of beans received from Mr. Balcom, was issued by the warehouse. The paper, Plaintiff's Exhibit 1, which you show me, I know what it is. It is a scale ticket representing the weights of beans. It was issued by Mr. Sheppard. He is foreman of my warehouse—that is the warehouse of the F. A. Shipley Company—which was operated by the company in the year 1918. That is one of the tickets isused from the warehouse by Mr. Sheppard, and he, as foreman of the warehouse, was authorized to issue those tickets and authorized to receive the beans and put them in the warehouse. * * * This paper you show me, Plaintiff's Exhibit 6, is a weight ticket of the Growers' Warehouse Company issued by that company and represents the receipt of a load of beans. * * * The word 'gross' on Plaintiff's Exhibit 29, would indicate on the weight ticket the weight of the entire load, consisting of the beans and the wagon; the word 'tare' indicates the weight of the wagon after the beans have been unloaded; and the word 'net' indicates the weight of the beans themselves."

In connection with the foregoing testimony, the witness was caused to identify the writing on and the authenticity of 35 warehouse receipts which were given numbers as Plaintiff's Exhibits 1 to 35, inclusive. On further direct examination the witness was caused to testify as follows:

> "The beans of the 1918 crop of beans that were placed in these warehouses in October and November, 1918, were not to my knowledge returned to Mr. Balcom. None of them were to my knowledge delivered to any one except upon the order of the Lima Bean Association, as the selling agent of Mr. Balcom. The beans mentioned in the several reports that I have identified as having been made to the Lima Bean Growers' Association were delivered on the order of that association; they were delivered to them or to their order."

After those proceedings were had, the cross-examination commenced:

> "Mr. Blackstock: Did you deliver to Mr. Balcom or to the Lima Bean Growers' Association on his behalf, all of the beans that Mr. Balcom stored with you in 1918?
>
> "Mr. Selby: Object to that question on the ground that it calls for the conclusion of the witness.
>
> "The Court: The objection will be overruled. A. We delivered them all to the Lima Bean Growers' Association."

There was no error in the ruling. The appellant had immediately before in the direct examination asked the witness to whom the beans were delivered. As the cross-examination proceeded the witness testified:

> "All of these tickets here are not original weight tickets. Six of them are not. I can identify those that are not originals. I have picked them out. I can identify them by their exhibit number. The exhibit numbers are 12, 13, 6, 7, 14, and 11.
>
> "Mr. Blackstock: Now, will you explain how these six tickets happened to be issued at all?
>
> "Mr. Moss: If the court please, it is not proper cross-examination, and we object to it as incompetent, irrelevant, and immaterial; it is a part of their defense.
>
> "The Court: The objection is overruled."

There was no answer to the question, and immediately thereafter Mr. Blackstock propounded the same question, and there was no objection made, and the witness proceeded in part as follows:

> "They were issued due to the fact that Mr. Balcom telephoned in a request that we have the beans, some of his beans, weighed—"

And that answer was never completed. Immediately following the above proceedings the following occurred:

> "Mr. Blackstock: You say these tickets are not originals? A. They are not.
>
> "Mr. Moss: Now, if the court please, we desire to object to that question and the testimon as given, and move to strike out all the testimony of this witness heretofore given tending to contradict these receipts, upon the ground that his testimony is incompetent, irrelevant, and immaterial, and upon the further ground that under the law this witness is not permitted nor is the defendant permitted to contradict the receipt.
>
> "The Court: The motion to strike is denied, and the objection is overruled.
>
> "Mr. Moss: I suppose for the sake of the record it may be stipulated that we object to all testimony offered by the defense tending to contradict the receipts.
>
> "The Court: Very well; it will be so understood. (At this time it may be well to interpose that, although the appellant made the last objection in the trial court, on argument in this court Mr. Moss frankly stated that he did not make the same contention at this time.)
>
> "The Court: If there is any further point or any other objection as to competency, or relevancy, or materiality, you may raise it, but, so far as this particular point is concerned, you may present it."

[1] Now as to the bounds of cross-examination being transcended, we think it is clear: (1) That the subject-matter of the cross-examination was the same as the subject of the direct examination; (2) that, if appellant would raise such a question in this court, he must have interposed in the lower court his objection to the very question that was answered, and ask for a ruling thereon, and in the instant case that was not done; (3) after an answer was made to which an objection had been made and the objection overruled, appellant's attorney should have moved to strike the answer out, which he did not do in the instant case; and (4) after the cross-examination was closed and on redirect examination the attorney for the appellant proceeded to examine the witness exhaustively on the very subjects to which theretofore he had strenuously objected.

We will turn now to the subject of hearsay, and examine the record as to how the record stands in that behalf:

> "Mr. Blackstock: Now, will you explain how these six tickets happened to be issued at all?
>
> "Mr. Moss: We make the further objection, if the court please, we state it is well known to Mr. Blackstock, as to ourselves, that this witness has no personal knowledge of those facts.
>
> "The Court: The court does not know; the objection will be overruled.
>
> "Mr. Blackstock: Go ahead and explain the exhibit; read the question, Mr. Reporter. (Question read by reporter.)
>
> "Mr. Moss: If the court please, for the purpose of laying the foundation, may I ask the question— (Discussion.)
>
> "The Court: The objection will be overruled. The ruling may stand. Answer the question, if you know."

At this point it will be noted that the discussion by counsel, or some other cause, had apparently taken from the trial court's mind the nature of the request which counsel was attempting to make, and counsel, observing the fact, or not observing the fact, did not call to the court's mind the fact that he was making a request to ask a question of the witness, and that he was not making an objection until he had laid the foundation. Immediately thereafter the record continued as follows:

> "The Witness: What is the question?
>
> "Mr. Blackstock: Explain how these tickets happened to be issued at all.
>
> "A. They were issued due to the fact that Mr. Balcom telephoned in and requested that we have the beans, some of his beans, weighed—
>
> "Mr. Moss: The question of you, Mr. Shipley—
>
> "Mr. Blackstock: Let him answer the question.
>
> "The Court: He can testify to what he knows as a matter of fact.
>
> "Mr. Blackstock: I withdraw the question."

Thus it appears that after all of the discussion and wrangling, etc., the question was not answered at all. Closely following, however, and it may be conceded as part of the proceeding, the reporter read the question:

> "Just explain, Mr. Shipley, how you know those tickets are not originals.
>
> "A. Mr. Balcom telephoned into our office at the time he stored, or I will say shortly thereafter, and stated—
>
> "Mr. Moss: Is that over our objection, if the court please, as to the knowledge of the witness?
>
> "The Court: Well, I cautioned the witness to testify to what he had personal knowledge of, Mr. Moss; if this telephone message was received by you or in your presence, you can testify to it. A. It was not, your honor."

Thus again the record shows much ado about nothing.

> "Mr. Blackstock: Regardless of that telephone conversation, you say these tickets are duplicates. State how you know they are duplicates. (The witness here delineates methods of bookkeeping, weighing, etc., as practiced in his warehouses, and then proceeded:) I was told by Miss House (and I have tickets and can identify them), that Mr. Balcom had telephoned in and requested that we have the beans, some of his beans, weighed on both scales, both on the large scales and the small scales, as comparison weights.
>
> "Mr. Moss: We object to that hearsay testimony as incompetent, irrelevant, and immaterial.
>
> "The Court: I take it what some one told Mr. Shipley would be simply hearsay. Just refrain from telling what you do not know yourself, Mr. Shipley."

[2] The ruling was correct and as exact as the occasion permitted. Furthermore, when the cross-examination was ended and the redirect examination was commenced, the third question propounded was:

> "Mr. Selby: You have stated that you know the tickets marked Plaintiff's Exhibits 6, 7, 11, 12, 13, and 14 are tickets that were issued for loads that had been previously weighed, and other tickets issued for the same loads? A. Yes, sir.
>
> "Q. Did you know that at the time it happened? A. I did not."

And in reply to the appellant's questions the witness gave the following hearsay testimony:

> "I learned the fact along in the summer of 1919, seven or eight months after the delivery of the beans. I got the information by calling my employees together, and Miss House telling me. What I am testifying to is from what Miss House told me and the evidence that was shown me. * * * Ticket 5 was posted, was brought over from the Citrus Warehouse, having been weighed by Mr. Sheppard, and given to Miss House, and that ticket was posted and the duplicate representing that load were not posted on the same day. Miss House absolutely knew they were duplicates. She knew it because these beans came into the Growers' Warehouse and were weighed on the large scales and the tractor or teams hauling around and went to the Citrus Warehouse. I absolutely know she knew this and she knew those tickets were all the same load. I know it because it is as plain as can be. All I have to go by is that Miss House and Mr. House told me these were duplicates. * * * On the 29th of October there was an entry of 217 sacks weighing 20,730 pounds. They were not weighed twice. They appear to be the same beans as are covered by Plaintiff's Exhibits 24 and 25. * * * I did not make the entries upon the warehouse ledger. I was not present when any of the entries were made other than being in the same office."

After eliciting these facts, the appellant made no motion to strike. Before leaving the subject of hearsay, which, as above shown, came from Miss House and Mr. House, it is proper to state that both of those individuals appeared in court and were examined and cross-examined in extenso, and that any of the testimony that crept into the record as hearsay, without regard to whether it was objected to or was not objected to, was given anew by the witness who was altogether competent to testify on the subject.

[3] The plaintiff had employed Mr. Moss under a written contract to present the plaintiff's case. That contract provided that Mr. Moss would be compensated by a contingent fee. During the trial Mr. Moss took the stand as a witness. To show his interest in the case the respondent asked him questions concerning that contract. The contract was produced and was offered in evidence.

> "Mr. Moss: We object to the introduction for any purpose other than to show my interest in the case as it might affect my testimony as a witness."

The court did not then limit the testimony and did not thereafter limit the testimony.

It might well have done so. However, we cannot appreciate that the omission was prejudicial error. There was not one word in the instrument that was possibly pertinent for or against either of the parties litigant, except as showing a weakness in the testimony of Mr. Moss, one of the witnesses produced by the appellant.

We have read the record from cover to cover, and it is patent that the case was fully and fairly tried, and determined on its merits. The respondents produced substantial testimony to the effect that the said tickets known as "weights for comparison" were such and nothing more. If the jury believed that testimony, and its verdict indicates that it did, then the judgment should stand.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing of this cause in the Supreme Court is denied.

[4] In the course of the opinion it is said that, where the appellant objects to a question on the ground that it was not cross-examination, and his objection was overruled, and the question thereupon repeated and answered, the appellant must again object to the question as repeated, and that, if he does not repeat his objection, he cannot have the ruling reviewed on appeal. We think this is erroneous. When an objection has been overruled, it is not necessary for the party objecting to renew his objection when the question is repeated and answered by the witness.

[5] It is also said that, where an objection was made and overruled, and the question is then answered by the witness, the ruling cannot be reviewed on appeal unless a motion was also made and overruled to strike out the answer. We do not think this is the law.

[6] Nor do we understand that, if the appellant's attorney re-examines the witness on subjects upon which he was questioned on the cross-examination by the respondent over the objection of the appellant, he thereby waives all objections made by him on the relevancy of the cross-examination. These statements in the opinion we think were erroneous, but they were not necessary to the decision.

SHAW, C. J., and SHURTLEFF, WASTE, WILBUR, LAWLOR, and SLOANE, JJ., concur.

55 Cal. App. 654

WHEAT et al. v. BIG PINES LIME & TRANSPORTATION CO. et al. (EVERETT, Intervener). (Civ. 4051.)

(District Court of Appeal, First District, Division 2, California. Dec. 15, 1921.)

Corporations 🔑590(5)—Owners of secured bonds of corporation consolidated with another held not entitled to assert equitable lien on property included in a deed of trust by new corporation.

Pursuant to agreement a corporation conveyed its property subject to a deed of trust securing bonds to a corporation organized to consolidate it with another, and the latter likewise conveyed property subject to a mortgage thereon, and the new corporation executed a deed of trust on all the property conveyed to it to secure bonds to be used in part to take care of its obligations as agreed, but the bonds were never issued because of a refusal of bondholders to exchange bonds of the old corporation therefor. Thereafter the old corporations were dissolved by operations of law. Part of the property conveyed by the old corporation subject to the deed of trust was sold to satisfy a judgment against the new corporation, and held by the grantee subject to the lien of such deed. The mortgaged property was regularly sold and conveyed on foreclosure pursuant to law, and the sheriff's grantee, the mortgagee, conveyed the same to a bondholder secured by the deed of trust first referred to. *Held*, that the owners of the bonds of the old corporation were not entitled to assert an equitable lien on all the property included in the new corporation's deed of trust because of its agreement to issue its bonds secured thereby and exchange their bonds therefor, since the security which they accepted in purchasing their bonds and their legal rights remained the same, so that there was no reason why they should avail themselves of their legal remedy, and as to the mortgaged property their rights, if any, were barred, either in the foreclosure proceeding or in a subsequent suit to quiet title thereto, and, as to the purchase thereof by a bondholder claimed as a redemption inuring to the benefit of all the bondholders, the equity of redemption was not asserted, and the sale to the mortgagee became final, and the property hers absolutely, before her sale to such bondholder.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by W. H. Wheat and another against the Big Pines Lime & Transportation Company and others, in which John Potter and another filed a cross-complaint, and E. E. Everett intervened. Judgment for defendants, and plaintiffs, cross-plaintiffs, and intervener appeal. Affirmed.

John O. Bender, of Los Angeles, for appellants Wheat, Satterlee, and Everett.

Thomas H. McKee, of Pasadena, for appellants Potter.

Leonard B. Slosson, Robert Mitchell, Fred W. Morrison, and Benno M. Brink, all of Los Angeles, for respondents.

LANGDON, P. J. In this action there is an appeal by the plaintiffs and by the cross-plaintiffs, John and Cora M. Potter, from a judgment denying them equitable relief. The appeals were taken upon the judgment roll, consisting of about 600 pages of transcript, and the contention of the appellants is that the findings of fact do not support the conclusions of law.

We have carefully read the transcript and the findings, and they reveal facts so exceedingly complex and parties so numerous that we deem it expedient and necessary in the interest of clarity to set out herein only such portions of the findings as are necessary for an understanding of the main features of the controversy.

On the 1st day of March, 1912, the Lone Pine Utilities Company, a corporation, hereinafter called the Utilities Company, issued its bonds in the sum of $100,000, payable 20 years after said date. All of said bonds were issued and are outstanding and are the bonds referred to herein as belonging to plaintiffs and some of the defendants. To secure the payment of said bonds, said corporation executed a deed of trust to the Los Angeles Abstract & Trust Company, as trustee, conveying to said trustee all property it then owned or might thereafter acquire.

Thereafter it acquired certain properties described in plaintiffs' third amended complaint, which properties are hereinafter referred to as the lime claims and rights of way. Said trust deed was duly recorded. Subsequently the Los Angeles Trust & Savings Bank was substituted as trustee in the place and stead of the former trustee, and said bank is now the duly appointed, qualified, and acting trustee under said deed of trust.

The interest payments on said bonds are represented by coupons thereto attached, and it is provided in each of said bonds that said coupons must be presented for payment at the office of the trustee, and that, in case of default in the payment of any of said coupons when due for a period of three months after presentation at the office of the trustee, the principal of said bonds may become due and payable with the effect and subject to the conditions provided in the deed of trust securing said bonds. Said deed of trust provides that the principal of said bonds shall not become due and payable after such default in payment of interest coupons unless the holders of at least 51 per cent. of the total amount of said bonds outstanding shall make a declaration to that effect to the trustee and shall request the trustee to begin foreclosure proceedings accordingly. No such declaration and no such request has ever been made to said trustee, and the principal of said bonds or of any of them has not become due or payable and is not now due or payable. Said interest coupons which have become due and payable have not been presented to the trustee for payment, and no default has been declared in the payment of said coupons. Said deed of trust is still in full force and effect as to all of its terms and conditions, and said issue of bonds is still secured by the property referred to hereinbefore.

On the 20th day of August, 1914, said Utilities Company granted and transferred said properties to defendant Big Pines Lime & Transportation Company, subject to said deed of trust, and the deed of conveyance was accepted by said grantee and contained the following recital:

> "Subject to a trust deed given by the Lone Pine Utilities Company, a corporation, to the Los Angeles Abstract & Trust Company, a corporation, to secure a bond issue of $100,000. * * *"

Said conveyance was duly recorded.

On the 27th day of May, 1917, defendant Rickershauser obtained a judgment against said Big Pines Lime & Transportation Company in the superior court of Los Angeles county for the sum of $9,760.60, and thereafter an execution was duly issued upon said judgment, and on April 19, 1918, in satisfaction of said judgment, the sheriff sold to said Rickershauser, at public sale, as provided by law, all of the right, title, and interest of said transportation company in and to said lime claims. Thereafter, on April 21, 1919, said sheriff executed and delivered to said Rickershauser a deed conveying to him said property in fee. Thereafter, on April 28, 1919, said Rickershauser sold and conveyed said property to defendant Sheepshead Lime Company, a corporation. This conveyance was duly recorded, and said last-named corporation now holds said property subject to the lien of the deed of trust securing said issue of bonds.

All of the parties to this action, and who are the owners of said bonds, have a plain, speedy, and adequate remedy at law pursuant to the provisions of said deed of trust, and can have said property sold at public auction at any time to satisfy their claims alleged in said complaint by complying with said provisions. Said parties have not complied with said provisions and have taken no steps to secure relief thereunder.

Upon the foregoing facts no possible question could arise as to appellants' right to recover in this action; there would absolutely be no such right. However, the appellants contend that a different legal situation arises by reason of the existence of the following facts found by the court:

On August 15, 1914, the Lone Pine Mill & Lumber Company, a corporation, hereinafter called the Lumber Company, was the owner in fee simple of the property known and designated as the "Big Pines," which property is particularly described in said third amended complaint. On said date and long prior thereto said property was subject to a mortgage executed by one M. C. Rodgers to secure the payment of one promissory note for $5,000, dated March 1, 1911. Said mortgage was duly recorded. On August 15, 1914, said corporation transferred said property subject to said mortgage, by grant deed, to said Big Pines Lime & Transportation Company. Said grant deed contains the following recital:

> "Subject to a mortgage executed by M. C. Rodgers, a single woman, to secure one note for five thousand dollars dated March 1, 1911, payable on or before two years after date, with interest at 10 per cent. per annum, payable quarterly, in favor of A. R. Lendner."

On September 14, 1915, one Melissa H. L. Ford was the owner of said promissory note and the mortgage securing the same. Said mortgage was not paid, and on September 14, 1915, said Ford instituted an action in the superior court of the state of California in and for the county of Los Angeles to foreclose said mortgage, said action being entitled Melissa H. L. Ford, plaintiff, v. M. C. Rodgers et al., Defendants, and numbered B–29194. At the time said action was filed a notice of pendency of said action was duly recorded in the office of the county recorder of said county, and all persons holding conveyances from or under the mortgagor or having a lien thereon at the time of the institution of said action, and which appeared of record at said time, where made parties to the action and were duly served with summons therein. Thereafter a decree of foreclosure and an order of sale were duly made, and said property sold by the sheriff and purchased by said Ford, the plaintiff in said action, on or about December 20, 1915. Said property was not redeemed within the time required by law, and on the 21st day of December 1916, the sheriff issued a deed conveying said property to said Ford.

On or about February 13, 1917, said Ford entered into a contract with defendant Robert Mitchell to sell and convey to him said property, and thereafter said Ford conveyed to said Mitchell all her right, title, and interest in and to said property and the deed conveying said property was duly recorded on February 1, 1918.

Now, in this piece of property so conveyed to Mitchell, and which we shall call the "Big Pines property," the appellants claim an interest by reason of the following facts:

During the month of June, 1914, said Lumber Company and said Utilities Company, by and with the consent of their stockholders, bondholders, and creditors, entered into an agreement to merge and consolidate their interests, and, to carry out the purposes of said agreement, they organized and incorporated said Big Pines Lime & Transportation Company with a capital stock of $1,000,000, divided into 1,000,000 shares of the par value of $1 each. It was agreed, as part of said merger, that the Transportation Company would issue a new series of bonds in the sum of $250,000 and use the same for the general purposes of the corporation and to take care of its obligations. Thereupon the old corporations transferred their properties to the new corporation, as hereinbefore set forth, and, in consideration therefor, the Transportation Company agreed to issue to the Lumber Company 100,000 shares of its capital stock, to deliver to it $40,000 worth of the new bonds proposed to be issued, and to pay its creditors out of the proceeds of the new bond issue. To the Utilities Company the Transportation Company agreed to issue 508,150 shares of its capital stock, to pay its creditors out of the proceeds of the new bond issue, and to issue to the holders of the bonds issued by said corporation on March 1, 1912, and in exchange therefor bonds of the new issue to the amount of $100,000. The Transportation Company did issue to the Lumber Company 100,000 shares of its capital stock and to the Utilities Company 508,150 shares of its capital stock. The Transportation Company also issued and delivered to the stockholders of the Lumber Company certificates evidencing their respective rights to the $40,000 worth of bonds whenever the same should be issued. Thereafter the old corporations were dissolved by operation of law, having failed to pay the state license tax for the year 1915.

To secure said proposed issue of bonds, the Transportation Company executed a trust deed to the Los Angeles Trust & Savings Bank covering all of the properties transferred to it by the Lumber Company and the Utilities Company. Said trust deed bears date of September 1, 1914, and was duly recorded. Said deed recited that it was given to secure an issue of bonds, which bonds were to be used in promoting any of the lawful purposes or objects for which the corporation was organized, among which are: The development of power plants, power systems, and numerous other enterprises more or less related thereto; also for the marketing of real property acquired by the company and the construction of a hotel, places of amusement, halls, dwelling houses, and other improvements deemed advisable by the board of directors; also for the payment of the indebtedness formerly existing against the Lone Pine Mill & Lumber Company and the Lone Pine Utilities Company, including the bonded indebtedness of said last-named company, not exceeding $100,000. It was intended that said trust deed was to be a first lien upon property conveyed to the Transportation Company, but some of the bondholders of the Utility Company refused to exchange their old bonds for the new bonds and so release the prior lien created by the trust deed of March, 1912, given by the Utilities Company. For that reason it became impossible to carry out the plan of the corporation, and the new bonds were never issued, and the intention to issue said bonds was abandoned. The trust deed of September 1, 1914, given by the Transportation Company to secure a proposed bond issue, was therefore given without consideration, no bonds having been issued, and it is of no force and effect.

It is the contention of the appellants, however, that, regardless of the fact that they have acquired no legal rights under the trust deed given by the Transportation Company, nevertheless, as bondholders of the Utilities Company, an equitable lien is created in their favor upon all of the property mentioned in said trust deed of the Transportation Company because of the fact that the Transportation Company agreed to issue its bonds and execute its trust deed to secure the same and to exchange appellants' bonds for the new bonds, and because the Transportation Company accepted the transfer of the property of the Utilities Company upon these conditions.

We shall not deal with the question of what equities might have been presented had the appellants parted with anything of value in reliance upon this agreement, or had they lost any right or advantage of any kind, or were in a position where they were unable to enforce their claims by a plain, speedy, and adequate remedy at law. Such a question is not presented here. For the appellants have, as security for their bonds, precisely the same property which they always had and precisely the same security which they accepted in purchasing their bonds. They never gave up any of their legal rights under the trust deed securing these bonds and there is no reason why they should not avail themselves of their plain, speedy and adequate legal remedy. Under such circumstances they show no basis for equitable interference.

The property sought to be bound by an equitable lien consists of the "Lime property," upon which appellants have, admittedly, a first lien under the trust deed of 1912, and another piece of property, the "Big Pines property," upon which a lien prior to any possible right of appellant has already been foreclosed and the property sold thereunder and all equities of redemption foreclosed. As to the "Big Pines property," the rights of the appellants, if any they had, were barred either in the foreclosure proceeding or in the subsequent action to quiet title to this land.

There is no merit in the claim of cross-plaintiffs, John and Cora M. Potter, that the defendant Mitchell's purchase of the "Big Pines property" was in reality an assertion of his equity of redemption as a bondholder having an equitable lien upon the property, and that such redemption inured to the benefit of all the bondholders of the Utilities Company. If by any process of reasoning these bondholders did have any equity of redemption in this property, such equity was never asserted by any of them. The sale of the property to the mortgagee became final, and the property became hers absolutely, free from all equities, some time before she sold it to Mitchell.

There are no other matters requiring discussion, and the judgment appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

55 Cal. App. 624

ROTTMAN v. ROTTMAN. (Civ. 3531.)

(District Court of Appeal, Second District, Division 2, California. Dec. 13, 1921.)

1. **Equity 🔑87(2)—Action brought within period of limitation not barred by laches unless delay has injured defendant.**

As the statute of limitations is applicable to both legal and equitable actions, there can be no laches in delaying the bringing of an action if it is brought within the period of limitations, unless there are some facts or circumstances attending the delay which have operated to the injury of the defendant.

2. **Equity 🔑84—Doctrine of laches not strictly applied between near relatives.**

The doctrine of laches is not strictly applied between near relatives, particularly where relationship is so near and confidential as that between husband and wife.

3. **Cancellation of instruments 🔑34(1)—Wife not barred by laches from suing to set aside postnuptial contracts in absence of showing that delay prejudiced husband.**

Wife's action against husband to set aside postnuptial contracts relating to property rights brought within period of limitation *held* not barred by laches because of delay of almost three years, in absence of showing that husband was prejudiced by the delay.

4. **Cancellation of instruments 🔑34(1)—Wife who made postnuptial contracts under threats not barred by laches from suing to set aside contracts three years after.**

Wife, having entered into postnuptial contracts making settlement of property rights for the purpose of securing to herself a continuance of the marriage relation, which husband had threatened to deny her if she refused to make contracts, was not barred by laches from suing to set aside contracts almost three years thereafter.

5. Cancellation of instruments 🔑37(7)—Complaint to set aside postnuptial contracts held to show contracts procured by undue influence of husband.

Wife's complaint in action to set aside postnuptial contracts, alleging that husband induced wife to make contracts by statement that his father and uncle would not give him any peace until property matters had been arranged with his wife as provided for in such contract, and that he would not be the husband to the wife that he should and desired to be unless she signed the contract, and that she was influenced to sign the contract by reason of her love for and confidence in, and by reason of the undue influence exercised by husband over her, *held* to show contract procured by undue influence of husband.

6. Husband and wife 🔑34—Evidence held to sustain finding that wife in making postnuptial contracts was ignorant of respective rights of herself and husband.

In wife's action to set aside postnuptial contracts relating to property rights, evidence *held* to sustain finding that wife in making contracts was ignorant of the respective rights of herself and husband.

7. Appeal and error 🔑1071(1)—Finding that no consideration passed to wife for postnuptial contract held harmless where no substantial consideration passed.

Court's finding in action to set aside postnuptial contracts that no consideration passed to wife, if technically erroneous in that there was some consideration, was harmless, since the disparity between what wife received and what she parted with under the contracts was so great as to warrant finding that no substantial consideration passed to her.

8. Husband and wife 🔑30—Husband cannot by undue influence induce wife to part with property rights for nominal consideration.

A husband may not by the undue pressure of illegitimate argument or persuasion induce a wife by postnuptial contract to part for a nominal consideration with valuable rights which were hers under the marriage covenant.

9. Husband and wife 🔑34—Finding that husband procured postnuptial contracts to effect release from obligation to support wife and children sustained.

In wife's action to set aside postnuptial contracts, finding that husband procured the contracts in order to effect his escape from any obligation to support his wife *held* proper in view of provision of contract releasing husband from the obligation to support the wife.

10. Appeal and error 🔑1071(3)—Finding that husband procured postnuptial contracts to release him from supporting any children that might be born held harmless in view of the unjust character of contracts.

In wife's action to set aside postnuptial contracts whereby husband worth $50,000 made cash payment of $5 and $500 to wife, quitclaimed any interest in property that admittedly belonged to the wife and released wife from liability to support him in consideration of wife's release of any interest in husband's property, and of any obligation on part of husband to support her, or to pay alimony or provide separate maintenance, finding that husband procured agreement to effect a release of his obligation to support any children that might be born *held* harmless, though not warranted by evidence, in view of the palpably unjust and unfair character of the contracts.

11. Appeal and error 🔑1071(1)—Finding as to wife's property in action to cancel postnuptial contracts held harmless where other finding would not have affected unfair character of contract.

In wife's action to set aside postnuptial contracts in which wife released husband, worth $50,000, from the obligation to support and maintain her for no substantial consideration, finding that wife was worth $5,000 at time of execution of contracts *held* harmless, even though finding should have given her worth at such time as $16,000, as alleged by answer, since court's conclusion of the unfairness of contract would not have been affected by finding that wife was worth $16,000 instead of $5,000.

12. Husband and wife 🔑30 — Postnuptial agreement whereby wife released husband from obligation to support wife without providing for separation held void.

Under Civ. Code, § 159, postnuptial contracts whereby wife released husband from the obligation to support her or to pay alimony in the event of a divorce and to provide separate maintenance, but which made no provision for separation, *held* void as against public policy.

Appeal from Superior Court, Imperial County; E. A. Luce, Judge.

Action by Ula May Rottman against Sam E. Rottman. Judgment for plaintiff, and defendant appeals. Affirmed.

Dan V. Noland and Meserve & Meserve, all of Los Angeles, for appellant.

Robert M. Pease, of Los Angeles, and Conkling & Brown, of El Centro, for respondent.

WORKS, J. The parties to this action are husband and wife. A little less than a year and a half after their marriage, they, as opposing contracting parties, entered into two written agreements, the rescission of which is the purpose of the present litigation. While there were two contracts between the parties, executed some weeks apart, they in effect really constitute but one obligation, as the second was but an amplification of the first. The earlier of the agreements—and we shall henceforth refer to them, respectively, as the first contract and the second contract—was executed on June 11, 1915. Its terms are introduced by the recital that the parties are husband and wife, that they are desirous of settling all rights of property between them and all monetary obligations of each to the other under their marital relation. Following this premise it is agreed that all property standing in the husband's name is his separate estate, and not community property; that all property standing in the name of the wife is her separate property; that the husband, upon the execution of the agreement, will pay to the wife the sum of $5, the receipt of which is acknowledged; that, in consideration of such payment, the wife grants to the husband all right, title, or interest which she may have in all property, real or personal, theretofore acquired during coverture and as the common property of the parties; that, further, in consideration of such payment and of the release by the husband to the wife "hereinafter contained," the wife releases the husband "from any obligation of whatsoever kind or nature, either present, past or future, to in any way contribute to the support or maintenance" of the wife, and that the wife "will not at any time apply to any court or take any proceedings against" the husband "wherein or whereby she shall seek to recover" from the husband "any moneys for her support or maintenance, or for temporary or permanent alimony, attorney's fees, or costs in any action which may be hereafter commenced by either" the husband or the wife; that the agreement shall be a receipt to the husband "because of any liability, present or future," by him to the wife; that the husband releases the wife "from any similar obligation" to him; that the parties "mutually agree, one with the other that any property which may hereafter be acquired by either of the parties hereto shall be deemed and held to be the property of the party so acquiring the same," and the taking of title by the party so acquiring shall be deemed conclusive evidence that the property acquired is the separate property of the party so taking title; and that each party releases, remises, and quitclaims unto the other all right, title, or interest in all real and personal property which the other may hereafter so acquire. The second contract is dated June 26, 1915, but it was not executed until July 12. This agreement opens with a recital stating the fact that the first contract was executed between the parties; that it was recorded on the date of its execution, the book and page of the record being given; that the parties have been advised to describe with more particularity certain of the properties referred to in the first contract; and that they have agreed that neither should incur any bills against the other, in consideration of which the husband has agreed to pay to the wife an additional $500. It is then, following this introduction, agreed that the parties do jointly and severally ratify and confirm the first contract, each stating "that he and she respectively have fully considered said contract, and has been fully advised as to all of its contents and the legal force and effect thereof"; that the husband, at the time of the execution of the agreement, has paid to the wife "an additional" sum of $500, the receipt of which by her is acknowledged; that each of the parties will not incur any bill or obligation against the other unless express written authority so to do is first given, the wife "particularly obligating herself" not to incur any bills or obligations against the husband without such authority; that the wife (in paragraph 4 of the contract), in addition to the general grant, release, and conveyance contained in the first contract, "does hereby grant, quitclaim, and convey" to the husband, "in particular, all and every right which he [sic] has or may claim to have" in certain described property; that the wife agrees "that said hereinabove particularly described property, as well as all and every other piece of property standing in the name" of the husband, is his separate property and estate"; that the husband (in paragraph 5 of the contract) in addition to the general grant, release, and conveyance contained in the first contract, "does hereby grant, quitclaim, and convey" to the wife, "in particular, all and every right which he has or may claim to have" in certain described property; and that the husband agrees "that said hereinabove particularly described property, as well as all and every other piece of property standing in the name "of the wife," is her "separate property and estate."

Upon a trial of the issues arising under the pleadings a decree rescinding both agreements was rendered in favor of plaintiff. Defendant appeals.

One of the points made by appellant is that the amended complaint fails to state facts sufficient to constitute a cause of action. The pleading alleges that the parties intermarried January 29, 1914, and ever since have been husband and wife; sets up the first contract; alleges that at the time of its execution, and at all times, the wife was unacquainted with business, ignorant of business matters, and unable to understand the legal effect of the contract, or what were the rights of the parties to it, all of which was well known to the husband; that no consideration for the signing of the contract passed between the parties; that the wife received no consideration therefor and was induced to sign it by reason of her love for her husband and her trust and confidence in him and her ignorance concerning the matter, and that by reason of her love for her husband and her trust and confidence in him she signed the contract without legal or other advice in regard to the matter and notwithstanding that he was fully advised concerning it and had legal advice touching it and understood all the rights and obligations of the parties; that the $5 mentioned in the contract was not paid to the wife, nor was any other sum paid to her or any other consideration given; that to induce the wife to sign the contract the husband stated to her that "his father and his uncle would not give him any peace until the defendant had his property matters arranged with his wife as provided in the said contract, and that by reason of his mind being troubled upon that account he could not be to the plaintiff the husband he should and desired to be, and that if she would sign the said contract that all would be well between them, and that he would continue to live with her and love her as a husband should"; that at the time of the execution of the contract there was no property of record in the name of the wife which was not her separate property, and there was no property of record in the name of the husband which was not his separate property, and the husband obtained the contract "solely and entirely in order that he might thereafter freely violate his marriage vows and by virtue of said agreement might preclude the plaintiff from obtaining from the said defendant thereafter any support or maintenance and in order that he might with impunity abandon the plaintiff and leave her without support," and also that he might thereafter be free from obligation to support children thereafter born to the parties, and that he might cast upon the wife the burden of supporting such children; that on April 7, 1916, one child was born to the parties, "now" of the age of about three years; that the husband has not supported or maintained the child and has contributed but $25 toward its maintenance; that the contract was and is unfair in that it was without consideration and its effect was to cast upon the wife the entire burden of supporting herself and the child, and she signed it only by reason of her love and affection for her husband and her trust and confidence in him and by reason of his undue influence over her at that time and to give him the peace of mind "he claimed he could only have when his property matters were arranged to the satisfaction of his father and his uncle"; that at the time the contract was signed it was not known that a child would thereafter be born to the parties; that since the birth of the child the wife has been unable to work and support herself because her time has been entirely taken up with the care and raising of the child, and the contract was and is unfair in that it provided no consideration for the loss by the wife of the time necessarily to be given by her in the care of the child, or her inability to support herself by her labor owing to the necessity of devoting her time to the care and education of the child; that on June 26, 1915, the husband caused to be drawn up and presented to the wife for her signature the second contract, which is set out in full; that at the time she signed the second contract she loved and trusted her husband and had no advice other than that of her husband, who had advice of an attorney concerning that contract; that no sum was paid and no consideration passed between the parties for the execution of the second contract, and no consideration was received by the wife for or with respect to the execution thereof, but that at the time she signed it she was entirely ignorant of business and of law and did not understand the effect of the agreement, whereas the husband understood it and was advised by attorneys regarding it, and he procured the execution of it in order to procure his release from any obligation thereafter to support the wife or to support any children that might thereafter be born to them; that the property described in the fourth paragraph of the second contract was prior to its execution the separate property of the husband and the property described in the fifth paragraph was the separate property of the wife; that the property standing of record at that time in the name of the wife was her separate property, and any property standing of record in the name of the husband was his separate property; that the second contract was unfair in that it was without consideration and in that no provision was made for the maintenance of the wife or of any child or children which might thereafter be born to the parties, whereas the husband was then "and is now" very wealthy, worth about $100,000, and bountifully able to support and care for the wife and for the child of the parties, while the separate property of the wife was "and is" of the value of only about $5,000 above all incumbrances, and was "and is" insufficient to support the wife and the child; that in order to induce the wife to sign the second contract the husband told her "that his father and uncle insisted upon it, and that he could not have any peace of mind unless it was signed." and that "unless she signed the same immediately that he would desert the plaintiff and go to South America"; that the wife signed the second contract "solely by reason of her love and affection for her husband and by reason of his undue influence over her, and in order to satisfy her said husband and retain his presence with her"; that since the making of the second contract the husband has not supported the wife nor the child, and that the income from the wife's separate property has not been sufficient to maintain the wife or child, and that the wife has borrowed $1,500 with which to support herself and the child and has been damaged in the sum of $1,500, no part of which has been paid; and that prior to the commencement of the action and after the execution of the two contracts the wife demanded of the husband that he contribute to the support of herself and the child, but that he refused and has not contributed anything whatever to the support of the wife and only a small and insufficient sum to the extent "hereinabove alleged" for the support of the child. The prayer was that the two contracts be canceled and declared null and void and for general relief.

[1, 2] Appellant's contention that the amended complaint fails to state a cause of action is made upon several grounds. One of these is that nothing is alleged by way of excuse for the long delay in commencing the action; the original complaint having been filed but about a month short of three years from the execution of the second contract and a day short of three years after the execution of the first. Such a delay was of course a great one, but whether it operates as a bar to the prosecution of the action depends upon all the facts and circumstances of the case disclosed upon the face of the plaintiff's pleading. It may be conceded that the courts of this state have many times held causes of action to be barred by laches where the period elapsing before an attempt to prosecute them was less than that which transpired in the action now before us. On the other hand, cases are not lacking in which it has been determined that the lapse of an equal time will not operate as a bar. No guide is furnished by any of these cases, except as to principles general in character, for the question whether a plaintiff has been guilty of laches in commencing an action must be determined upon the facts and circumstances peculiar to that particular action. One of the general rules laid down by the cases is:

> "As the statute of limitations is applicable to both legal and equitable actions, there can be no laches in delaying the bringing of an action if it is brought within the period of limitation, * * * unless there are some facts or circumstances attending the delay which have operated to the injury of the defendants." Meigs v. Pinkham, 159 Cal. 104, 112 Pac. 883.

Practically the same rule has been stated in these terms:

> "In order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed." Title Ins. Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542.

Another rule stated in the books is that the doctrine of laches is not strictly applied between near relatives (Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108); the principle, of course, finding a ready application in cases in which the relationship is so near, dear and confidential as that existing between husband and wife (21 C. J. 250, 251).

[3, 4] Either of these rules completely meets the point made by appellant. As to the first one, we can see no reason for asserting that he has been prejudiced in the least by respondent's delay in commencing the action. According to the complaint, by both specific and general allegation, no consideration passed from appellant under the two contracts. Therefore respondent has nothing of his which she could be required to surrender as a condition upon which relief might be granted her and through the retention of which by her for even a great length of time he might have been damaged. As to the second rule of law which we have mentioned, respondent is in a peculiarly strong position. Not only is she the wife of appellant but according to the amended complaint, the two contracts she seeks to rescind were entered into by her for the purpose of securing to herself a continuance of the relations which she had a right to expect from the very fact of marriage, but which her husband had threatened to deny her. This, we repeat, places her in a position from which she may strongly combat the charge that she unduly delayed the commencement of her action. Having made a very foolish and improvident contract, treating the two as one, for the purpose of securing her rights as a wife, other than the right to support, which she cast away in order to hold to the remainder, she could hardly be expected to be zealously diligent in attempting to cancel the contracts. A move in that direction might imperil the very consummation she had so devoutly wished. She was justified, without incurring the charge of guilt of laches, in holding to the last possible moment to the hope that, in the language of the amended complaint, her husband would "live with her and love her as a husband should," and that she might "retain his presence with her." As the contracts were executed by the wife for the purposes shown by the amended complaint, and as the husband had the degree of undue influence over her evidenced by the execution of agreements so unilateral in character, it will be presumed that, under all the circumstances shown by the pleading, the influence continued for a very long time. We hold that the amended complaint shows sufficient excuse for the delay in commencing the action.

[5] The sufficiency of the amended complaint is challenged upon the ground that its allegations make no showing of undue influence practiced upon respondent. The argument of this question is largely based

upon the idea that the pleading contains no averment of the untruth of the statement ascribed to appellant "that his father and uncle would not give him any peace until the defendant had his property matters arranged with his wife as provided in the said contract, and that by reason of his mind being troubled upon that account he could not be to the plaintiff the husband he should and desired to be, and that if she would sign the said contract that all would be well between them, and that he would continue to live with her and love her as a husband should." We are at a loss to understand why respondent's pleading should negative the truth of these unusual assertions. It is all one whether they were true or false, so long as respondent was influenced by them to sign contracts by means of which she got nothing and gave up much and appellant got much and gave up nothing. And she was influenced to sign by his statements, as witness the allegation that she "only signed the said agreement by reason of her love and affection for the said defendant, and her trust and confidence in him and by reason of the undue influence of her said husband over her at that time and in order to give the defendant peace of mind which he claimed he could only have when his property matters were arranged to the satisfaction of his father and his uncle." Courts may pause in wonderment at the extent of human credulity, but they cannot doubt its existence, especially when it is distinctly averred. It is difficult to understand how respondent could rely upon the promises of appellant to "live with her and love her as a husband should" after the first contract was signed, when he asserted such flimsy reason for his inability, unless it was signed, to be "the husband he should and desired to be." She did rely on them, however, as her pleading plainly shows, and they were no consideration for the valuable rights which she relinquished under the contracts, and her pleading shows that no other consideration passed to her. The husband was bound by their marriage contract to "live with her and love her as a husband should," and she could not be called upon through the exertion of pressure by him to pay him to do his duty in that regard. Not only was her payment made without consideration; it was opposed to the principles of a sound and enlightened public policy. The amended complaint makes a plain showing of undue influence.

Appellant makes several other objections to the sufficiency of the amended complaint, but we are convinced that they are not meritorious, and that they require no separate consideration at our hands.

[6] It is contended by appellant that several of the trial court's findings are not supported by the evidence. The court found, for instance, that respondent was ignorant of the respective rights of herself and of her husband under the two contracts, and that she was unable to appreciate or understand their legal effect, and the propriety of these findings is assailed. We can see nothing more than a conflict of evidence upon the issues covered by the findings we have mentioned. There is evidence that the contracts were explained to respondent by attorneys who were in the employ of her husband, but, on the other hand, she herself testified at some length as to her utter lack of business experience and as to the very limited extent of her knowledge concerning contracts and business transactions. From her testimony upon these subjects the court was justified in concluding that the explanations did not really enlighten respondent and in finding as it did. It must be remarked, too, that the findings in question are supported by the fact that respondent could have been induced to enter into the contracts at all. The pretexts upon which her husband procured her assent to them were of the most flimsy and unsubstantial character, for the burden of the evidence follows the allegations of the amended complaint upon the score of the representations made by him to procure the execution of the contracts by her. The fact that she could be won so easily to barter away her rights as a wife is most persuasive of the view that she labored under a distressing want of appreciation of the nature and value of those rights and of the extent to which she was impairing them by executing the contracts. She was putty in the hands of her husband, and if she ever had even a limited understanding of business affairs it was dethroned by his unhusbandlike and unmanly conduct toward her. We have no doubt that the findings we have mentioned are supported by the evidence.

[7, 8] The trial court found that no consideration passed to respondent for the execution of the two contracts by her, and it is contended that this finding is without sufficient support in the evidence. It may be that, in strictness, the finding was not justified; but, if so, the considerations passing to respondent were merely nominal, and the disparity between what she got and what appellant got under the contracts is so marked that it may be truly said that no substantial consideration passed to her. If, then, the finding is technically erroneous, there is no material injury wrought by it. A husband may not, by the undue pressure of illegitimate argument or persuasion, induce a wife to part, for a mess of pottage, with valuable rights which are hers under the marriage covenant, and then attempt to justify the relinquishment by her and the seizure by him, for it was in this instance nothing less than that, upon the ground that a nominal consideration passed between them. In view of

these remarks it is proper for us to recapitulate the provisions of the two contracts bearing upon the matter of consideration and to state what was done under them. The first contract provides for the payment of $5 to respondent, and the amount was paid. The second contract provides that $500 should be paid to her, and that amount was handed to her, but she immediately returned it to appellant, saying that she did not want it. Aside from these matters of monetary consideration, appellant by the terms of the contracts made quitclaim to respondent of property that was admittedly hers and released her from liability to support him, a liability which can but seldom be invoked against a wife. In this instance the liability was practically nil, viewing the situation as of the time when the contracts were executed, for the trial court found that appellant was then worth not less than $50,000. Respondent was then worth not more than a third of that amount. In contrast with the unsubstantial considerations moving to respondent, observe the covenants of the contracts inuring to the benefit of the husband, laying aside those matters of release and quitclaim which are reciprocal to certain of those in favor of the wife and which are of no more value. The husband is released for all time from all obligation to support the wife and from all obligation to pay alimony, attorney's fees, or court costs in any divorce action commenced by either party, and is released from liability to suits for separate maintenance. When the covenants of the contracts are thus contrasted, it is at once apparent that the arrangement made by them is woefully one-sided, so much so that our remark made above is practically correct; that is, that by the contracts the husband got much while the wife got nothing. We are satisfied that the disparity between the acquisitions of the respective parties under the contracts is so great that the finding that no consideration passed to respondent is justified, or, at least, if that finding be not supported by the evidence, when strict rules are applied, then the error is harmless. In other words, under the record as presented to us the allegation of the amended complaint that no consideration passed to respondent for the contract is an immaterial one. If some slight consideration did pass to the wife, the contracts were practically unilateral and were manifestly unjust and unfair as to her.

[9] Appellant objects to the sufficiency of the evidence to support a finding of the trial court that appellant procured the two contracts in order to effect his release from any obligation to support respondent or to support any child or children which might be born to the parties. We need not look far in a search for evidence to support this finding, except, it is true, that part of it referring to the maintenance of children. The finding, with the exception noted, is in accord with the terms of the two contracts entered into by the parties. We might very properly dismiss the question presented by appellant with this assertion, but we elect to pursue the subject further, for it is one which has a bearing on the entire case. A full discussion of it will present an opportunity to expose, more clearly than we have yet done, the iniquity of the arrangement which appellant wrested from respondent by means of the two contracts which he procured from her in such an illicit manner. In considering the contracts themselves, we are to remember what we have said in the last preceding paragraph upon the subject of the lack of consideration moving to the wife, for our remarks on that head are somewhat germane to the present point. From what we there said it is apparent that on the face of the contracts the only real consideration passing to the wife was the $500, the receipt of which she acknowledged in terms, although we have shown that the consideration mentioned did not really pass, for the money was returned to appellant the moment the wife had it in her hands. The reciprocal releases and quitclaims between the parties gave to them respectively no substantial rights whatever, except only the release of the husband from all liability to support the wife. If we strip the contracts of their superfluous integuments and view them in their nakedness, this release of the husband represents the whole agreement between the parties; or, keeping in mind the provision for a consideration of $500 moving to the wife, in an endeavor to ascertain the intent of the parties from the face of the contracts, thus escaping the conclusion that by their very terms the agreements are unilateral, we have neither more nor less than this as the effect of the documents: The wife is to be paid the sum mentioned as the price for a release of the husband from all obligation to support her. This course of reasoning would seem to demonstrate, from the face of the contracts, the propriety of the finding as to the purpose of the husband in procuring them, with the exception, again, of that portion of the finding relating to the support of children. We shall again touch upon that part of the finding later.

It is true that the wife says in her testimony that the husband besought her to "sign away" her interest in his property. It is true that the husband testified in practically the same manner, as witness the following question addressed to him and his answer to it:

> "The Court: But what was the direct result you expected to accomplish; was it that you expected by this to prevent her from inheriting your property, or was it to relieve you of the

trouble of having to support her? A. No, no; it was just simply to have my property in some definite shape, to please my father and uncle, because as I say, I was very much obligated to them."

This testimony about the wife "signing away" her interest in the property and about the husband's desire to have his property "in some definite shape" is in strict accord with the letter of the two contracts. She did sign away her interest, in terms, but the signing away amounted to absolutely nothing when considered apart from the matter of her right to support and maintenance out of whatever income the husband received or whatever property he possessed, and apart from her release of the husband from all liability to support and maintain her. Who can deny that the two contracts would amount to nothing if the release clause just mentioned were not incorporated in them? If they had been executed in all respects as they are, but with the release clause omitted, they would have been mere scraps of paper; and it is quite apparent to us that, with the release clause omitted, the husband would not have urged that they be executed. There is nothing in the record before us to show that the wife ever made claim to any interest in the husband's property. On the other hand, there is not the slightest doubt that the property was the husband's separate estate, and that the wife had never disputed the fact. The property all stood of record in the husband's name. According to the undisputed fact, it was a gift from his father and his uncle. That is what the husband refers to in the answer quoted above when he says, "I was very much obligated to them." The mere fact that the release clause was included in the contracts at all, taken in connection with the fact that the property was the husband's separate estate, is most persuasive of the view that the clause was inserted as the main feature of the agreements. It was solely through her right to support and maintenance that the wife could make any claim upon the separate property of the husband or upon his income arising from it. Therefore a deprivation of her right to support and maintenance was the one great thing to be accomplished, and we are satisfied that the arguments addressed by the husband to the wife were employed, in effect, for the purpose of inducing her consent to the release clause. It is apparent to us that the trial court was justified in finding that the purpose of the husband in procuring the contracts was to effect a release from his obligation to support her.

[10] We have left for later treatment that portion of the finding now under discussion to the effect that the purpose of appellant in procuring the contracts was to effect a release from obligation to support children which might be born to the parties. This part of the finding is not warranted by anything appearing in the contracts, for their terms will not allow a construction indicating any such intent on the part of appellant. In truth, this view is assented to by respondent. She argues, however, that her testimony to the effect that appellant failed to contribute substantially to the support of the child born to the parties some months after the execution of the contracts, by relation back, sufficiently shows an intent on appellant's part, in procuring the contracts, to escape liability to support children thereafter to be born. We cannot assent to such a proposition. The entire circumstances of the case convince us that appellant believed at the time the contracts were executed that no children would ever be born to respondent and him. The amended complaint alleges and the evidence conclusively shows that when the contracts were signed neither of the parties suspected the impending arrival of the child, which was born some months later. Further, we are convinced that the husband believed at the time of the execution of the contracts, that he and respondent would not be long together, and that for that reason he had not in mind the possible coming of children. The contracts do not by their terms contemplate a separation, it is true. Nevertheless, and although appellant could sacrifice the rights of his wife by persuading her to execute such contracts as those before us merely, to use his own words, "to please my father and uncle," and to "make them feel better," we cannot convict him of the enormity of desiring to remain long with a wife from whom he had wrung a contract providing for his release from all liability to support and maintain her. We are satisfied, then, that all thought of children was out of his mind. It is true that he did remain with the wife until shortly after the coming of the child, and he says he did "take care" of her during that period. He would have been hard indeed could he have done otherwise. The second contract was executed July 12, 1915, and the child was born April 7, 1916, less than nine months afterward. If we take the period of 280 days, the time fixed by science as the average period of gestation, instead of the even 9 months popularly ascribed to that phenomenon, respondent was 10 days advanced in her pregnancy at the time the second contract was signed. At any rate, her condition could not have remained a secret for any great length of time after the execution of that document. Under such conditions it would be practically impossible for any man to forsake his wife. These remarks will serve to explain why, in our opinion, a separation of

the parties did not occur immediately after the signing of the second contract; and the fact that it did occur soon after the child was born further supports our theory. We are satisfied that in procuring the contracts appellant had no purpose to escape liability for the support of children, and that the finding to the contrary is not warranted by the evidence. We are far from deciding, however, that the impropriety of this finding amounts to reversible error. As we have already shown, the two contracts sought to be rescinded are so palpably unjust and unfair to respondent, on other grounds, that the failure to find correctly upon this issue is harmless. It makes no difference whether or not appellant purposed by the procuring of the contracts to avoid liability to support children later to be born to respondent and him.

[11] Respondent alleged in her amended complaint that she was worth only about $5,000 at the time of the execution of the two contracts between the parties. This averment was denied by appellant, and in addition he alleged affirmatively that respondent was worth "to exceed" $16,000. The trial court found upon these issues that respondent was worth $5,000 and it is contended that the finding is not supported by the evidence. This contention must be sustained, as there is no evidence in the record upon which the court might properly have based the finding. If, however, we take the worth of respondent as it is alleged in appellant's answer—that is, as being the sum of $16,000—we are unable to see that what we have said above as to the unfairness of the contracts to the wife is to any extent affected. If the trial court had found respondent's worth to be as alleged in the answer, we could have taken no different view of the merits of the cause. It is therefore apparent to us that the court's error in finding her worth to be but $5,000 was harmless and unprejudicial.

[12] Section 159 of the Civil Code provides:

> "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation."

Inasmuch as the contracts between respondent and appellant make no provision for a separation of the parties, either "immediate" or otherwise, respondent contends that the contracts are void as against the public policy indicated by the terms of section 159. Under the views which we have above expressed as to the effect and main purpose of these contracts, we are of the opinion that the point made by respondent is well taken. The contracts are within the language of the Supreme Court in Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. By their terms appellant was placed in such a position that he might at any time abandon respondent, or commit any other breach of the marriage covenant, with impunity, except that respondent could secure a decree of divorce from him. By the contracts he was granted complete immunity from any financial charge whatever, and that, too, whether he continued to live with his wife, either as a faithful or a faithless husband, or whether he deserted her in whatever shameless a manner; and he was equally freed from liability to suit for separate maintenance, however flagrant his conduct. Such contracts afford most persuasive temptation to marital infidelity, and cannot be upheld, even if we forget the existence of such legislation as is embraced in section 159.

We need not consider the various other respects in which it is contended by appellant that the trial court committed error.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

55 Cal. App. 595

FLORES v. FLORES. (Civ. 3756.)

(District Court of Appeal, Second District, Division 1, California. Dec. 12, 1921. Hearing Denied by Supreme Court Feb. 9, 1922.)

1. Deeds 🔑38(1)—Description that identifies property is sufficient.

The grantee of a deed is entitled to have title declared in him wherever, by reason of a fair interpretation of the terms of the conveyance, assisted by extrinsic evidence, the property may be identified.

2. Descent and distribution 🔑84—Grants by a widow of interest in property devised to her by her deceased husband held valid.

Two deeds by a widow to plaintiff, reciting that in one of the courts in the "county of Imperial Valley" there was being administered grantor's husband's properties, all of which he left to her by will "as follows: * * * seven lots situated in the city of C.," each deed conveying "a 25 per cent. of the rights which she represents in the properties," operated to convey to plaintiff a one-half interest in all of the real estate located in the city of C. which was owned by her husband at the time of his death, and which was therefore a part of his estate then being administered on by the probate court in the county of Imperial, and the fact that the county of Imperial was referred to in the deeds as the "county of Imperial Valley" did not impair the description.

3. Estoppel 🔑47—Decree of distribution by probate court would make good attempted transfer of title by devisee.

Where one bought of a devisee half of certain lots in the city of C. left to her by the will of her late husband, the decree of distribution would make good any title theretofore attempted to be transferred by the widow as distributed under her husband's estate.

4. Partition 🔑63(3)—Identity of property described in plaintiff's deed held sufficiently established.

In suit for partition of property, a half interest in which defendant had sold to plaintiff as land in the city of C. devised to her by her deceased husband, concerning which probate proceedings were being had in I. county as her husband's estate, plaintiff *held* to have sufficiently shown that the property of which grantor's husband died possessed was of the description set forth in his complaint, having offered in evidence the records in the probate proceeding in I. county in the matter of the estate of defendant's husband, from which it appeared that deceased left real property in the named city answering the general description in the deeds, and left no other property.

5. Evidence 🔑82—Inventory of property and decree of distribution presumed to contain all of property of decedent in county.

It is presumed that an inventory of a deceased person's property, filed in the probate court of I. county, and the decree of distribution, showed all the property possessed by the deceased in I. county, and all of the property that was distributed to the widow by decree of the court.

6. Partition 🔑63(3)—Failure to produce map used in probate proceedings in distribution of land held not to prevent establishing title in purchaser.

In a suit for a partition of property conveyed to a purchaser as half of all the property in the city of C. left the devisee by the will of her husband, being administered in the probate court of I. county, where the descriptions of the land in the complaint coincided with its descriptions in the probate proceedings, failure to produce a map of the land referred to in the probate proceedings does not prevent establishing title in the purchaser.

Appeal from Superior Court, Imperial County; Phil D. Swing, Judge.

Suit by Jose Maria Flores against Juana E. de Flores. From judgment for defendant, plaintiff appeals. Reversed.

Alfred Blaisdell, of Calexico, for appellant.

Ault & Anderson, of Calexico, for respondent.

JAMES, J. Plaintiff brought this action in equity, asserting that he was the owner of a one-half interest, which he held in common with the defendant, who owned the remaining interest in certain real property which was described in his complaint. He further alleged that income in the way of rentals had been collected by the defendant, who had failed to make accounting to him for any part thereof. His prayer was for partition of the property according to the interests of the parties, and for a share of the rentals and profits as the same might appear to be due him. The allegations of the complaint were sufficient in form and substance to authorize a judgment for the relief demanded. The action was tried, findings and judgment were made in favor of the defendant, and plaintiff has appealed.

To establish his interest in the land, plaintiff offered in evidence two documents, both of which were in practically identical terms, except that one was dated on the 15th of June, 1917, and the second on the 16th of July, 1917. Each purported to transfer to the plaintiff a 25 per cent. interest in the property referred to therein, and the description of the property affected in both instruments was the same. We quote those portions of the instruments which are important to be considered in connection with the questions raised by the defendant's appeal:

"Mrs. Juana E. de Flores, widow, declares and shows, that in one of the civil courts which is established in the city of El Centro, county of Imperial Valley, of the state of California, in the republic of the United States, and in the court of the first instance of this judicial district of Mexicali, there are being determined at the present time the probate actions of the properties of her deceased husband, Mr. Francisco Flores, who died in the city of Calexico in the month of March last of the present year, and who, before dying, executed in her favor a will, leaving to her, as a sole and entire heiress, all of his properties which he possessed, as well in the city of Calexico as in this city, and is as follows: * * * Seven lots situated in the city of Calexico, of and in the United States of North America, there being on one lot constructed two houses of wood, and on the land which embraces the six lots there being constructed one house, and the rest remaining vacant, and of which property she will take possession as soon as the suits concerning same are terminated and the respective adjudication is made. The said Mrs. Juana E. de Flores, widow, declares that she sells, grants, and conveys to Mr. Jose Maria Flores a 25 per cent. of the rights which she represents in the properties, which are described in the article which precedes or which is a one-quarter part of same, for the sum of 500 pesos, national gold, or its equivalent, $250, which the vendor acknowledges to have received before this act. * * * It is agreed that the buyer shall enter into possession of the (25%) twenty-five per cent. that this represents in the properties to which this writing refers, as soon as the adjudication is made to the seller, but from now he shall be able to receive the profits and rents which belong to him according to the right which he represents."

Issue was made, first, as to the execution of the instruments by the defendant; and, second, it was urged that the property was not sufficiently described in the documents to enable the land to be located by reference to that description. At the trial it was contended, further, that the evidence did not assist in making certain that description. The court found that defendant had executed the documents referred to, but sustained the other contentions, and concluded that the property had not been identified, either by the descriptions in the instruments of conveyance or the evidence submitted.

[1, 2] The grantee of a deed is entitled to have title declared in him wherever, by reason of a fair interpretation of the terms of the conveyance, assisted by extrinsic evidence, the property may be identified:

> "The fact that evidence aliunde the deed may be required to determine the land conveyed does not render insufficient a general description pointing out the subject with reasonable certainty. * * * The meaning that the parties attached to the language employed, especially in matters of description, may be shown by parol evidence relating to the situation and condition of the subject-matter, for the deed should be given a favorable construction, and one as near the meaning and intention of the parties as the rules of law will allow. A deed conveying all the lands of the grantor is not void for uncertainty of description, and passes the title to all lands in which he has an interest." Devlin on Real Estate, vol. 2 (3d Ed.) pp. 1928, 1937.

Similar expressions are found in Pingrey on Real Property, vol. 2, § 1377. Thompson v. Motor Road Co., 82 Cal. 497, 23 Pac. 130. A deed describing property as "all my right, title, and interest in Sacramento City, Upper California, consisting of town lots and buildings thereupon," was held a sufficient description to convey title. Frey v. Clifford, 44 Cal. 335. A similar holding was made as to a descriptive clause in a deed reading:

> "All lands and real estate belonging to said party of the first part, wherever the same may be situated." Pettigrew v. Dobbelaar, 63 Cal. 396.

In McCullough v. Olds, 108 Cal. 529, 41 Pac. 420, the court was considering a like question and there said:

> "The objection that the description in the deed to Couts was void for uncertainty, because it did not state the state, county, or city in which the property is situated, is not tenable. Such a statement was not necessary if without it the property could still be located and identified."

We think it quite clearly appears from the instruments executed by the widow Flores that she intended to convey to the plaintiff a one-half interest in *all* of the real estate located in the city of Calexico which was owned by her husband at the time of his death, and which was therefore a part of his estate then being administered upon through the probate court in the county of Imperial. That intention being made manifest, it was incumbent upon the plaintiff to show that the property of which Francisco Flores died possessed was of the description set forth in his complaint.

[3] The decree of distribution would make good any title theretofore attempted to be transferred by the widow as distributee under her husband's estate. Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

> "An heir may contract about or convey the title which the law had cast upon him on the death of his ancestor, and the validity or force of such contract is not affected by the fact that a probate court afterward, by its decree of distribution, declares his asserted heirship and title to be valid." Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081.

[4] The records in the probate proceeding in the matter of the estate of Francisco Flores were received in evidence, particularly the inventory of the property and the decree of final distribution. It appeared from that evidence that the inventory of the real property did show the descriptions according to the terms used by the plaintiff in describing the land; also that those descriptions covered all of the real property shown by said proceeding to have been owned by said Flores at the time of his death in Calexico. It appeared by the decree of distribution that the real property was distributed to the widow Flores, plaintiff's grantor, less a certain portion thereof which had been sold during the course of administration. Plaintiff gave testimony at the trial and stated that he knew the property of Francisco Flores located in the city of Calexico and that it was the same which he had described in his complaint; that one lot had upon it two houses, and that the remaining parcel, which was shown by other testimony to be 200 by 300 feet in dimensions and capable of being divided into six lots, each 50 by 200 feet, had upon it one house. The description of the property given by the witnesses corresponded generally with the description contained in the instruments of conveyance in so far as the same illustrated the physical condition of the lots.

The trial judge, in a written opinion which respondent prints in her brief, indicated how his conclusion as to the facts had been arrived at. In this opinion it is stated that plaintiff had failed to show "that the land described in the probate proceedings was all the land that the deceased owned in the city of Calexico," or "that the files offered to the court were the only probate proceedings pending in that court for the estate of Francisco Flores, or that the court in which said probate proceedings were pending was the only court existing at the time in the county of Imperial which had jurisdiction over probate proceedings," and further that, assuming all of those things to be proven, there was a failure to produce the map called for in the description found in the probate proceedings.

[5, 6] There was error in this reasoning of the trial judge: In the first place, there was only one court which could have jurisdiction of probate proceedings in the county of Imperial. In the second place, it would be presumed that the inventory filed in that case and the decree of distributon showed, first, all of the property possessed by the deceased in the county of Imperial; and, second, all of the property that was distributed to the widow by decree of that court. The absence from the evidence of the map referred to in the probate proceedings has no significance at all as influencing the determination of the issues which the court was called upon to make. We will presume that the decree of distribution and the appraisement list correctly described the property. Plaintiff having shown that he was entitled to a one-half interest in all of that property (at least so much as was distributed to the defendant), the only question which it was necessary to further determine was as to whether the description set forth in the complaint corresponded with the descriptions which the probate proceedings exhibited. We have already remarked that those descriptions coincided. If the instruments of conveyance are interpreted as not on their face importing an intention to transfer interests in *all* of the real property of which Flores died possessed, but, rather, interests only in particular property intended to be specifically described, our conclusion would be the same. That is, it having appeared by the evidence that the deceased left real property in the city of Calexico answering generally to the description contained in the deeds, and that he left no other property, the identity was sufficiently established.

The fact that the county of Imperial was referred to in the deeds as the "County of Imperial Valley" did not impair the description. There was in fact a city of Calexico in the county of Imperial, and in the probate court of that county there were pending the proceedings in the estate of Francisco Flores at the time the deeds were made. Considering these facts, with all of the circumstances surrounding the parties, a court would not be justified in concluding that possibly some other city of Calexico, some other county of Imperial, in some other location in the United States, were intended to be designated.

The findings of the court are not sustained by the evidence.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

187 Cal. 785

STARK v. SHEMADA. (L. A. 6915.)

(Supreme Court of California. Jan. 27, 1922.)

1. Damages 🔑79(5)—$500 damages for failure to deliver $1,700 worth of secondhand goods held a penalty.

In contract by which defendant sold plaintiff, for $1,700, the furniture and furnishings of a certain hotel, a stipulation that defendant should pay $500 stipulated damages in case he defaulted in delivery of the goods, was invalid as a penalty under Civ. Code, §§ 1670, 1671, in view of sections 3308, 3354; the fact that the goods were purchased by plaintiff, a secondhand furniture dealer, to be sold at auction, not bringing the stipulation within the exception of section 1671, as providing for a case in which "it would be impracticable or extremely difficult to fix the actual damage."

2. Evidence 🔑18—Judicial notice taken that secondhand furniture has a readily ascertainable market value.

It is a matter of common knowledge that secondhand household and hotel furnishings are a commodity of extensive barter and sale, with a market value, according to condition and quality, readily ascertainable.

3. Damages 🔑79(1)—Stipulation for liquidated damages founded on a statement of difficulty of fixing damages will not be sustained if not supported by fact.

Though parties to a contract providing for liquidated damages have agreed by written stipulation that it would be impracticable and difficult to fix actual damages, if the facts do not support the stipulation, it will not be enforced.

4. Appeal and error 🔑907(3)—Presumption that finding of trial court is based on evidence held precluded by recital of conditions in findings.

In an action on a contract for liquidated damages, the presumption, on appeal on judgment roll alone, that the finding of the trial court that the damages were the specified amount was based on circumstances surrounding the transaction which appeared in evidence, was precluded by the court's predicating its finding on a recital of conditions that contract was for the sale of secondhand goods and that the damages would be extremely difficult to determine, which conditions are not sufficient to sustain an agreement for liquidated damages.

5. Trial 🔑404(2)—Where special facts on which finding rests are declared by the court, the ultimate finding is a conclusion of law.

Where the special facts upon which a finding rests are declared by the court, the ultimate finding of the court is but a conclusion of law with no better foundation than is given by the facts recited.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by B. Stark against M. Shemada. From judgment for plaintiff, defendant appeals. Reversed.

Cedric E. Johnson, of Los Angeles, for appellant.

E. F. Gerecht and C. W. Hall, both of Los Angeles, for respondent.

SLOANE, J. Defendant appeals from a judgment awarding plaintiff as liquidated damages the sum of $500 for breach of a contract for the sale of certain secondhand household furniture.

[1] By the terms of the agreement defendant sold to the plaintiff the furniture and furnishings of the premises known as the Federal Hotel in the city of Los Angeles for the agreed price of $1,700. It was stipulated by the parties that should the plaintiff fail to take the goods or pay the purchase price on the 24th of January, 1919, he was to forfeit the sum of $50 cash on the purchase price, and the sum of $450 additional which he had deposited in bank on account of said transaction; and should the defendant refuse to deliver to plaintiff the possession of the goods on said 24th of January, 1919, defendant should pay to plaintiff the sum of $500.

The defendant defaulted in the delivery of the goods on tender of performance by the plaintiff at the date stipulated.

The stipulated damages, therefore, on the part of the defendant, are all we are concerned with on this appeal.

The precise terms of the contract in this particular are as follows:

> "It is also agreed that in case the said Shemada [the defendant] fails to deliver said furniture to said B. Stark [the plaintiff] on January 24th, 1919, he is to pay B. Stark the sum of $500.00 as a forfeit for his failure to deliver said furniture."

Whether this stipulation is for a penalty, or as liquidated damages, we are satisfied it will not support the judgment appealed from.

It is pleaded as liquidated damages in the amended complaint.

In an attempt to avoid the application of sections 1670 and 1671 of the Civil Code wherein it is declared that "every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof" shall be void, except "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage," the amended complaint contains the following allegations:

> "That the business of the plaintiff is that of an auctioneer and that the sole purpose for the purchasing of said furniture and furnishings from defendant by this plaintiff was to sell said furniture and furnishings by auction at public sale, all of which facts the defendant knew at all times mentioned herein, and the amount to be realized from said sale of said furniture and furnishings depended entirely on the conditions surrounding said public sale, and naturally the amount of the profits to be made cannot be ascertained, as there is no way to ascertain the amount that each piece of furniture or furnishings would bring at such sale; that from the nature of the case it would be impractical or extremely difficult to fix the actual damage suffered by plaintiff in case of a breach of said agreement on the part of defendant, and that fact being recognized by both parties hereto, the sum of $500 was agreed upon as the amount of damage to be paid to plaintiff by defendant in case of a breach of the terms of said agreement by defendant; that it is impractical to fix the actual damage suffered by plaintiff herein by reason of the breach of said agreement on the part of defendant because of the facts as hereinabove set forth."

There is nothing contained in these averments of the complaint to bring the stipulated damages within the exception of the Civil Code, § 1671.

The circumstance that plaintiff was an auctioneer, and that his purpose, as known to the defendant, was to sell the goods again at public auction, does not add anything to the ordinary measure of damages for breach of the contract to sell.

[2] The essential facts are that this secondhand furniture as shown by the pleadings and findings was an ordinary commodity of personal property to be bought and sold on the open market. It is a matter of common knowledge that secondhand household and hotel furnishings are a commodity of extensive barter and sale, with a market value, according to its condition and quality, readily ascertainable. The obligation of the vendor is not to guarantee the purchaser a certain future profit whether on public or private sale. His liability is fixed by statute.

The breach of an agreement to sell personal property, the price of which has not been fully paid in advance, as is the situation here, is declared by section 3308 of the Civil Code to be "the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled," and in estimating damages it is provided by section 3354 of the Civil Code that—

> "The value of the property, to a buyer, or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase."

Circumstances may arise where, when the property is purchased for a special purpose, or has a special value, special damages may be allowed, but the facts as here pleaded and found that the goods were purchased by a dealer in secondhand furniture to be sold at auction in the line of his business does not take the case out of the general rule.

[3] Even where the parties to the contract for liquidated damages have by written stipulation agreed that it would be impracticable and extremely difficult to fix the actual damages, if the facts do not support such stipulation it cannot be enforced. Pacific Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890.

[4] This appeal was taken on the judgment roll alone, and the trial court has found, in accordance with the allegations of the complaint:

> "That it is true that from the nature of the business of the plaintiff, and of the defendant, it would be impracticable and extremely difficult to fix the actual damage suffered by either party in the event of a failure of either party to fulfill his part of the agreement."

Doubtless it is upon this fact that the learned District Court of Appeal, from whose decision this hearing was granted, based its judgment of affirmance. The presumption might ordinarily be indulged that facts and circumstances surrounding the transaction appeared in evidence before the trial court to support its finding. We think, however, that such presumption is precluded here from the circumstance that the court predicated its finding upon a recital of the conditions that plaintiff was an auctioneer, and dealer in secondhand goods and bought the furniture for resale, together with other reasons stated in the complaint, as the basis for the conclusion that it would be impracticable and extremely difficult to fix the actual damages.

[5] Where the special facts upon which a finding rests are declared by the court, the ultimate finding of the court is but a conclusion of law with no better foundation than is given by the facts recited. Ions v. Harbison, 112 Cal. 260, 44 Pac. 572; Niles v. Edwards, 90 Cal. 10, 27 Pac. 159, 296; Klein v. Lewis, 41 Cal. App. 463, 182 Pac. 789. As already pointed out, the conditions under which this stipulation for liquidated damages was given, and as recited in both the complaint and the findings, do not support the judgment for damages.

There are other specifications of error advanced by appellant; but, as the judgment must be reversed on the ground discussed, it is unnecessary to consider them.

The judgment is reversed.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; SHURTLEFF, J.; LAWLOR, J.

WILBUR, J. I concur.

Under sections 3308 and 3314 of the Civil Code, the measure of damages for the failure to deliver personal property sold is fixed by law and thus rendered definite and certain. The parties cannot, by stipulation or agreement that such damages are in fact uncertain, nor can the court by so finding render uncertain that which the law has thus fixed.

187 Cal. 773

Ex parte STEVENSON. (Cr. 2435.)

(Supreme Court of California. Jan. 24, 1922.)

1. Habeas corpus ⚷92(1)—Appellate court's decision affirming judgment of lower court on issue of insanity is final.

The defense of insanity having been presented, as it must be, to the court having jurisdiction of the cause, such court's decision is final against collateral attack, and the case put beyond further consideration by any court if the appellate court affirms the judgment.

2. Habeas corpus ⚷27—Does not lie unless lack of jurisdiction appears on face of record.

As respects the court's authority to proceed with the trial of a criminal charge against one claimed to be of unsound mind and the legality of a sentence against him, habeas corpus does not lie, unless lack of jurisdiction appears on the face of the record.

3. Habeas corpus ⚷92(1)—Question of defendant's insanity cannot be raised after conviction and sentence.

After a conviction and sentence have become final, the question of defendant's insanity at the time of trial cannot be raised on habeas corpus.

In Bank.

Application by Robert Stevenson for writ of habeas corpus. Writ denied.

Robert Stevenson, in pro. per.

SHAW, C. J. The petitioner, Robert Stevenson, is imprisoned in the state prison at Represa, Cal., upon a charge of forgery under sentence for the period prescribed by law. He applies for a writ of habeas corpus on the ground that prior to the time he was charged with the crime and sentenced to imprisonment he had been committed to the Norwalk state hospital as an insane person and that he had never been lawfully discharged from said hospital nor formally declared restored to sanity, and that until he was so restored or discharged from that custody he could not be prosecuted for felony.

[1-3] The petitioner is mistaken with regard to the effect of the commitment to a state hospital as an insane person. When a person is charged with crime by information or indictment, if the defense of insanity exists, it must be presented to the court

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

having jurisdiction of the cause, and the decision of that court is final against any collateral attack. If an appeal is taken the appellate court may consider the question. Its decision thereon, when it becomes final, if it affirms the judgment, puts the case beyond further consideration by any court. So far as the legality of the sentence for the crime charged is concerned, habeas corpus does not lie unless the lack of jurisdiction appears on the fact of the record of conviction. If it does not so appear the jurisdiction will be presumed. These propositions also apply to the question whether the court had authority to proceed with the trial of the criminal charge upon the claim that he was at that time of unsound mind. After the conviction and sentence have become final, the question of his insanity at the time of trial cannot be raised on habeas corpus.

The petition for a writ of habeas corpus is denied.

We concur: LENNON, J.; WASTE, J.; LAWLOR, J.; SLOANE, J.; WILBUR, J.; SHURTLEFF, J.

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188 Cal. 8

PEOPLE v. FORD MOTOR CO. (Sac. 3055.)

(Supreme Court of California. Jan. 27, 1922. Rehearing Denied Feb. 23, 1922.)

1. Taxation 🔑165—Foreign corporation's exercise of right to do intrastate business is taxable franchise.

The exercise by a foreign corporation of the power of engaging in intrastate business in this state is a franchise subject to taxation under Const. art. 13, § 1, and section 14, subd. (d).

2. Taxation 🔑165—Franchise of foreign corporation held subject to franchise tax, though not contemplated by authors of constitutional provision.

Under Const. art. 13, § 14, subd. (d), providing for the assessment of franchises at their actual cash value, as interpreted by St. 1911, p. 530, § 5, providing that such franchise shall include the actual exercise by a foreign corporation of the right to do business as a corporation in this state, the franchise of such a corporation is subject to a property tax, though the revenue commission which proposed the general system of taxation embodied in section 14 did not contemplate such result; the language of such section being definite and unambiguous.

3. Taxation 🔑592—Complaint in action to recover franchise tax on foreign corporation held sufficient.

A complaint in an action to recover a franchise tax on a foreign corporation *held* sufficient as against a general demurrer, though it referred to both the right to do business and the exercise of such right as a franchise, where it was apparent from the complaint as a whole that it was not the mere right but the actual exercise thereof on which the tax was sought to be imposed.

4. Pleading 🔑364(5)—No error in striking from answer denials of facts admitted therein.

In an action to recover a franchise tax on a foreign corporation, where defendant admitted in its answer and at the trial that it was doing an intrastate business, the court did not err in striking from the answer denials that it had a franchise in the state; such admission being tantamount to an admission that it had a franchise taxable in the state, and the denials being merely incorrect conclusions of law.

5. Taxation 🔑593(1)—Testimony as to methods of valuation in other years and rate of general taxation properly excluded in action to impose franchise tax.

In an action to recover a franchise tax on a foreign corporation, the court properly sustained objections to questions as to the method of valuation followed by the board of equalization in other years than that for which the tax was sought to be imposed and the rate at which property in general was taxed for other than state purposes; such matters being irrelevant and immaterial.

6. Appeal and error 🔑1058(2)—Error in sustaining objection to questions not considered, where objection ultimately overruled and answer permitted.

Error in sustaining an objection to questions will not be considered, where such objection was ultimately overruled and the court permitted the questions to be answered.

7. Appeal and error 🔑1058(2)—Error in sustaining objections to questions not prejudicial, where witnesses testified to same facts.

In an action to impose a franchise tax on a foreign corporation, where members of the board of equalization testified as to the general method followed in determining the value of defendant's franchise and that similar corporations similarly situated were treated in the same way, error, if any, in sustaining an objection to hypothetical questions as to the method of valuation was not prejudicial to defendant.

8. Commerce 🔑69—Constitutional law 🔑283—Taxation 🔑37—Method of determining value of franchise of foreign corporation held constitutional.

Determination of the value of a franchise of a foreign corporation for taxation purposes, by deducting from the value of its total assets the value of its tangible property and fixing the value of the corporate excess in the state at that percentage of the difference represented by the ratio between its intrastate and total business, *held* not violative of the interstate commerce clause (Const. U. S. art. 1, § 8), or Fourteenth Amendment of the United States Constitution, nor arbitrary or unreasonable.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the People of the State of California against the Ford Motor Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Williamson, of San Francisco (Edward Elliott, of San Francisco, of counsel), for appellant.

U. S. Webb and Frank L. Guerena, both of San Francisco, for the People.

LENNON, J. The state of California instituted the present action against the Ford Motor Company for the recovery of a franchise tax for the fiscal year 1915–1916, in the sum of $24,000, and accrued delinquency penalties amounting to $3,000. Judgment was rendered in favor of the state, and defendant appeals.

Upon this appeal the first question for consideration is whether the Constitution and laws of this state authorize the imposition of a franchise tax upon the defendant, a corporation organized under the laws of the state of Michigan and transacting both interstate and intrastate business in the state of California. Article 13, § 1, of the Constitution of California, provides:

> "All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include * * * franchises. * * *"

Section 14 of the same article reads in part:

> "(d) All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law. * * *"

These sections of the Constitution in effect authorize a tax upon all franchises in this state not exempt under the laws of the United States, unless otherwise expressly provided in the Constitution.

[1] This court has held that, by the use of the term "franchises" in these sections of the Constitution, it is intended to provide for the taxation of the intangible property of the corporation. Miller & Lux v. Richardson, 182 Cal. 115, 187 Pac. 411. The right to be a corporation, or to do business as a corporation, is a franchise which ordinarily has its situs at the place where the home office of the corporation is situated, but, when a corporation engages in business in a state other than the state wherein it was chartered, the actual exercise of the power to engage in business creates valuable intangible property in the foreign state where the business is transacted. In other words, the actual exercise of the power to do business is also a franchise, and such a franchise has a substantial existence in every state where the business is transacted. People v. Alaska Steamship Co., 182 Cal. 202, 187 Pac. 742. In so far as this franchise, or intangible property, consists of the exercise of the power to transact intrastate business within the foreign state, it may be taxed by that state. Adams Express Co. v. Ohio, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; People v. Alaska Steamship Co., supra. It follows that, if a foreign corporation is actually exercising its right to do business in this state and is doing an intrastate business it thereby has in this state taxable intangible property. Since the exercise by a foreign corporation of the power of engaging in intrastate business in this state is a franchise in this state not exempt under the laws of the United States and not excepted in the state Constitution, it is property taxable under section 14, art. 14, of the Constitution.

[2] Appellant contends that the revenue commission which proposed the general system of taxation ultimately embodied in section 14, art. 14, of the Constitution, did not contemplate that foreign corporations should pay a tax on franchises in the sense of "corporate excess," that is, a property tax, but that subdivision (d) of that section, above quoted, refers only to domestic corporations. However, the language of the constitutional section is definite and unambiguous in this respect, and it is not permissible to go outside of the Constitution itself and consult the reports of the commission and other sources for the purpose of construing words or phrases the meaning of which, as used in the Constitution, admits of no doubt. As stated in Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183, 192, 167 Pac. 845, 848:

> "While the report is very valuable and enlightening upon the subject treated, we cannot read it into the Constitution for the purpose of defining words of plain meaning. If we were to be governed by contemporaneous construction, we would have to consider also that given by the Legislature to the fourteenth section of article 13 shortly after its adoption."

This interpretation is to be found in the statutes of 1911, p. 530, c. 335, § 5, where the Legislature provided:

> "All franchises * * * shall be assessed at their actual cash value. * * * These franchises shall include the actual exercise of the right to be a corporation and to do business as a corporation under the laws of this state and the actual exercise of the right to do business as a corporation in this state when such right is exercised by a corporation incorporated under the laws of any other state or country."

[3, 4] The next contention is that the court committed reversible error in overruling defendant's demurrer to the complaint. The complaint is claimed to be defective, in that

it alleges that the tax was levied on the "right to do business in the state of California, rather than the "actual exercise of the right to do business in the state of California." It is true that there is language in the complaint susceptible of the construction contended for by appellant, arising from the fact that the complaint refers to both the "right to do business" and the "exercise of the right to do business" as a franchise. This creates some confusion and ambiguity. However, it is apparent from the complaint as a whole that it was not the mere right to do business, but the actual exercise of that right within this state, which constituted the property taxes, and the complaint was therefore sufficient as against an attack by general demurrer. Likewise, no error was committed by the court in striking from appellant's answer the denials that it had or possessed a franchise in the state of California. Appellant admitted in its answer and at the trial that it was doing an intrastate business in this state, and, in view of what we have previously said, this was tantamount to an admission that the defendant had a franchise taxable in this state. Under the circumstances the denials in question were merely incorrect conclusions of law which served but to confuse the issues and were properly eliminated.

[5] The third alleged error in law to which appellant directs attention is the action of the court in sustaining objections to a number of questions put to certain witnesses by appellant. In this connection appellant relies upon but one proposition of law, namely, that the corporation was entitled to examine the members of the board of equalization concerning the method pursued by them in arriving at the value of the property to be taxed. Conceding, for the purpose of discussion, this proposition to be correct, it is of no avail to appellant, for it does not appear that appellant was prevented from ascertaining the method by which the value of appellant's franchise was determined. By some of the questions appellant sought to ascertain the methods of valuation followed by the board in other years and the rate at which property in general was taxed for purposes other than state purposes. These matters were clearly irrelevant and immaterial, for the validity of the 1915 state tax on appellant's franchise was the sole question before the court, and in this connection the methods of valuation followed in previous years or the rates employed in imposing taxes of a different nature were of no moment.

[6, 7] It appears that the tax in suit had been originally computed at the sum of $29,700, and that the board had thereafter, upon the hearing of an application by the appellant for a reduction, reduced the tax to $24,000, which amount was finally fixed by the board. Appellant sought to question the witnesses as to the method by which the board fixed the sum of $29,700 as the amount of the tax in the first instance, and now complains that the court erroneously sustained an objection to such questions. Conceding that the method adopted by the board in fixing the tax at the higher sum was material and relevant to an inquiry as to the method by which they arrived at the tax which was finally fixed, still the record shows that the trial court did not, as counsel contends, sustain the objection to the questions referred to. On the contrary, the record shows that the objection was ultimately overruled, and that the court permitted every question propounded by counsel for appellant upon that phase of the case to be answered. No prejudice was suffered by appellant in the sustaining of objections to any of the hypothetical questions concerning method of valuation, for elsewhere in the record it appears that the witnesses were permitted to testify as to the general method followed in determining the value of appellant's franchise in 1915. Nor was any prejudicial error committed in sustaining objections to questions regarding the uniform application of the method, for these questions were but a repetition of previous questions in answer to which the witness testified that all similar corporations similarly situated were treated in the same way as the appellant corporation.

[8] Appellant's final attack is directed against the method of assessment. That method was as follows: The board first determined the value of the total assets of the corporation, that is, the capital stock and securities, from which it deducted the value of the tangible property of the corporation. The value of the corporate excess in California was then determined by taking that percentage of this difference (which was the total corporate excess) represented by the ratio between the intrastate business in California and the total business of the corporation. It is claimed that this method of allocation is violative of the interstate commerce clause (Const. U. S. art. 1, § 8), and of the Fourteenth Amendment of the United States Constitution.

This contention is answered by the United States Supreme Court in the case of Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164. In this case the corporation was organized in the state of Utah and was doing some intrastate business; it appearing, however, that the great bulk of its business and capital was outside of the state of New York. In discussing the validity of a tax imposed by New York upon "corporate franchise or business," the United States Supreme Court said:

"The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the state. Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the state, and in doing such business it puts itself under the law of the state, however that may be characterized. * * * It is true, the greater part of the business of the company was done out of the state, and the greater part of its capital was also without it, but the statute of New York does not require that the whole business of a foreign corporation shall be done within the state in order to subject it to the taxing power of the state. It makes, in that respect, no difference between home corporations and foreign corporations, as to the franchise or business of the corporation upon which the tax is levied, provided it does business within the state, as such corporation. There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the state, according to the amount of its business or capital without the state. That is a matter, however, resting entirely in the control of the state, and not a matter of federal law, and with which, of course, this court can in no way interfere."

Upon the authority of that case, the validity of the tax here attacked seems clear, for the method employed in fixing the amount of the corporate excess or intangible property situated in this state called for a division of the entire excess in the proportion that the California business bore to the entire business—a method which would doubtless be characterized as fairer than that pursued and upheld in the Horn Case.

The argument with respect to the application of the Fourteenth Amendment of the United States Constitution is further answered by the United States Supreme Court in the case of Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. Ed. 165. In this case the state of Connecticut had taxed a Delaware corporation operating within its borders, and the court said:

"The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state. 'The plaintiff's argument on this branch of the case,' as stated by the Supreme Court of Errors, 'carries the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs.' The corporation has not even attempted to show this."

Similarly, in the instant case, there is no showing that the percentage of the corporation's total intangible property apportioned to the state of California was an arbitrary or unreasonable allocation.

The judgment is affirmed.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; SLOANE, J.; SHURTLEFF, J.; WILBUR, J.

(188 Cal. 1)

MOORE v. MOFFATT et al. (L. A. 6336.)

(Supreme Court of California. Jan. 27, 1922.)

1. Pleading 🔑129(2)—Allegations not denied deemed admitted.

In an action by a trustee in bankruptcy of a corporation to recover the difference between the amounts agreed to be paid for stock and the par value of the stock, where allegations that defendants had paid the sums agreed to be paid, and that pursuant to their directions the stock was issued to a third person were not denied, the facts alleged may be taken as admitted facts.

2. Stipulations 🔑14(7)—Stipulation of parties held to support allegation as against motion for nonsuit.

In an action by a trustee in bankruptcy to recover the difference between the amount agreed to be paid for stock and its par value, where the parties stipulated that plaintiff had offered evidence tending to prove all the allegations of the complaint except those that defendants were stockholders or subscribed to the stock, the stipulation sufficiently supported, as against a motion for a nonsuit, the allegation that the corporation and defendants' nominee to whom the stock was issued were at all times insolvent and known by defendants to be so.

3. Corporations 🔑268(1)—Allegation as to transfer of stock to insolvent person to escape liability held defective.

Under the rule that the transfer of stock of an insolvent corporation to a financially irresponsible person, made with intent to escape liability as a stockholder, will not suffice to enable the transferer to escape such liability, an allegation that pursuant to defendants' direction a certificate for stock subscribed by them was issued to a third person, and that he was insolvent and known by defendants to be so, was defective, where it did not allege that defendants' direction was given with the intent and purpose of evading the stockholder's liability.

4. Appeal and error 🔑241—Trial 🔑163—Grounds of nonsuit not mentioned in motion not considered on hearing or on appeal.

In an action to recover the difference between the amount which defendants agreed to pay for stock in a corporation and its par value, where the failure to allege that their direction that the stock be issued to an insolvent person was with intent and purpose to evade their liability as stockholders was not made a ground of the motion for a nonsuit, it could not be considered on such motion, nor by the court of appeal in determining the merits of the motion, as the defect might have been remedied if attention had been called thereto.

5. Corporations 🔑243(2)—Stock issued after a permit for sale obtained on previous subscription agreement held valid so as to subject subscribers to liability of stockholders.

Conceding that a subscription for corporate stock was in its inception void and incapable of acceptance by the corporation because executed in contravention of St. 1913, p. 715, before the procurement of a permit from the corporation commission authorizing a sale of the stock, where the stock was not issued until after a permit had been granted, the subscription agreement should be construed as a continuing offer to subscribe which ultimately became the embodiment and expression of a new agreement, the validity of which should be tested by the circumstances and conduct of the parties at the time of its ultimate acceptance, rather than by the circumstances attending its mere physical making in the first instance, and the subscribers were therefore subject to the liability of stockholders.

6. Licenses 🔑36—Provision of permit for sale of stock as to expenses construed.

Under a permit from the corporation commissioner for the sale of stock by a corporation which provided that the total compensation, commission, or expense to be paid or incurred in the sale of the stock should not exceed 20 per cent. of the selling price, the corporation could pay compensation, commission, or expense not in excess of 20 per cent. out of the price for which the permit authorized the stock to be sold.

7. Licenses 🔑36—Sale of stock for net price in excess of that permitted by commissioner's permit held valid.

Under the Investment Company's Act (St. 1913, p. 715) and a permit issued by the corporation commission thereunder, authorizing a corporation to sell preferred stock for $30 per share on the condition, among others, that the total compensation, commission, or expense should not exceed 20 per cent. of the selling price, a sale for $25 per share was valid; the purpose of the law and the object of the permit being fulfilled when the corporation received a net price in excess of the minimum named in the permit.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by William H. Moore, Jr., trustee in bankruptcy of the Admiral Manufacturing Company, against H. W. Moffatt and others. From a judgment of nonsuit. plaintiff appeals. Reversed.

Kimball Fletcher and Edgar K. Brown, both of Los Angeles, for appellant.

Oliver O. Clark and Claud B. Andrews both of Los Angeles (Carnahan & Clark, of Los Angeles, of counsel), for respondents.

LENNON, J. This is an appeal from a judgment of nonsuit in favor of the defendants Neeland and Beggs, in an action brought by the plaintiff, as the trustee of a bankrupt corporation, to recover, under the trust fund theory, the difference between the sums paid on a subscription agreement for stock in the corporation and the par value of said stock, irrespective of the terms of the agreement. See Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265; Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166; Sherman v. Harley, 178 Cal. 584, 174 Pac. 901, 7 A. L. R. 950; Hasson v. Koeberle, 180 Cal. 359, 181 Pac. 387.

The pleaded facts of the plaintiff's case pertinent to the points presented on the motion for a nonsuit are these: On January 8, 1915, the defendants entered into an agreement in writing with the Admiral Automatic Water Heater Company, a corporation, and certain individuals interested therein, for the formation of a new corporation to be known as the Admiral Manufacturing Company. The agreement provided in part:

> "That said Neeland and Beggs agree to subscribe and purchase from the said Admiral Manufacturing Company 96 shares of its capital stock at the sum of $25.00 per share to be paid as follows: $400.00 on the 1st day of January, 1915, and a like sum on the 1st day of each and every month thereafter to and including the 1st day of June, 1915, and upon the payment of each $400.00 when the same becomes due there shall be issued to said Beggs and Neeland 16 shares of the capital stock of the Admiral Manufacturing Company."

Thereafter, so the complaint alleged, in accord with the terms of said subscription agreement, the defendants paid for said stock the sum agreed to be paid therefor.

The Admiral Manufacturing Company was organized with an authorized capital stock of $100,000, divided into 1,000 shares of the par value of $100 each. It does not appear from the complaint when this company was organized. At all times from the organization of said corporation it was insolvent, and its insolvency was known to the defendants. No certificate of stock was ever issued to said Neeland and Beggs, or either of them, but on December 1, 1915, they directed that a certificate for 96 shares be issued to A. E. Warmington, and, pursuant to such direction, such certificate was issued on December 11, 1915. On said last-mentioned dates, and at all intervening times, said Warmington was insolvent, and known to be so by the defendants. No demand has ever been made by the board of directors of said corporation for the unpaid balance of the purchase price of said stock, and no assessment levied.

On April 6, 1916, said Admiral Manufacturing Company filed a voluntary petition in bankruptcy, and plaintiff was appointed trustee. Claims against the bankrupt estate were allowed aggregating $13,402.12, while the available assets amounted to but $349.17. On June 28, 1917, the referee in bankruptcy directed the plaintiff, as trustee, to call in all unpaid subscriptions, and, upon failure of the stockholders to make payment, to sue therefor. Each of the defendants refused to make payment, and plaintiff thereupon brought this action.

The defendants, after denying generally their ownership of the stock in question, by their answers admitted that they signed said subscription agreement, alleging, however, in that behalf, matters and things which, if true, and had they been established in evidence as part of the defendants' case, might have tended to show that said A. E. Warmington, and not the defendants was the real subscriber for the stock, and was to be the actual owner thereof, when it was issued. With the latter phase of the case, however, we are not concerned upon this consideration of the merits of the motion for nonsuit.

[1] The defendants did not deny the allegation of the complaint that they had paid to the corporation the sums agreed to be paid for the said stock in keeping with the terms of the subscription agreement. This being so, it may be taken as an admitted fact that the defendants paid to the corporation the price agreed upon for the purchase of the stock. No denial was made of the allegation of the plaintiff's complaint that pursuant to defendants' direction on December 1, 1915, the stock subscribed for was issued on December 11, 1915, to said Warmington, and that likewise may be taken as an admitted fact in the case. It was also an expressly admitted fact in the case that no permit authorizing the sale of the corporation's stock was issued by the commissioner of corporations until September 10, 1915, and that this permit was superseded by an amended permit issued and dated October 24th of the same year. The amended permit provided, among other things, that the applicant was permitted "to sell 600 shares of its preferred stock at $30 per share," upon the condition, among others, "that the total compensation, commission or expense to be paid or incurred by said applicant in the sale of any of said shares of preferred stock shall not exceed 20 per cent. of the selling price thereof."

The bill of exceptions shows, as a part of the plaintiff's case, that it was stipulated by and between the parties that the subscription agreement in question was made prior to the organization of the corporation, and "that the plaintiff had offered evidence tending to prove all the allegations of the complaint, except that in regard to the allegations that the defendants Neeland and Beggs were stockholders or subscribed to the stock, the only evidence offered was that already in the record and the admissions of the pleadings." Upon the record thus made plaintiff then rested his case, whereupon the defendants moved for a nonsuit "upon the ground [that] the subscription agreement purported to have been made was made at a time anterior to the issuance of any permit by the Corporation Commissioner in violation of the Investment Company's Act as it was in force in January, 1915; and further that it appears from the terms of the subscription agreement itself that the stock was sold for less than the sum authorized by the Corporation Commissioner to sell it."

[2-4] At this point it may not be amiss to note that the stipulation of the parties applied as a matter of course to, and sufficiently supports, as against a motion for a nonsuit, the allegation of the complaint that the corporation and Warmington, the nominee of defendants to whom the stock was issued, were at all times insolvent and known to the defendants to be so. This allegation was evidently intended to charge and hold the defendants as stockholders, despite the fact that the stock was issued to another person, upon the recognized and approved theory that the transfer of stock in an insolvent corporation to a financially irresponsible person, made with the intent to escape liability as a stockholder, will not suffice to enable the transferor to escape such liability. 14 C. J. 1032; Pauly v. State Loan, etc. Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844; American Alkali Co. v. Kurtz (C. C.) 134 Fed. 663. But the allegation of the plaintiff's complaint in this behalf is grievously, if not vitally, deficient in not alleging that the defendants' direction to issue the stock of the insolvent corporation, for which they had subscribed, to an insolvent person, was done with the intent and purpose of evading their stockholder's liability. However, no point is made of this upon the record now before us. It was a defect in the plaintiff's case which might have been remedied had attention been called to it by the motion for nonsuit, and, inasmuch as it was not made a ground for the motion for a nonsuit, it could not, upon that motion, be considered by the trial court, nor can it, for the same reason, be considered by this court in determining the merits of the motion. Schroeder v. Mauzy, 16 Cal. App. 443-450, 118 Pac. 459; Sebring v. Harris, 20 Cal. App. 56, 128 Pac. 7; Williamson v. Williamson, 41 Cal. App. 721, 183 Pac. 301; Potts v. Mehrmann, 195 Pac. (Cal.

App.) 941; Raimond v. Eldridge, 43 Cal. 506; Gardiner v. Schmaelzle, 47 Cal. 558; Coffey v. Greenfield, 62 Cal. 602; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Daley v. Russ, 86 Cal. 114, 117, 24 Pac. 867; Palmer & Rey v. Marysville, 90 Cal. 168, 27 Pac. 21; Warner v. Warner, 144 Cal. 615, 619, 78 Pac. 24; Durfee v. Seale, 139 Cal. 604, 73 Pac. 435; Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443.

[5] Conceding, for the purposes of discussion and decision, as is contended in support of the judgment, that the subscription agreement was in its inception void and incapable of acceptance by the corporation because executed, in contravention of the provisions of the Investment Company's Act (Stats. 1913, p. 715), prior to the procurement of a permit from the corporation commissioner authorizing a sale of the corporation's stock, and therefore could not have been legally made the basis of an action against the defendants upon the theory that they were stockholders in the corporation, still we have the admitted fact in the plaintiff's case that no stock of the corporation was in fact issued in response to any agreement of the parties until after an admittedly regular and valid permit had been granted by the corporation commissioner. This being so, the subscription agreement, even though it may have been void and incapable of acceptance in the first instance, should, in the light of the subsequent conduct of the parties to the transaction, be considered and construed as a continuing offer to subscribe for the stock in question, pending the procurement of a permit from the corporation commissioner, which ultimately became the embodiment and expression of a new agreement to purchase the stock entered into at a time when the only legal obstacle in the way of a valid agreement had been overcome. The agreement, so considered, and having been in fact ultimately accepted by the corporation after the required permit had been procured—as evidenced by the issue of the stock upon the order of the defendants—the validity of its making and acceptance must be measured and tested by its character as revealed by the circumstances and conduct of the parties with relation thereto at the time of its ultimate acceptance rather than by the circumstances attending its mere physical making in the first instance. That is to say, the conduct of the parties to the transaction, the defendants on the one hand and the corporation on the other, with reference to the subject-matter of the agreement, at a time when the only legal obstacle to the making of a valid subscription agreement had been overcome by compliance with the statutory requirement, was tantamount to an adoption by them of the terms and conditions of the subscription agreement as of the date of its ultimate acceptance, thereby in effect making it finally effectual as the expression of a new agreement, even though in its original making it may have been void and ineffectual for any purpose.

Of course, the parties to the transaction could not, nor did they, as a matter of law, by their adoption of the agreement ratify and thereby validate as of the time of its original making or any time thereafter an agreement which may have been void in the first instance. But the parties could, and we think they did, when the bar of the statute to the making and acceptance of a valid agreement had been removed, elect to adopt and accept and stand upon the subscription agreement already signed as embodying—even though it may have been ineffectual at the time it was signed—the terms and conditions of a new agreement by which their future dealings were to be governed. Montgomery, etc., Co. v. Montgomery, etc., Co., 229 Fed. 672, 144 C. C. A. 82; Turner Const. Co. v. Union Term. Co., 229 Fed. 702, 144 C. C. A. 112; Miles v. Janvrin, 200 Mass. 514, 86 N. E. 785; Williston on Contracts, § 1772, p. 3082.

So considering the subscription agreement in question, it must be held that it did not fall within the claimed inhibition of the statute, and therefore the motion for a nonsuit was improperly granted upon the ground of the alleged invalidity of the agreement.

[6, 7] It seems to be conceded by the respondents, as we think it must be, that the proviso in the permit of the corporation commissioner, "that the total compensation, commission or expense to be paid or incurred by said applicant in the sale of any of said shares of preferred stock shall not exceed 20 per cent. of the selling price thereof," should be construed as meaning that it "permitted the corporation to pay compensation, commission or expense" of the sale of the stock "out of" and "up to 20 per cent. * * * of the price of $30 per share" at which the corporation was authorized to sell the stock." This being so, it must be held that the sale of the stock was made to the defendants in substantial accord with the provisions of the permit. Obviously the purpose of the law and the object of the permit were fulfilled when the corporation received a net price in excess of the minimum named in the permit. The subscription agreement provided for the payment of $25 a share, and the stock admittedly was sold at that price, which is $1 per share more than the minimum net price fixed by the corporation commissioner for the sale of the stock. This being so, the ground for the motion for nonsuit in this particular was nonsubstantial, and will not suffice to support the judgment.

For the reasons stated the judgment is reversed.

We concur: SHAW, C. J.; SLOANE, J.; WILBUR, J.; WASTE, J.; LAWLOR, J.; SHURTLEFF, J.

187 Cal. 790

MONSCH v. PELLISSIER. (L. A. 6488.)

(Supreme Court of California. Jan. 27, 1922.)

1. Municipal corporations ⟹808(3)—Owner maintaining light wells in sidewalk over area liable for injuries without notice to repair.

An abutting owner maintaining an area or vault under the sidewalk in front of her property, and maintaining in the sidewalk above the area light wells for her sole and exclusive benefit to supply light, must use reasonable care to keep them in safe condition and is liable for an injury resulting from a defective condition of which she knew, without notice from the Board of Public Works under the Vrooman Act and the acts amendatory thereto to repair the sidewalk, especially where their condition rendered them in the nature of a nuisance.

2. Pleading ⟹214(3)—Allegation taken as true on demurrer.

In an action for personal injuries an allegation that light wells over an area or vault under a sidewalk were kept and maintained by the abutting owner for her sole and exclusive use must be taken as true on demurrer.

3. Pleading ⟹254—Allegations in answer not considered in passing on demurrer to amended complaint.

Averments of defendant's answer to the original complaint will not be considered when passing on the demurrer to the amended complaint.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Elizabeth M. Monsch against Marie Julie Pellissier for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed.

Ford & Bodkin and Jos. J. Herlihy, all of Los Angeles, for appellant.

George J. Denis, of Los Angeles, for respondent.

SHURTLEFF, J. The amended complaint alleged that defendant kept and mantained for her own use and benefit an area or vault under the sidewalk in front of and adjoining her property in the city of Los Angeles; that in the sidewalk over and above said area or vault defendant kept and mantained light wells consisting of iron grating and inlaid glass for her sole and exclusive use and benefit, for the purpose of supplying light to said vault and area and to the basement of her building standing upon her said property; that said light wells were maintained by defendant in a negligent and dangerous condition, in that large portions of the inlaid glass were broken out or chipped, leaving holes in the surface thereof, and that in other portions of the same the glass had been replaced with boards. It was further alleged that the defendant knew, or by the use of ordinary care or diligence should have known, of the condition of these light wells; that plaintiff, while passing over and upon said light wells, stepped into a hole in one of them, causing her to fall violently to the sidewalk, with the result that her left shoulder and her left hip were fractured and her nervous system seriously shocked. To this complaint defendant interposed a demurrer, which was sustained without leave to amend, the plaintiff having declined to make further amendment. Thereupon judgment was entered for defendant, from which judgment plaintiff takes this appeal.

[1, 2] Both parties agree that the sole question in the case is whether, under the facts alleged, the defendant is responsible for the said injury sustained by plaintiff. The respondent contends that the complaint is insufficient because of the absence therefrom of an allegation that the board of public works of the city of Los Angeles had, prior to the accident, received notice of the alleged dangerous condition of the sidewalk, or that the defendant was ever notified by said board that the same was in a condition requiring repairs or reconstruction. This position is predicated upon the Vrooman Act (St. 1885, p. 147) and acts amendatory thereto (St. 1891, p. 206, St. 1893, p. 172) and Martinovich v. Wooley, 128 Cal. 141, 60 Pac. 760, which holds that the street law does not impose a liability upon the owner for personal injuries resulting from the nonrepair of the sidewalk in front of his lot, unless, as required by said act, the defect continues after the lapse of 24 hours or more from the time of the giving of the statutory notice thereof by the proper officer, which in that case was the superintendent of streets, and in this the board of public works, but we do not think the Martinovich Case is controlling here. What is there decided must be read in the light of the facts which the case presented. There the injury was due to a "decayed and rotten" plank in the sidewalk, which was essentially a component part and portion of the structure, and placed therein solely and entirely for the use of the public, and not, as here, for the special accommodation of the owner and his property. In the instant case the grating and glass became part of the surface of the sidewalk over which pedestrians could walk, but it performed an additional and distinct office, namely, the passage of light to the basement of the defendant's building, in which use it

was, as such, no part of the sidewalk. The fact that what may be termed its secondary use was to provide light, as stated (the same being for defendant's sole benefit), should not relieve her from keeping the light well in safe repair, even though the primary use of the sidewalk is for the public to walk over, and is, in such use, under the supervision of the city. Moreover, as we have said, the complaint alleges, which upon demurrer must be taken as true, that the light wells were kept and maintained by defendant for her sole and exclusive use.

Inasmuch, therefore, as the light wells, as such, were, as we have seen, constructed for the benefit of defendant and her property and for a use independent of, and apart from, the ordinary and accustomed use of the sidewalk, the law casts upon her the duty, to be discharged with reasonable care, of keeping it in proper and safe condition. Trustees, etc., v. Foster, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575. The case last cited was an action by the trustees of the village of Canandaigua for the amount of a judgment that had been recovered against it in a suit by a party who had been injured by the giving way of a grating in the sidewalk in front of defendant's property, because, so it was claimed, the grating was insecure by reason of the want of reasonable care on the part of defendant to keep it in proper repair. In rendering its decision, the court said:

> "It [grating] was built for his [defendant's] accommodation, and was a benefit to his property only, and the law placed upon him the obligation of using due care to keep it in a suitable and safe condition for the public to walk over as a part of the sidewalk. Proper construction, in the first place, was not enough to relieve him from liability; but the duty of inspection and repair continued while he owned and was in the exclusive possession of the premises. The duty ran with the land as long as the grate was maintained for the benefit of the land. * * * While the owner cannot be held liable in this action for failing to repair the entire sidewalk in front of his premises, was he properly held liable for failing to keep in repair the grate itself. which was his own structure? This depends upon the duty that he assumed when he cut a hole in the sidewalk and covered it with the grate. That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks and as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted."

[3] Respondent in her brief refers to certain averments in her answer to the original complaint, to the effect that the sidewalk in question was constructed under the provisions of the Vrooman Act, March 18, 1885, and was accepted by the superintendent of streets of the city of Los Angeles, or by the board of public works, his successor. But such averments will not be considered when passing upon the demurrer to the complaint. As we view the liability of the defendant under the facts as stated in the amended complaint, it is entirely separate from, and independent of, the city, and the latter's obligation to keep the sidewalk in proper repair. It is an original responsibility resting upon defendant to keep the gratings and lights in a condition which will render the sidewalk, of which they form a part, reasonably safe for use by those who may pass over it.

We cannot concede that defendant, having knowledge of the dangerous condition of the gratings and their resultant menace to the safety of the general public, could shut her eyes to the necessity of repairing them until such time as some one was injured, and then avoid liability by pleading that she had not received the 24 hours' notice required by the Vrooman Act. In other words, under the facts of this case, the duty was, in the first instance, independent of notice to or by the city, cast upon the defendant to repair the gratings. It is only where there is no liability whatever until service thereof, that the notice we are discussing must be given. In the latter case the service of the notice lies at the very foundation of the liability and its enforcement, which is not the situation here. Moreover, an examination of the photograph attached to the complaint as an exhibit depicts the gratings apparently in a condition which might render them in their character "of the nature of a nuisance" (Barry v. Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55; Spence v. Schultz, 103 Cal. 208, 37 Pac. 220), in which event defendant, who was responsible for their presence and had knowledge of their condition, as it is alleged she did, for a long time prior to the injury to plaintiff, or by the exercise of reasonable diligence would have known of it, should not escape liability upon the ground that she had not received statutory notice of the existence of such nuisance.

We think the amended complaint stated a cause of action, and that the court below erred in sustaining the demurrer.

Judgment reversed.

We concur: SHAW, C. J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

187 Cal. 774

YOSEMITE LUMBER CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 9556.)

(Supreme Court of California. Jan. 27, 1922. Rehearing Denied Feb. 23, 1922.)

1. Constitutional law 🔑67—Power to determine existence of liability under workmen's compensation provision of the Constitution is judicial.

Under Const. art. 20, § 21, as amended in 1918, authorizing the Legislature to create and enforce liability on all persons to compensate their workmen for injury or disability and their dependents for death, the power to determine whether or not such liability exists against any person is judicial power.

2. Master and servant 🔑347—Legislature may only confer on Industrial Commission power to settle disputes under workmen's compensation legislation.

Under Const. art. 20, § 21, as amended in 1918, giving the Legislature power to create a system of workmen's compensation, and giving the Legislature power to provide for the settlement of disputes under "such legislation" by an Industrial Accident Commission or otherwise, the Legislature can only confer on the commission jurisdiction of disputes arising under legislation authorized by that section.

3. Master and servant 🔑347—Constitutional provision for creation of compensation system does not authorize creation of liability for compensation.

So much of Const. art. 20, § 21, as amended in 1918, as authorizes the Legislature to create a system of workmen's compensation, does not touch on the subject of liability, and does not authorize the creation of liability on any person to pay such compensation, or require any person to contribute funds to support the proposed system.

4. Master and servant 🔑347—Constitution only authorizes creation of liability on part of employer to compensate his own workmen and their dependents.

Const. art. 20, § 21, as amended in 1918, giving the Legislature unlimited plenary power and authority to create a system of workmen's compensation, and in that behalf to create a liability on all persons to compensate their workmen for injury or their dependents for death, does not authorize the creation of liability on the part of any person to compensate any one but his own employees and their dependents, and does not authorize the Legislature to enlarge the liability to include compensation to workmen in general, or a contribution to a fund to be applied to the benefit of disabled workmen generally.

5. Constitutional law 🔑16—Pamphlet distributed to voters may be assumed to fairly state the meaning and purpose of the amendment.

Under Pol. Code, §§ 1195, 1195a, providing for the preparation by the author of any constitutional amendment and one other member voting for its submission, and for the distribution to voters, of a pamphlet giving reasons for the adoption of the amendment, it may be assumed that the arguments so prepared state fairly and with reasonable fullness the meaning of the amendment and the effect it is expected to produce.

6. Master and servant 🔑347—Statute providing for payment to state, when deceased leaves no one entitled to compensation, held to impose a "tax" unauthorized by Constitution.

St. 1919, p. 273, providing that the employer of one receiving a fatal injury of a kind compensable under the Workmen's Compensation Act, and not leaving surviving any person entitled to a death benefit, shall pay $350 to the state for the promotion of vocational reeducation and rehabilitation of persons disabled in industry, imposes a tax, and is unauthorized by Const. art. 20, § 21, as amended in 1918, relative to workmen's compensation, as a "tax" includes every charge on persons or property, imposed by or under the authority of the Legislature for public purposes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax—Taxation.]

7. Master and servant 🔑347—Compensation statute, giving commission jurisdiction of disputes concerning liability where deceased leaves no dependent, held void.

Since St. 1919, p. 273, requiring the employer of one receiving a fatal injury compensable under the Workmen's Compensation Act, and not leaving surviving any person entitled to a death benefit, to pay $350 into the state treasury, is unauthorized by Const. art. 20, § 21, as amended in 1918, relative to workmen's compensation, the Legislature had no authority to confer on the Industrial Accident Commission jurisdiction to determine disputes concerning the liability of employers thereunder, in view of the limitation on the power of the Legislature to create new courts or tribunals under Const. art. 6.

8. Master and servant 🔑347 — Constitution held not to authorize Legislature to give commission power to enforce a contribution from employers for re-education of injured employees.

Const. art. 20, § 17½, authorizing the Legislature to provide for the general welfare of employees, and to confer on any commission such authority as necessary to carry out the provisions thereof, refers to the comfort, health, etc., of employees during their employment, and gives no authority to the Legislature to authorize the Industrial Accident Commission to levy contributions on employers to raise revenue for the re-education of disabled employees, or for any other state purpose.

In Bank.

Proceeding under the Workmen's Compensation Insurance and Safety Act, by the People of the State of California, for an award for the death of John Moore, opposed by the Yosemite Lumber Company and others. Compensation was awarded, and the defendants bring certiorari. Award annulled.

A. E. Bolton and Arthur W. Bolton, both of San Francisco, for petitioners.

Adolphus E. Graupner and U. S. Webb, both of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

SHAW, C. J. This is a proceeding in certiorari, under the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831), to review an order of the Industrial Accident Commission requiring the Yosemite Lumber Company to pay to the state of California the sum of $350 for the death of John Moore, who was killed by an injury arising out of and in the course of said employment, and the further fact that he left no dependents surviving him. The order was made under the authority of the act of 1919, Stats. 1919, p. 273. The sole question for decision, as we view the case, is whether or not the said act gives the commission jurisdiction to adjudicate the liability of the employer to the state.

The act provides that when an employee receives a fatal injury, of a kind that is compensable under the provisions of the Workmen's Compensation Insurance and Safety Act, and "does not leave surviving him any person entitled to a death benefit, the employer * * * shall pay into the treasury of the state of California the sum of three hundred and fifty dollars for each such fatal injury in addition to any other payments under the provisions of said Compensation Act," not exceeding three times the average annual earnings of such employee, and that the moneys so paid "shall be covered into a special fund to be known as the 'industrial rehabilitation fund,' which fund is hereby created and appropriated for the purposes set forth in this act." Section 1.

It further declares that said fund may be used by the Industrial Accident Commission "for the promotion of vocational re-education and rehabilitation of persons disabled in industry in this state" (section 2); that the remainder of the fund which may be left after the commission shall have used so much thereof as they deem best in such promotion, shall be placed "semiannually, to the credit of the accident prevention fund, established by said compensation act" (section 3; also section 51, Compensation Act, Stats. 1917, p. 865). When $5,000 "shall have been accumulated in said fund," it is to be deposited "with the state compensation insurance fund as a revolving fund." From this "revolving fund" the payments so required by the aforesaid sections 1, 2, and 3 are to be made, on the order of the Industrial Accident Commission, and the "state treasurer shall from time to time, upon the order of the Commission, reimburse said state compensation insurance fund from the industrial rehabilitation fund for expenditures made from said revolving fund." The expenses of administration of the state compensation insurance fund in carrying out the duties imposed by the act are also "to be paid from said state industrial rehabilitation fund," all under the direction of the commission. Section 4. The commission is given jurisdiction to determine the liability of such employer and to require the payment by him of the $350 to the state in such cases by proceedings before it in the same manner as provided in the Workmen's Compensation Insurance and Safety Act, "provided further" that at any time after it is paid into the state treasury any person claiming to be a dependent of the employee may establish such dependency to the satisfaction of the commission, and thereupon the state may be required to pay to said dependent the said $350, or whatever thereof is necessary to meet his claim. Sections 5 and 6.

The accident prevention fund referred to is used to support the "department of safety" carried on by the Industrial Accident Commission. Sections 33 to 52, Workmen's Compensation Act. The state compensation insurance fund mentioned is established by the Workmen's Compensation Act for the purpose of enabling the commission to carry on the business of an insurance carrier for employers, with respect to their liability under the act.

It will be seen from these provisions that the act makes no provision for compensation by the employer to the person injured, nor to the dependents of such person. The "compensation" contemplated by the act is only to be made when the workman who is killed by the injury leaves no dependents to be compensated, and it goes to other persons not related to the deceased workman nor connected with his employer. It goes to the state to enable it to carry on a benevolent enterprise for the benefit of a class of workmen throughout the state, and to provide funds for the insurance bureau of the Industrial Accident Commission. The true intent of the act is to provide for the creation of a general fund for these purposes.

The proceeding in which the order or award in question was made was begun by the state of California after the death of John Moore. In its petition it averred that Moore left surviving him no person dependent on him for support, nor any person entitled to a death benefit under the Compensation Act, and that, on account thereof, $350 was owing by the Yosemite Lumber Company to the state, under and by virtue of said act of 1919. The act of 1919 purports to confer upon the commission the power to make orders determining and enforcing the liability which the act creates. It is contended on behalf of the commission that legislative authority to confer such power upon the commission is found in section 21, article 20, of the Constitution, as amended in 1918. This claim is contested by the petitioner, who asserts that it has no such effect.

Prior to the amendment of 1918, section 21 of article 20 read as follows:

> "The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, or by an industrial accident board, by the courts, or by either, any or all of these agencies, anything in this Constitution to the contrary notwithstanding."

The following is the section as amended in 1918 (see St. 1919, p. lxxv):

> "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a state compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government.
>
> "The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it: Provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state. The Legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined.
>
> "Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this state or the state compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed."

[1, 2] The power to determine whether or not the liability referred to in the first paragraph of the above section and imposed by this law exists against any person is judicial power. Western, etc., Co. v. Pillsbury, 172 Cal. 411, 156 Pac. 491, Ann. Cas. 1917E, 390; Pacific C. C. Co. v. Pillsbury, 171 Cal. 322, 153 Pac. 24; Carstens v. Pillsbury, 172 Cal. 579, 158 Pac. 218; Marin W. & P. Co. v. R. R. Comn., 171 Cal. 712, 154 Pac. 864, Ann. Cas. 1917C, 114. It is claimed that the new section authorizes the creation of a liability on employers in favor of the state for the benefit of workmen in general, and that it gives the Legislature power to confer on the Industrial Accident Commission jurisdiction to determine disputes concerning such liability. The second paragraph of the section is the part which purports to give this power, if it is contained anywhere in the section. It gives no authority to create a tribunal for any other purpose or with any other judicial power than to settle the "disputes arising under such legislation," referring to the legislation provided for in the first paragraph of the section. It is therefore apparent that, when we have ascertained the kind and character of the disputes that may arise under the legislation authorized by the first part of the section, we have found the limits beyond which the judicial power and jurisdiction of the Industrial Accident Commission cannot go.

[3] The first grant to the Legislature by the new section is the grant of power "to create and enforce a complete system of workmen's compensation." This does not authorize the creation of a liability on any person to pay such "compensation," or require any person to contribute funds to support the proposed system. It does not purport to touch upon the subject of liabilities.

[4] The next phrase of the new section empowers the Legislature "in that behalf to create and enforce a liability on the part of any and all persons to compensate any and all of their workmen for injury or disability

and their dependents for death incurred or sustained by the said workmen in the course of their employment." This does not authorize the creation of a liability on the part of any person to compensate the workmen of other persons, nor the dependents of workmen of other persons. The phrase "their workmen" necessarily confines the persons to be compensated to workmen who are in the employ of the person who is made liable. This is also shown by the provision that if the workman is killed by an injury in the course of his employment, the compensation is to be made to his "dependents" thus excluding any idea of liability in such a case to provide for the welfare of workmen in general, or of a particular class of disabled workmen, in no way connected with the employer who is made liable for the particular injury. Nothing is added to the force of the provision by the use of the word "plenary." If the Legislature has power to do a certain thing, its power to do it is always plenary. It is merely surplus verbiage.

The use in this clause of the words "any and all persons," in describing those made liable, and the words "any and all of their workmen," in describing those to be compensated, do not show an intent to empower the Legislature to enlarge the liability against a particular employer for a particular injury so as to include compensation to workmen in general as a class, or a contribution to a fund to be applied to the benefit of a class of persons, instead of to the dependents of the workman who may be killed by the injury.

Nor is such enlarged meaning given to the section by the use of the phrase "complete system of workmen's compensation," in the opening clause, or by the elaborate definition of that phrase which follows the first sentence. The section mentions and describes but one kind of liability: The liability of "any or all persons" to compensate "any or all of their workmen." This is in effect a provision for any person to compensate his workmen, which is but another form of saying that any employer shall compensate his employee, for an injury arising out of the employment, or the dependents of such employee, if the injury causes death to him. The language of neither one of these parts of the section shows or expresses an intent to add another liability to that expressly stated. In these circumstances the maxim, "expressio unius, est exclusio alterius," is applicable, and the meaning to be inferred is that only which is explicitly stated. And particularly it should not be inferred or implied from such language that so novel and different a thing was intended as the liability to the state which is imposed by the act of 1919.

[5] That there was no such thought in the minds of those who framed the amendment, or of the Legislature that proposed it, is clearly indicated by the argument in favor of the amendment in the pamphlet distributed to the voters with the ballot at the election at which the amendment was adopted. The amendment was proposed by the Legislature of 1917. Under section 1195 of the Political Code, when the Legislature proposes an amendment to the Constitution to be voted upon by the electors of the state, the author of such amendment and one member of the same house who voted with the majority in submitting the same shall be appointed as a committee to draft an argument giving the reasons for the adoption of such amendment. This argument is to be printed in a pamphlet and distributed to the voters with the sample ballot, to be used by the voter in preparing his vote and in studying the questions upon which he is to act. Pol. Code, § 1195a. It is to be assumed that the arguments prepared by the author of the amendment state fairly and with reasonable fullness the meaning of the amendment and the effect it is expected to produce. The argument printed and distributed with the ballot upon the amendment here under consideration refers to the fact that the Workmen's Compensation Act had been in force for several years; that section 21 of the Constitution, as it was, "failed to express sanction for the requisite scope of the enactment to make a complete and workable plan," which plan embraced, as essential components, compulsory compensation for injury and death irrespective of fault, safety provisions, insurance by the state, and administration of the system, and it then states that the original section contained nothing covering safety or insurance, and only meager authority for administration; that the law in force had apparently exceeded the scope of the amendment authorizing it, and that the amendment was designed to give authority for the legislation already enacted and to sanction the plan then in existence. This obviously refers to the extensive revision of the original Workmen's Compensation Act that was enacted at the same session, as well as to the original act, neither of which attempted to create such a liability as that provided by the act of 1919. There is no suggestion in the argument that the proposed amended section was intended to authorize the Legislature to impose any liability upon employers of a character different from that already provided by the original section, and nothing to suggest to any voter the idea that it was for carrying on a system for the benefit of disabled workmen in general or for the levy of contributions to support such system upon employers in whose service men having no dependents were killed by injuries received in the course of their employment. It cannot

be supposed that the author of the amendment, or the Legislature that proposed it, intended to provide for such a scheme as that contained in the act of 1919 by language so illy adapted to suggest the idea as that contained in this section and that the voters should be inveigled into voting for it by an argument presented to them with the ballot which does not even mention it.

[6] In so far as the act purports to exact from employers a sum to be used by the state for disabled workmen in general, it is in reality a taxing law, a revenue measure. It requires any employer to pay to the state the sum of $350 whenever one of his workmen who has no dependents is killed by an injury received in the course of his employment, and the fund thus raised is to be used for vocational re-education of workmen not connected in any way with such employer, and the surplus, if any, to go to pay the expenses of the state in carrying on the department or bureau administered by the Industrial Accident Commission, all of which are public purposes. This is purely a tax. "A tax is a charge upon persons or property to raise money for public purposes." Perry v. Washburn, 20 Cal. 350. A tax "includes every charge upon persons or property, imposed by or under the authority of the Legislature, for public purposes." Madera v. Black, 181 Cal. 310, 184 Pac. 400; 1 Cooley on Taxation, p. 6. The amended section of the Constitution contains no suggestion of a design to provide for raising revenue by a tax of such an extraordinary character as this statute proposes. We need not consider the question whether as a tax it would not be void because of its unfair discrimination. We are of the opinion that the language of the section gives no warrant for the conclusion that it was intended to provide for taxation of any kind.

[7] Our conclusion is that section 21 of article 20, as amended in 1918, did not authorize the Legislature to impose a liability on an employer to pay money to the state for the purposes specified in the Act of 1919. It follows by necessity that said section gives no authority to the Legislature to confer on the Industrial Accident Commission jurisdiction to determine any dispute that may arise concerning the liability of employers sought to be imposed by said act of 1919. It may be conceded that under its general powers the Legislature might provide a fund for the benefit of persons disabled in industry in this state and commit the administration of the fund to the Industrial Accident Commission, and might also levy a tax in some form to raise such fund. But any disputes that might arise concerning such tax would be cognizable only by the courts established by or under the provisions of article 6 of the Constitution, since no section of the Constitution gives the Legislature power to confer jurisdiction thereof upon the Industrial Accident Commission. Pacific, etc., Co. v. Pillsbury, 171 Cal. 322, 153 Pac. 24; Western M. S. Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; Carstens v. Pillsbury, 172 Cal. 579, 158 Pac. 218; Employers' L., a Corp., v. Ind. Acc. Comn., 177 Cal. 775, 171 Pac. 935.

Counsel for the commission cite the case of State Ind. Comn. v. Newman, 222 N. Y. 363, 118 N. E. 794, as contrary to our views as aforesaid. The case is not in point. The Constitution of New York contains no provision limiting the power of the Legislature of that state to create new courts or tribunals such as are contained in our article 6. The question which we have discussed—that is, the power of the Legislature to confer judicial power of this character upon the Industrial Accident Commission—could not arise in New York, for that state has not the constitutional limitations upon the legislative power to create courts which give rise to the question here and control our decision thereof.

[8] It is further claimed that authority for the imposition of this liability and for the giving of this jurisdiction to the commission is found in section 17½ of article 20, which reads as follows:

> "The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section."

The arguments printed on the ballot for the election of 1914, at which this section was adopted, indicate that its main purpose was to authorize the establishment of a minimum wage for women and minors. Nothing whatever is said in the arguments upon any other subject except that there is a suggestion that all employers, bad as well as good, should be compelled to provide proper living and working conditions for their employees. The part of the section authorizing the Legislature to "provide for the comfort, health, safety and general welfare of employees" was, as we think, intended to refer to the comfort, health, safety and welfare of employees during the time of their employment and to have no reference to general provisions, such as are here involved, for the vocational re-education of those who have been injured and are not able to pursue their former occupation. It certainly furnishes no authority and has no reference to authority for giving the Industrial Accident Commission power to enforce the levy of contributions upon employers for the purpose of raising revenue with which to carry on a school for the re-education of employees or for any other state purpose.

We find no ground upon which the jurisdiction of the commission can be upheld. Many other objections are made to the constitutionality of the act, but, in view of the conclusion above stated, we deem it unnecessary to consider them.

It is ordered that the award of the Industrial Accident Commission aforesaid be annulled.

We concur: LENNON, J.; SLOANE, J.; WILBUR, J.; SHURTLEFF, J.

I concur in the judgment: LAWLOR, J.

188 Cal. 49

WHEELER v. HALL, County Clerk.

(S. F. 10130.)

(Supreme Court of California. Feb. 6, 1922. Rehearing Denied Feb. 6, 1922.)

1. Elections 🔑144—Appointment of verification deputies by several candidates by attaching signature to same paper held sufficient.

Appointment of verification deputies by primary election candidates by signature to writing, "I, the undersigned candidate for election, * * * hereby appoint the following registered and qualified electors * * * as verification deputies," etc., *held* sufficient as against objection that the candidates should have made appointments by separate papers; the appointment being, in legal effect, a several appointment.

2. Elections 🔑144—Appointment by primary election candidates of verification deputies was not required to state residence of candidates.

Appointment of verification deputies by primary election candidates was not required to state the residence of the candidates.

3. Elections 🔑144—Primary election candidate's signature by agent to appointment of verification deputies held sufficient.

Primary election candidate's signature to appointment of verification deputies, "by M., his agent and attorney, duly authorized," *held* sufficient.

4. Elections 🔑144—Primary election nomination paper not defective because it contained names of several candidates.

Primary election nomination paper circulated among the voters was not faulty because it contained the names of several candidates for the same office, not exceeding the whole number to be elected.

5. Elections 🔑144—Description in nomination paper of office of member of board of freeholders to prepare charter for county held sufficient.

Designation in primary election nomination paper and in appointment of verification duties of the office as "the office of board of freeholders," *held* to sufficiently describe membership on the board of freeholders to prepare and propose a charter for the government of a county.

6. Elections 🔑144—Direct primary election nomination paper containing name of city, town, or county in which it was circulated in caption or indorsement on back was sufficient.

Under Direct Primary Law, § 5, subd. 3, requiring nomination paper to "bear the name" of the city, town, or county in which the paper was circulated, a nomination paper would be sufficient if the name of the city, town, or county in which it was circulated was inserted in the caption or indorsed on the back of the paper, in view of subdivision 4; it being unnecessary that the paper state that it was circulated in such city, town or county.

7. Elections 🔑144—Nomination paper presumed to contain name of county, city, or town in which circulated.

In the absence of an allegation to the contrary, it will be presumed that primary election nomination paper contained name of city, town or county in which it was circulated, as required by Direct Primary Law, § 5, subd. 3.

8. Elections 🔑144—Primary election candidate's attorney in fact, who had signed appointment of verification deputies as such, not disqualified from administering oaths to verification deputies.

The attorney in fact of primary election candidate, who, as such, had signed candidate's name to appointment of verification deputies, was not by reason thereof, disqualified from administering, as a notary public, oaths to the verification deputies in the execution of their affidavits.

9. Elections 🔑144—Primary election law requirement as to filing of affidavit by candidates inapplicable to special election of board of freeholders to propose charter for county.

Direct Primary Law, § 5, subd. 4, requiring primary election candidate to file affidavit stating residence, election precinct, name of office, etc., not later than the twenty-fifth day prior to the election, *held* not applicable to a special election for election of board of freeholders to prepare a charter for the government of a county, under Const. art. 11, § 7½, requiring such election to be held no less than 20 nor more than 60 days after the adoption of the ordinance directing the holding of such allegation, notwithstanding Pol. Code, § 1188.

10. Mandamus 🔑152—City clerk cannot be compelled to omit names from ballot for election of freeholders to prepare county charter on ground that candidates are not eligible, in proceeding to which candidates are not parties.

City clerk cannot be compelled by mandamus to omit names of certain persons from the ballot to be used at a special election of a board of freeholders to prepare and propose a charter for the government of a county, under Const. art. 11, § 7½, on the ground that such persons are not eligible to act on the board of freeholders because they have not been qualified electors of the county for at least five years, in a proceeding to which the candidates are not parties.

In Bank.

Application by Jay Wheeler for writ of mandamus against Harry W. Hall, as County Clerk of the County of Sacramento, state of California. Writ denied.

R. Platnauer, of Sacramento, for petitioner.

Hugh B. Bradford, Theodore W. Chester, Fontaine Johnson and J. M. Inman, all of Sacramento, for respondent.

PER CURIAM. Petitioner asked a mandate to compel the county clerk to omit from the official ballot to be used at a special election, to be held in the county of Sacramento for the purpose of electing freeholders to prepare and propose a charter for the government of said county, the names on a certain list of persons offering themselves as candidates for members of said board and claiming to have been nominated for such office in the manner provided by the primary election law. Upon the hearing the court denied the application, holding the objections made by the petitioner to the proceedings for placing said names on the ballot to be untenable, as follows:

[1] 1. The first objection is that the appointment of verification deputies by the said candidates is invalid because it consisted of one paper signed by all of them, instead of separate papers signed by each for himself alone. The appointment is in the singular number and declares that—

> "I, the undersigned, candidate for election to office of board of freeholders, * * * hereby appoint the following registered and qualified electors of said county of Sacramento as verification deputies," etc.

According to its grammatical construction, this is a several appointment by each candidate of the persons named in the paper as verification deputies. The fact that it is signed by all of the candidates may make it also a joint appointment of them all, but it comes within the terms of the statute by the fact that, in legal effect, it is also a several appointment. In cases where two or more members of such a board or of any similar body are to be elected, we find nothing in the statute that forbids any number of candidates, not exceeding the whole number to be elected, from obtaining their nomination in this manner. This applies to numerous other objections based on the same fact and which will not be further noticed.

[2] 2. The objection that it fails to state the residence of the candidates is met by the fact that the law does not require it.

[3] 3. Another objection is that E. D. Turner's signature thereto appears as follows:

> "E. D. Turner, Isleton, Cal., by Mae E. Allen, his agent and attorney duly authorized."

It must be assumed from this signature that Mae E. Allen had authority to sign Turner's name to that particular document. There is no provision in the law that forbids this method of signing such appointment, and as that method of signature is sufficient for contracts, we see no reason why it should not be a sufficient compliance with the law on this subject.

[4] 4. There is no force in the objection that the nomination paper filed in behalf of said candidates is faulty because separate nomination papers were not circulated and signed for each of the candidates, and that a single nomination paper containing all their names should not have been circulated and signed by the voters. There is no provision in the law that forbids several candidates for such an office, not exceeding the whole number to be elected, from having their names inserted in a single nomination paper and circulating it in that form. We therefore hold that it does not render the nomination paper defective.

[5] 5. It is claimed that the name of the office is not properly given in the nomination paper or in the appointment of verification deputies. The office is there designated as "the office of board of freeholders." This particular office is not given a special name in the Constitution or in any statute. It obviously must be sufficient for the candidate or voters who sign the nomination paper to designate it by any form of words that will describe it with reasonable certainty. We think the above-quoted phrase is a sufficient description to answer that purpose.

[6, 7] 6. The next objection is in these words: "It was circulated in the city of Sacramento and fails to state that fact," referring to the several sections of the nomination paper filed in the clerk's office. Subdivision 3 of section 5 of the direct primary law (Deering's Supp. 1917–19, p. 993), provides that—

> Each section of a nomination paper "shall bear the name of the city or town, if any, and also the name of the county or city and county, in which it is circulated, and only qualified electors of such county * * * shall be competent to sign such section."

It does not require that the paper shall "state" that it was circulated in the city, town, or county named, but only that it shall "bear the name" of such city, town, or county. If the name was inserted in the caption or indorsed on the back of the nomination paper, it would substantially comply with this provision. The provision was evidently intended for the convenience of the county clerk when he compares the paper with the affidavit of registration and certifies as to the genuineness of the signatures, as required in subdivision 4 of section 5. He might perhaps at that time refuse to compare or certify to a paper not so complying with the law. But, there being no allegation to the contrary, we must presume that the papers complied with the law in this particular in the manner suggested and that the clerk has made the certificate that the signatures counted by him are "sufficient." The defect, if any there be, is not shown, and the objection as made is not good.

[8] 7. The next objection to be noticed is that the affidavits of the verification deputies are sworn to before the aforesaid Mae E. Allen, who was the attorney in fact signing the name of E. D. Turner to the appointment of such deputies. The petitioner insists that the fact that she signed his name and was his attorney in fact in some manner disqualifies her for administering an oath to any of the verification deputies. We are unable to see how that fact can in any way operate to affect her official act as notary public.

[9] 8. It is objected that the affidavits of the several candidates do not comply with the provisions of subdivision 4 of section 5 of said primary law. That requirement is that—

> Each candidate "shall file * * * his affidavit, stating his residence, with street and number, if any; his election precinct; that he is a qualified elector in the election precinct in which he resides; the name of the office for which he is a candidate; that he will not before said primary election withdraw as a candidate for nomination and that if nominated, he will accept such nomination and not withdraw, and that he will qualify as such officer if nominated and elected."

The Constitution, authorizing the framing of charters for county government, provides that the board of supervisors may order the holding of a special election for the purpose of electing the board of freeholders, "which said special election shall be held not less than twenty days nor more than sixty days after the adoption of the ordinance" directing the holding of such election. Article 11, § 7½. The provision of the primary election law (subdivision 4, § 5), aforesaid, requires that the affidavit there prescribed shall be filed by the candidate not later than the twenty-fifth day prior to the primary election. Section 1188 of the Political Code provides generally that in the nomination of any candidate for any public office, to which the direct primary law does not apply, the provisions of that law shall "substantially govern as to * * * the filing of the candidate's affidavit."

It is obvious from the provisions of the Constitution, above quoted, that the requirement concerning the filing of an affidavit by the candidate prior to his name being placed on the ballot, contained in the primary election law, above stated, cannot be applied to an election of persons to serve on the board of freeholders to prepare a county charter. Under the Constitution the supervisors may fix the time of the election not less than 20 days after the time the election is called. If, therefore, the election is to be held at any time less than 25 days after the passing of the ordinance directing it, no affidavits could be filed in compliance with the direct primary law. The office of freeholder to prepare a county charter, while important in many respects, is not of such a character that there is likely to be great competition therefor, nor any condition which creates the necessity of safeguarding the nomination by such requirements as are provided for in the primary election law. If the provisions of that law cannot apply to an election held before the expiration of 25 days from the time of calling the election, it cannot reasonably be held that it should apply to an election held at a later time. It either must apply to all elections for voting for freeholders or none. Since it cannot be applied to all, it is clear that it does not apply to any. The consequence is that all the objections to placing the names on the ballot, based on the alleged defects in the affidavits filed by the several candidates, must be held to be baseless.

[10] 9. Further objection is made on the ground that some of the candidates, so it is claimed, are not eligible to act on the board of freeholders because they have not been for at least five years qualified electors of the county. If this be true it may be that such persons would not be eligible to serve on the board of freeholders. But we do not think that the objection can be raised in this way. The clerk is a mere ministerial officer and he is not required to ascertain whether or not the candidate who offers himself to be voted for at an election is or is not eligible to hold the office for which he stands. The several candidates are not parties to this proceeding, and they have no opportunity to controvert the allegation. It is sufficient to say that we do not think the clerk can raise the objection and refuse to place the name on the ballot because of his knowledge, information, or belief that the proposed candidate is not eligible to the office, and consequently that it would not be cause for mandamus to compel him to omit such candidate from the printed ballot.

The foregoing comprise all the objections made to validity of the proceedings for placing the names of said persons on the ballot which we deem worthy of notice.

For the reasons given, the writ of mandate was denied.

SHAW, C. J., and WILBUR, SHURTLEFF, LAWLOR, SLOANE, and WASTE, JJ., concur.

55 Cal. App. 745

MORROW v. LEARNED. (Civ. 3728.)

(District Court of Appeal, Second District, Division 1, California. Dec. 22, 1921.)

1. Appeal and error ⚿193(6)—Insufficiency of pleading not available on appeal in absence of demurrer or objection to evidence on ground thereof.

In seller's action on purchase-money note, in which buyer counterclaimed for breach of warranty, the seller could not complain on appeal of the buyer's failure to plead the particulars in which the goods were defective, in the absence of a demurrer to the complaint, and objections to the evidence touching such issue, on the ground of the insufficiency of the pleading.

2. Sales ⚿435(5)—Pleading held sufficient as to measure of damages for breach of warranty.

In seller's action, allegation in buyer's counterclaim for breach of warranty that the engines purchased would have been worth $3,500 more than their actual value if they had been as warranted *held* sufficient to warrant recovery of the damages for breach of warranty specified by Civ. Code, § 3313, although the counterclaim did not allege the actual value of the engines at the date of sale.

3. Trial ⚿395(1)—Finding of fact in substantially same language as allegation sufficient.

A finding of fact in substantially the same language as the allegation of the fact is sufficient.

4. Appeal and error ⚿1170(1)—Errors not resulting in miscarriage of justice not ground for reversal.

Errors not resulting in a miscarriage of justice are not ground for reversal under Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by W. L. Morrow against G. O. Learned. Judgment for defendant, and plaintiff appeals. Affirmed.

Nathan Newby, of Los Angeles, for appellant.

Jesse F. Waterman and A. W. Hutton, both of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought recovery upon a promissory note given to him by defendant as part of the purchase price of certain gasoline engines.

The answer admitted the execution of the note, but as a defense and offset to recovery thereon pleaded four counterclaims, in the fourth of which he alleged that on May 24, 1918, defendant purchased from plaintiff seven two-cylinder gasoline engines at the price of $200 each, two one-cylinder gasoline engines at the price of $75 each, one three-cylinder gasoline engine at the price of $250, one air compressor and tanks at the price of $400, and one water tank at the price of $15, making a total purchase price of $2,215, for which at the time he paid plaintiff the sum of $1,000, and for the balance of said purchase price of $1,215 made and delivered his promissory note of said date, bearing interest at the rate of 6 per cent. per annum, which is made the subject of plaintiff's action; that at the time of said purchase, and as a part of the transaction involving the execution of said note, plaintiff executed a written agreement whereby he warranted that all of said gasoline engines so purchased by defendant were in "first-class mechanical condition"; that at the time of such delivery none of said engines complied with said warranty, in that at the time of said delivery, to wit, May 24, 1918, none of said engines were in first-class mechanical condition, and that "the excess of the value which each of said seven 2-cylinder gasoline engines would have had if it had been as warranted as aforesaid over its actual value at that time was and is $350; that at that time the excess of the value which each of said two one-cylinder gasoline engines would have had if it had been as warranted as aforesaid over its actual value at that time was and is $175, and that at that time the excess of the value which said three-cylinder engine would have had if it had been as warranted as aforesaid over its actual value at that time was and is $700," making a total of $3,500.

The court found that at the time of said delivery all of said engines, except two of the seven two-cylinder engines, which had been disposed of by defendant, were not in first-class mechanical condition, and that each and all of said engines, except the two two-cylinder engines referred to, were not at the time of their purchase, nor at any other time, in first-class mechanical condition, and that the excess of value which the said engines would have had if they had been in first-class mechanical condition as warranted over their actual value at the time of their purchase, and at all other times, was and is more than $1,600, a sum largely in excess of that called for by the note. Upon these findings it was adjudged that plaintiff take nothing, and that defendant have judgment for his costs, from which judgment the plaintiff has appealed.

[1] While appellant attacks the sufficiency of each of the counterclaims and findings

thereon, under our view of the case it is unnecessary to consider other than the one herein designated as the fourth, and as to which appellant insists: First, that, while it is alleged the engines were not in the condition as warranted, to wit, in first-class mechanical condition, such statement is a conclusion of the pleader who should have set forth the particulars wherein they were defective. Conceding the pleading was uncertain in respect to the matters alleged, plaintiff should have demurred to it upon such ground. No demurrer was interposed, and, as the case was tried, evidence was received without objection touching the issues as fully and to the same extent as though the particular defects constituting the breach of warranty had been specifically stated. Under the circumstances appellant is in no position to now complain of the insufficiency of the pleading.

[2, 3] Basing his contention upon section 3313, Civil Code, which provides:

> "The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time,"

—appellant insists the counterclaim fails to state a cause of action for the reason that it does not allege the actual value of the engines at the date of the sale. The statute referred to provides that the detriment is the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

In our opinion, the allegation hereinbefore set out is sufficient in this respect. It is therein stated that, had the warranty been complied with, the engines were of the value of $3,500 in excess of their actual value at the time of the warranty, and in reliance upon which defendant made the purchase. Moreover, no attack was made upon the pleading on the ground of uncertainty, but evidence was received on behalf of both parties as to the excess in the value of the property as warranted over its actual value at that time. Since we hold the pleading was sufficient, it follows that the finding in substantially the same language is likewise sufficient to support the judgment. Since as found the damage sustained by reason of the breach of warranty was largely in excess of the amount of the note to recovery of which it was pleaded as an offset, plaintiff could not be prejudiced by the failure to find the sum due thereon.

Neither is there any merit in appellant's contention that the evidence is insufficient to justify the findings. While the testimony is conflicting, that produced on behalf of defendant, and which the trial court within its province accepted as true, clearly tends to show that the engines (other than the two two-cylinder engines disposed of by defendant) were improperly constructed, mechanically imperfect, and of no value, though if they had complied with the warranty they would have been of the value of $3,500, upon which the court fixed defendant's damage at $1,000.

[4] Conceding the counterclaim to have been defectively pleaded, nevertheless plaintiff accepted it both in substance and form as sufficient to tender the issue upon which the case was tried, and upon evidence offered, as to which no objection was interposed by appellant, a full inquiry was had as to the merits of the action. Moreover, it is apparent from an examination of the entire record that the errors complained of did not result in a miscarriage of justice, by reason of which fact, under section 4½, art. 6, of the Constitution, the judgment should not be reversed.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

55 Cal. App. 718

WHITNEY v. NEALLEY et al. (Civ. 3579.)

(District Court of Appeal, Second District, Division 2, California. Dec. 21, 1921. Hearing Denied by Supreme Court Feb. 16, 1922.)

1. Trusts ⚷140(3) — Deed of trust during grantor's life, with residue to persons named on her death, held to vest title immediately in them, without deed from trustees.

Under a deed granting property in trust during grantor's life, with the residue in the hands of the trustees at the time of her death, to named persons, title vested immediately and absolutely in the latter, without a deed or other conveyance by the trustees, especially where grantor added no qualification to the title and retained no control over the estate, such deed not being void as a trust to convey, nor could grantor's administratrix, having no rights in the estate, complain if the trustees exceeded their authority in selling the property on grantor's death.

2. Wills ⚷88(4)—Deed to trustees for grantor's life, with remainder to grantees, held not void, as testamentary, though not delivered to grantees.

A deed granting property to be held in trust during grantor's life, with the residue in the hands of the trustees at the time of her death to named persons, *held* not testamentary in character, though physical possession of the deed was not delivered to grantees, where it was stipulated that grantor delivered possession and control of the instrument and property to the trustees, and it was clear from the instrument and surrounding circumstances that she intended such delivery to complete the transaction and withdraw the property forever from her control.

3. Perpetuities ⚿9(7)—Grant in trust for grantor's life, with residue, including proceeds, on her death, to grantees, not void because it provides for accumulations, where none accrued.

A deed of property to be held in trust for grantor's life, with the residue, including proceeds, in the hands of the trustees at the time of her death, to grantees, will not be held void because it provides for accumulations, in violation of Civ. Code, §§ 722–726, in the absence of evidence that there were any accumulations.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Helen V. Whitney, administratrix of the estate of Julia Stebbins, deceased, against E. M. Nealley and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Eden & Koepsel, of Santa Ana, for appellant.

Scarborough & Forgy, of Santa Ana, for respondents.

CRAIG, J. This action is one for damages for the alleged conversion of property claimed to have belonged to the estate of Julia Stebbins. The record contains a stipulation as to facts, from which it appears that on August 4, 1915, the deceased executed a conveyance to M. M. Crookshank and E. M. Nealley as trustees, and to Harry O. Stebbins, Charles S. Stebbins, and the First Congregational Church of Santa Ana. She died on the 8th of March, 1918; that Helen F. Whitney was duly appointed and qualified as administratrix of the estate of Julia Stebbins and maintains this action in that capacity. It is further stipulated that the trustees received the instrument and the property conveyed immediately upon the execution of the conveyance; that Crookshank died in 1916, and Nealley thereafter continued as trustee alone; that upon the death of Julia Stebbins, at the request of Harry O. Stebbins, Charles S. Stebbins, and the First Congregational Church of Santa Ana, Nealley sold the trust property then in his hands and paid the proceeds of the sale to the parties last named.

[1] The instrument which we are called upon to consider clearly created a trust in Nealley and Crookshank and constituted a grant over to Harry O. Stebbins, Charles Stebbins, and the First Congregational Church of Santa Ana. The writing to be construed begins:

"I, Julia Stebbins, a single woman, of Orange County, California, *assign, grant and transfer* to M. M. Crookshank and E. M. Nealley of the same place, the following described property now belonging to me, to wit."

Then follows a description of the property conveyed. It continues:

"To have and to hold the same in trust during the remainder of my life. * * * All the remainder and residue of said property and funds and of the proceeds thereof in the hands of my said trustees at the time of my death, I *give* and *grant* to my nephews, Harry O. Stebbins and Charles Stebbins, of Baltimore, Maryland, and the First Congregational Church of Santa Ana, California, in the following proportions, to wit: One-half (½) of said residue to Harry O. Stebbins; one-quarter (¼) to Charles Stebbins and one-quarter (¼) to the First Congregational Church of Santa Ana, California." (Italics ours.)

The title which the trustees received was expressly limited to the life of the grantor. Under the terms of the instrument the title vested immediately and absolutely in the grantees by the act of the grantor. It is not void as a trust to convey, for the trustees are not directed to make a conveyance. If they did so, or if they sold the property, they may have exceeded their authority, but this fact gives the plaintiff no cause for complaint, for she has no rights. No deed or other conveyance was necessary to be executed by the trustees. The writing contains this statement:

"I give and grant to my nephews," etc., "all of the remainder and residue of said property."

It would be difficult to conceive of words which could be less ambiguous or more potent to convey title immediately and absolutely from the present owner to another than those here employed. It is noteworthy, also, that the grantor added no qualification to the title conveyed and retained no control over the estate given to the trustees and remaindermen. In this respect the case at bar is distinguishable from Daniel v. Smith, 64 Cal. 346, 30 Pac. 575, and Knight v. Tripp, 121 Cal. 674, 54 Pac. 267, upon which appellant relies.

[2] Appellant objects that in the absence of delivery to the grantees the instrument must be regarded as testamentary in character, and cites abundant authority so supporting this position. But delivery of the instrument and of the property conveyed by it took place. In the stipulated statement of facts it is recited that Julia Stebbins delivered possession and control of them to Crookshank and Nealley on the 4th day of August, 1915, which was the day the instrument itself was executed. Crookshank later died, and Nealley, the surviving trustee, retained the property under the deed of Julia Stebbins, the grantor.

While it is not so expressly stipulated, it is clear, both from the instrument and the surrounding circumstances, that Julia Stebbins intended the delivery to Crookshank and Nealley to complete the transaction and to withdraw from her control forever the property conveyed. This being so, in so far as receiving possession of the instrument of conveyance is concerned, Crookshank and Nealley became the agents of the remaindermen. The grantor might have executed several deeds, one to the trustees and one to each of the remaindermen, in which event each grantee might have received for himself the physical possession of his respective deed; but this was not necessary, and, having executed but one instrument, the physical delivery of it was logically made to the grantees of the immediate particular estate. This deed creates a trust during the life of the grantor; it provides that upon her death the trust is to end and the remainders to take effect in possession. The ownership of the interests in remainder became absolute at once. Their owners could have sold or otherwise exercised dominion over them. The enjoyment was only postponed until the grantor's death. Remainders are an exception to the general rule that one not a party to a deed can take nothing by it. Eldridge v. See Yup Co., 17 Cal. 52; Montgomery v. Sturdivant, 41 Cal. 292.

[3] It is claimed that the grant in trust is void because it provides for accumulations in violation of sections 722–726 of our Civil Code. It nowhere appears in the agreed statement of fact or elsewhere in the record that there were any accumulations. It may well be that all of the income derived from the property in trust was used to support the trustor. This provision is a severable one, and if there had been accumulations, they could have been separated from the principal and the income and other increase lawfully directed to be expended under the control of the trustees, which it is agreed was used to provide for the grantor during her life. Therefore the valid provisions of the trust will not be disturbed, and an appellate court will not decide a purely moot question concerning the validity of a provision for accumulations, where there is nothing to show that any in fact accrued. In the Estate of Whitney, 176 Cal. 12, 167 Pac. 399, cited by appellant, there were accumulations, and the court held that they could not be separated from funds in trust without practically making a new will, and consequently such accumulation remainders were void. These facts are not analogous to those in the instant case.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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55 Cal. App. 611

CHESTER v. HALL, County Clerk (CRUMP, Intervener). (Civ. 2405, 2410.)

(District Court of Appeal, Third District, California. Dec. 13, 1921. Rehearing Denied Jan. 12, 1922.)

1. Counties 🔑3½, New, vol. 14A Key-No. Series—County clerk must present petition for charter election to supervisors if signed by requisite number of electors as shown by registration record.

Under Const. art. 11, § 7½, requiring petitions for charter elections to be signed by 15 per cent. of the qualified electors, the county clerk, if a petition for an election is signed by the requisite number of qualified electors, as shown by the registration records, must so certify and present the petition to the board of supervisors, and the person soliciting the signatures need not attach an affidavit to the petition.

2. Counties 🔑3½, New, vol. 14A Key-No. Series—Statute requiring petitioners for charter election to affix date of signing held not invalid; "self-executing."

Though Const. art. 11, § 7½, requiring that petitions for charter elections be signed by 15 per cent. of the qualified electors, is self-executing, Pol. Code, § 1083a, requiring that the signer of a petition affix thereto the date of signing, is not invalid as making an additional requirement, since it does not prevent any one from signing, but merely facilitates the operation of the constitutional provision, and places safeguards around the exercise of the rights thereby secured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Self-Executing.]

3. Counties 🔑3½, New, vol. 14A Key-No. Series — Petition for charter election upheld, though dates of signing not affixed by signers.

Since acts to facilitate and safeguard the operation of a self-executing constitutional provision should be liberally construed in order that the constitutional right may not be defeated, a petition for a county charter election, sufficient to enable the county clerk to satisfy himself from the registration record that the requisite number of petitioners when signing were qualified electors required by Const. art. 11, § 7½, will be upheld, though some failed to affix dates of signature, and some dates were not affixed by the signers themselves as required by Pol. Code, § 1083a; there being no proof that the petition was signed at times other than the dates affixed.

4. Evidence 🔑11—Judicial notice that 1921 is not year of general registration.

The court will take judicial notice that 1921 is not a year of general registration.

5. Appeal and error 🔑1170(7)—Judgment not set aside where no miscarriage of justice.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside because of rejection of evidence unless the error resulted in a miscarriage of justice, a judgment, upholding a petition for a county charter election,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

signed by more than the requisite number of qualified electors, will not be set aside because of the rejection of the testimony of a handwriting expert that the dates of signature following the names of some of the petitioners were not affixed by the signers themselves, as required by Pol. Code, § 1083a, the purpose of such law being to guard against signatures by persons not qualified electors at the time of signing.

Appeals from Superior Court, Sacramento County; Charles O. Busick, Judge.

Mandamus by Theodore W. Chester, for himself and all persons similarly situated, against Harry W. Hall, as County Clerk of Sacramento County, in which J. C. Crump intervened. From a judgment granting the writ, defendant and intervener separately appeal. Affirmed.

Hugh R. Bradford, Dist. Atty., and J. R. Hughes, both of Sacramento, for appellant Hall.

Grover W. Bedeau, of Marysville, and Ray Coughlin, for appellant Crump.

J. M. Inman, J. Fontaine Johnson, and Theodore W. Chester, all of Sacramento, for respondent.

FINCH, P. J. The defendant and the intervener took separate appeals from the judgment herein commanding the defendant to present to the board of supervisors of Sacramento county a petition praying for the election of a board of 15 freeholders to prepare and propose a charter for said county, with his certificate thereon showing that the petition is signed by the requisite number of qualified electors. By stipulation the appeals were heard together.

In so far as pertinent to the questions presented by the appeals, the complaint alleges that the petition consisted of an original and two supplements; that they were signed by a total of 3,602 qualified electors, "each of whom at the time of such signing affixed thereto the date of such signing" and by 129 qualified electors who did not so affix the date of signing, and that the names on the original petition were subscribed during the month of July, 1921, and that those on the supplements were signed during the month of August and prior to the filing thereof. The complaint further alleges, and it was admitted at the trial, that the total number of votes cast for all candidates for Governor at the last gubernatorial election was 20,634, thus making the number of qualified signers required by the Constitution 3,095.

Giving due consideration to the rule applicable to conjunctive denials, the answer admits that more than the required number of qualified electors signed the petition and affixed thereto the dates of their respective signatures. The answer denies that the petiton was signed *and* the dates thereto affixed during July and August, 1921. The defendant further "avers that there were only 2,973 qualified electors of the county of Sacramento, at the time of signing said petition, affixed thereto the date of such signing, and had attached an affidavit purporting to be an affidavit of the person who solicited the signatures thereon, with the seal attached."

The complaint in intervention does not deny that any of the signers of the original petition were qualified electors at the time they signed the same, and alleges that the supplemental petitions were signed by 388 "qualified electors of the county of Sacramento," but further alleges, on information and belief, that the dates and ditto marks opposite 966 signatures to the original petition and 189 signatures to the supplements "were not affixed thereto by said signers at any time, but that said purported dates and ditto marks were affixed thereto by some person or persons other than said signers, and that said purported dates and ditto marks are false, fraudulent, fictitious, and void, and that by reason thereof said petition is false, fraudulent, fictitious, and void."

The defendant attached to the petition his certificate reciting:

"That said original petition contains the names of 2,973 qualified electors who, at the time of signing, gave date of signing, and had attached an affidavit purporting to be the affidavit of the person who solicited the signatures thereon, with seal attached;" that on sections of the original petition there were 241 "names of persons who signed said petition, whose names did appear on the record of the registration of qualified electors of Sacramento county at the time they signed said petition and at the time said petition was filed," but that to the sections containing 137 of these names no affidavit was attached, and that to the sections containing 104 of such names proper affidavits were attached, but to which affidavits the notary seals were not affixed, and that on sections containing 129 names no dates or affidavits were affixed; and that on sections of the supplemental petitions there were 388 "names of persons who signed said petitions whose names did appear on the record of the registration of qualified electors of Sacramento county at the time they signed said petition and at the time said petition was filed," to which no affidavit was attached.

[1] Section 7½, article 11 of the Constitution provides that—

Petitions for county charter elections shall be "signed by fifteen per centum of the qualified electors of said county, computed upon the total number of votes cast therein for all candidates for Governor at the last preceding general election at which a governor was elected. * * * It shall be the duty of said county clerk, within twenty days after the filing of said petition, to examine the same, and to ascertain from the record of the registration of electors of the county, whether said petition is signed by the requisite number of qualified electors. * * * Upon the completion of such examination, said clerk shall forthwith attach to said petition his certificate, properly dated, showing the result thereof, and if, by said certificate, it shall appear that said petition is signed by the requisite number of qualified electors, said clerk shall immediately present said petition to the board of supervisors, if it be in session, otherwise at its next regular meeting after the date of such certificate. Upon * * * the presentation of such petition, said board of supervisors shall order the holding of a special election for the purpose of electing such board of freeholders."

Neither this section nor any constitutional provision or law applicable to petitions filed under its authorization requires the person soliciting signatures to attach any affidavit to the petition. However wise such a requirement might be, it is beyond the powers of courts and ministerial officers to enact laws. The duties of the county clerk in examining and certifying the petition were purely ministerial. In the case of Butters v. City of Oakland, 200 Pac. 354, in discussing the duties of the clerk under a law in effect identical with the constitutional provision quoted, the court said:

> "We think all that is required of the clerk to accomplish this duty is to use his eyesight and capacity for counting to determine whether the names on the petition which also appear on the record of registration constitute enough persons to authorize the recall under the statute. * * * The record of registration will be sufficient upon the question whether or not the persons signing the petition are qualified electors. The law does not require him to go outside for information, 'but he must determine from the records of registration' whether or not the fact exists. Such an examination involves merely ministerial acts and is in no sense judicial.
>
> "If it should happen that names were forged to the petition in sufficient numbers to reduce the lawful signatures to the petition below the statutory requirement, persons legally interested perhaps might have a remedy, the nature and character of which we need not here decide."

See, also, Locher v. Walsh, 17 Cal. App. 728, 121 Pac. 712; Minges v. Board of Trustees, 27 Cal. App. 17, 148 Pac. 816; Osborn v. Board of Supervisors, 27 Cal. App. 88, 148 Pac. 970. Under the facts ascertained by the defendant he should have presented the petition, properly certified, to the board of supervisors.

[2] The only contention of the intervener is that it was necessary for the signers of the petition to affix the date of signing. At the trial the intervener offered to prove by a handwriting expert the allegations of his complaint in this regard, but the court sustained plaintiff's objection to such proof. Section 1083a of the Political Code provides:

> "Wherever, by the Constitution or laws of this state, any initiative, referendum, recall or nominating petition or paper, or any petition or paper, is required to be signed by qualified electors, only an elector who is a registered qualified elector at the time he signs such petition or paper shall be entitled to sign the same. * * * Such signer shall at the time of so signing such petition or paper affix thereto the date of such signing."

Respondent argues that the constitutional provision quoted is self-executing, and that the Legislature can make no additional requirements. "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." Cooley's Constitutional Limitations (7th Ed.) page 121; Winchester v. Howard, 136 Cal. 439, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153; People v. Hoge, 55 Cal. 612. It is clear that the constitutional provision in question is self-executing, but it does not follow that legislation may not be enacted to facilitate its operation and place safeguards around the exercise of the rights thereby secured so long as the right itself is not curtailed or its exercise unreasonably burdened.

> "Legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." Cooley's Constitutional Limitations (7th Ed.) page 122.

See, also, Welch v. Williams, 96 Cal. 365, 31 Pac. 222; State v. Hooker, 22 Okl. 712, 98 Pac. 964; City of Pond Creek v. Haskell, 21 Okl. 711, 97 Pac. 338; Stevens v. Benson, 50 Or. 269, 91 Pac. 577; State v. Superior Court, 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B, 838. The requirement of section 1083a of the Political Code that the signer of a petition shall "affix thereto the date of such signing" in no manner prevents any person from signing or places an undue burden on the exercise of the right. The Constitution prescribes the qualifications of electors, and provides that all persons having such qualifications "shall be entitled to vote at all elections." The Constitution makes no provision for the registration of electors, yet registration laws have always been upheld as reasonable regulations by the Legislature for the purpose of ascertaining who are qualified electors and preventing illegal voting.

[3, 4] Where a constitutional provision is self-executing, however, legislative enactments for the purpose of facilitating and safeguarding its operation should be liberally construed in order that the constitutional right may not be defeated. In State v. Superior Court, supra, the court said that—

Such legislative enactments require "liberal construction, to the end that this constitutional right [referendum] of the people may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right."

In the case of In re Initiative Petition No. 23, 35 Okl. 49, 127 Pac. 862, it is said:

> "Those who circulate the petition will necessarily be drawn from the ranks of volunteers or those who, for a very small consideration, call attention to their fellow citizens to the measure proposed, and solicit their interests therein. Necessarily, even with the best safeguards that can be thrown around the circulation of petitions, where such a large number of names are required, inaccuracies and technical departure from prescribed forms are certain to occur every time a petition is circulated. The people who sign the petitions often, if not generally, lack both convenience and the best writing materials to distinctly, legibly, and permanently attach their names thereto. All of these things are proper to be noted and taken in consideration in the administration of this law. It can be made effective or defeated by the officers charged with its administration, and it is our duty to sustain it, rather than destroy, if it can be accomplished within the law."

See, also, Stevens v. Benson, supra. It has been held that petitions must comply strictly with constitutional requirements (Thompson v. Vaughn, 192 Mich. 512, 159 N. W. 65), with laws wherein it is provided that no name shall be counted unless the requirements of the law are complied with (People v. Newell, 49 Colo. 349, 113 Pac. 643; Adamic v. People, 49 Colo. 546, 113 Pac. 648; State v. Superior Court, 70 Wash. 592, 127 Pac. 207), and that laws requiring the addresses of the petitioners to be stated must be substantially complied with in so far as necessary to provide means of tracing the signers (In re Referendum Petition No. 31 [Okl.] 172 Pac. 639; In re Referendum Petition No. 509, 78 Okl. 47, 186 Pac. 485). In State v. Superior Court, supra, 70 Wash. 592, 127 Pac. 207, the court said:

> "If it were not for the mandatory language of the law touching this requirement of the signers giving the names of the streets of their residence, there might be room for arguing that such requirement is only directory."

In Michaelson v. Wall Tp., 92 N. J. Law, 72, 108 Atl. 145, it is said:

> "Many of the petitioners did not state the name of the street or road on which they resided, as provided in the statute. This requirement we think was merely directory, and for the convenience of the governing body in ascertaining the genuineness and legitimacy of the signatures."

In Osborn v. Board of Supervisors, 27 Cal. App. 88, 148 Pac. 971, the court said:

> "The requirement as to 'residence' is undoubtedly for the convenience and aid of the clerk in finding the names in the great register. While the petition might have been more specific in this respect, it was apparently sufficient for the clerk's information, and the objection goes to a mere irregularity that could and did result in no prejudice."

See, also O'Keefe v. Dugan, 185 App. Div. 53, 172 N. Y. S. 558, 225 N. Y. 667, 122 N. E. 887.

Without going to the extent of holding that the provision requiring the signer to affix the date of his signing is merely directory, the foregoing authorities establish the rule that the statute is to be liberally construed in the light of the circumstances attending each particular case. The petition in this case seems to have been sufficient to enable the defendant to satisfy himself that the petitioners were qualified electors at the time they signed their names thereto. For aught that appears in the record, the names of the signers who failed to affix the dates of signing and those where others than the signers affixed such dates may have been interspersed among other names to which the dates were properly affixed. It might be logically inferred that any signature was made between the dates of the signatures immediately preceding and following the one in question. The court will take judicial notice that this is not a year of general registration. The clerk may have found that many or all signatures which were not properly dated were of persons who had been registered for a year or more, and have therefore considered the exact date of signing as immaterial. It is possible, of course, that sections of the petition may have been prepared and signed at times other than the dates affixed to the signatures, but no offer or attempt was made to prove that such was the case. The offer of proof made was merely to show by the testimony of a handwriting expert that such dates were not affixed by the signers themselves. Intervener suggests that the petition might have been circulated five years ago, and "all the purported signers could have signed at that time." Courts cannot however, base their decisions upon speculations contrary to the presumption that the ordinary course has been followed.

[5] The manifest purpose of the law requiring the signers to affix the date of signing is to guard against signatures by persons who are not qualified electors at the time of signing. The pleadings admit that several hundred more qualified electors signed the petition than the law requires. Under such circumstances, to hold that the petition is insufficient would be to follow the letter of the law in disregard of its spirit. "The letter killeth, but the spirit giveth life." "No judgment shall be set aside * * * on the ground of * * * rejection of evi-

dence * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const. art. 6, § 4½. It is plain that there has not been a miscarriage of justice in this case.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(55 Cal. App. 724)

PRATT-LOW PRESERVING CO. v. EVANS.
(Civ. 2379.)

(District Court of Appeal, Third District, California. Dec. 21, 1921. Rehearing Denied Jan. 20, 1922. Hearing Denied by Supreme Court Feb. 16, 1922.)

1. Sales 🔑84—Defendant held required by contract to deliver crop from certain land for definite term.

Under a contract of sale of fruit raised on certain land "during the seasons of 1917 to 1928, both inclusive," which recited that the defendant was the owner of the land, *held*, that defendant was bound to deliver the fruit for 12 years, and not only so long as he owned the land.

2. Covenants 🔑60—Covenant in agreement to deliver peach crops for number of years held not to run with land.

A provision in a contract providing for the delivery of all of the peaches grown on land for 12 years, and "that the covenants herein contained shall run with the land * * * and shall bind both of the parties hereto, their heirs, administrators, executors, successors and assigns," did not impose a lien or burden upon the land, and failed to charge a grantee with any responsibility, and did not relieve grantor from liability, under Civ. Code, §§ 1457, 1655.

3. Covenants 🔑84—Covenant running with land binding on original covenantor.

Assuming that an agreement to deliver all peaches raised on land for 12 years was a covenant running with the land as between the parties to the contract, the original covenantor nevertheless continued to be bound after a sale of the land.

4. Sales 🔑404—Contract held not to limit remedy to specific performance.

A contract of sale of all peaches raised on land for 12 years, providing that the parties have agreed that damages will not afford to either of the parties hereto a full remedy for breach, and that the contract may, at the instance of either of the parties hereto, be specifically enforced, does not limit the remedy of purchaser for breach by the seller to that of specific performance.

5. Sales 🔑404—Action for damages maintainable after remedy by specific performance has become impossible.

Under a contract of sale of all peaches raised on land for 12 years providing that for remedy for breach by suit for specific performance, the purchaser was entitled to sue for damages on breach by seller by sale of the land, since it cannot be supposed that parties contemplated that purchaser would have no remedy where seller rendered specific performance impossible.

On Petition for Rehearing.

6. Contracts 🔑147(3)—All parts considered to arrive at intention.

All parts of a contract should be considered in an effort to arrive at the intention of the parties.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the Pratt-Low Preserving Company against C. W. Evans. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

J. M. Walthall and Griffin, Boone & Boone, all of Modesto, and Chickering & Gregory, of San Francisco, for appellant.

James F. Peck, of San Francisco, and L. J. Maddux, of Modesto, for respondent.

BURNETT, J. The appeal is from a judgment in favor of defendant, rendered upon the sustaining of a demurrer to the complaint without leave to amend. The contract, for a breach of which the plaintiff sued for damages, after designating the defendant herein as the party of the first part and the plaintiff as the party of the second part, and after describing defendant's land, proceeded as follows:

"That the party of the first part has sold and the party of the second part has bought all the crop of fresh fruit grown or to be grown on the property hereinabove described, of the varieties and estimated quantities herein stated, delivered at the cannery of the party of the second part, in the city of Modesto, county of Stanislaus, during the seasons of 1917 to 1928, both inclusive, all of such fruit to be of good merchantable quality, ripe, firm, of good color, free from worms, scale, or other imperfections, and in good order and condition at the time of delivery. Any soft, small, or inferior fruit to be weighed back and deducted. It is to be optional with the party of the second part to take any fruit not up to specifications of this contract, at market price, and the party of the first part agrees not to sell the same to others without the knowledge and consent of the party of the second part. In case the party of the second part cannot use fruit not up to specifications of this contract, same shall be held by the party of the second part subject to the order of the party of the first part, or turned over to the representative of the party of the first part, making the delivery at the point of delivery, without notice.

"If the party of the first part shall be unable to deliver fruit, owing to the destruction of crop by flood, frost, or any unavoidable casualty, or if the party of the second part shall be unable to operate its cannery, at Santa Clara or Modesto, owing to railroad and labor strikes, fire, or any unavoidable casualty, or inability to get supplies necessary to operate on account of railroad and labor strikes, fire, or any unavoidable casualty, this contract shall be null and void upon written notice by either party to the other of inability to perform, but only for the season during which such inability shall exist.

"It is understood that the party of the first part shall till, cultivate, fertilize, and irrigate the soil, prune, spray, and thin trees where said fruits are grown in the manner customary and necessary to the proper care and growing of same during the full term of this contract. * * *

"It is mutually agreed between the parties hereto that the covenants herein contained shall run with the land hereinabove described, and shall bind both of the parties hereto, their heirs, administrators, executors, successors, and assigns.

"For reasons not herein specifically stated the parties hereto have agreed that a breach of this agreement by either of the parties hereto cannot be adequately relieved by pecuniary compensation, and that damages will not afford to either of the parties hereto a full, complete, and adequate remedy for any such breach. It is therefore covenanted and agreed that this contract may, at the instance of either of the parties hereto, be specifically enforced in any court of competent jurisdiction."

The breach of the contract is set forth in the complaint as follows:

> "That upon said 1st day of August, 1919, and at the time of said offer of plaintiff to perform and said demand by plaintiff as hereinbefore set forth and in violation of said contract, said defendant stated to plaintiff that he, the said defendant, did and would at all times refuse to make any further deliveries to plaintiff of any of the peaches referred to in said contract, and said defendant furthermore stated to plaintiff that he, the said defendant, did repudiate said entire contract and would not continue to perform said contract at any time or in any manner or at all, and said defendant furthermore stated to plaintiff that he, the said defendant, had theretofore parted with all title and ownership to and of said land and was no longer the owner thereof, and that he, the said defendant, was and would continue to be unable to perform said contract in accordance with the terms thereof or at all; that said defendant has at no time since his said refusal to perform and his said repudiation of said contract as hereinbefore set forth delivered or offered to deliver to plaintiff any of the peaches mentioned in said contract and has at no time since his said refusal to perform and his said repudiation of said contract performed any of the provisions of said contract upon his part to be performed."

In addition to the ground that the complaint failed to state a cause of action, many special grounds were presented by the demurrer, but these latter may be passed by as they could be cured easily by amendment, which the court should have allowed, if such error existed, and, besides, it is conceded that the order of the trial court was based upon the conviction that plaintiff was not entitled to any relief whatever in such action.

One serious question in the case involves the time during which said contract was to be binding upon the parties, the contention of appellant being that it was for 12 years, and of respondent that he was to deliver peaches only so long as he owned the orchard; and therefore that, when he sold the land, his obligation under the contract ceased.

There is no dispute as to the validity of the contract; it being conceded that it was competent for the parties to bind themselves for any period of years that they might agree upon. Nor is there any denial that by a transfer of the property the grantor could not escape his liability unless so provided either expressly or by necessary implication in the contract; the sole question being one of construction.

In determining the intention of the parties it is impossible to overlook the consideration that, by apt and concise terms, they expressed an absolute undertaking of sale and purchase for the term of 12 years:

> "That the party of the first part has sold and the party of the second part has bought * * * during the seasons of 1917 to 1928, both inclusive."

Manifestly, effect must be given to this plain, unambiguous language, unless it be cut down or modified in some manner by some other portion of the contract. As to this it is entirely clear that there is no express limitation or modification, since, at most, the specifications upon which respondent relies, can operate to reduce the term only by implication.

[1] Can any of them be so considered and construed? To the first of these, the recital that the defendant is the owner of the land upon which the peaches are to be grown, we attach no significance. It is to be observed that the contract does not provide that the parties are to be bound while defendant is the owner of the land. If they had intended to so limit it, the way was easy and obvious. The words were simply used as descriptio personæ and have no more pertinency than if, as suggested by appellant, defendant had described himself as a single man or as a resident of Modesto. If such had been the designation, he would hardly contend that he could escape his obligation under the contract by getting married or by moving to some other city.

Thus far we think nothing appears that limits the undertaking of defendant to a sale of the peaches only so long as he owned the orchard. Appellant calls attention to the fact that the cases cited by respondent in this connection do not deal with the violation of express provisions, but the obligation was sought to be extended, not terminated, by implication. Thus in Hamlyn & Co. v. Wood & Co. [1891] L. R. 2 Q. B. Div. 488, the defendant (Wood & Co.) agreed to sell all the grains made by Wood & Co. They made no grains and would not be liable unless it should be held that it was implied that they would not dispose of their business. Herein the defendant's provision was to sell and deliver all the peaches to be grown on the property for 12 years, not merely such as might be grown by him. The defendant had the legal right to sell the orchard in the meantime, but he would not thereby affect his obligation for the 12-year period.

So in La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179:

> "One Hopper agreed to sell all the grapes which he might raise during a period of 10 years from the vines which were then growing, or which he might thereafter plant, in a certain vineyard."

And the principal question discussed was whether this agreement was assignable by Hopper.

[2] Another circumstance deemed of great importance by respondent is that the contract provided that said covenant should run with the land. But it does not follow from such provision that the parties intended that the original covenantor should be relieved from his liability. This very question was determined by the court in California Packing Corporation v. Grove, 196 Pac. 891, wherein a hearing was denied by the Supreme Court. In that case the corresponding provision was:

> "It is mutually agreed between the seller and the buyer that the covenants herein contained shall run with the land herein described, and shall bind both parties hereto, their heirs, executors, administrators and assigns."

It was held that no covenant running with the land was thereby created, and that Grove was not absolved from liability, the court saying:

> "We are of the opinion that respondent Grove is bound, for the twofold reason that no covenant running with the land absolves him and carries the burden over to his grantee and that the parties have not used apt words in other respects either to relieve him or to shift the burden to another."

Therein the action was brought to recover damages for the failure by Grove to deliver a peach crop in accordance with the terms of a written contract entered into by him and plaintiff's assignor, and the lower court sustained a demurrer to the complaint. The judgment in favor of Grove was reversed, and the trial court was directed to overrule his demurrer.

By said provision the parties herein not only failed to impose a lien or burden upon the land, but they failed also to charge the grantee with any responsibility under said contract or to relieve respondent from his continuing liability. California Packing Corporation v. Grove, supra; Cal. Packing Co. v. Emirzian, 187 Pac. 77. Indeed, if we concede that the effect of said provision was to terminate the liability of respondent, then it follows that appellant has no redress at all.

[3] But if it may be said that, as between appellant and respondent, said provision should be considered as though creating a covenant running with the land, then the general rule would apply that the original covenantor continues to be bound after the sale. Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359; 15 Corpus Juris, p. 1301; Code commissioners' note to section 1457, Civil Code.

But, whether any effect can be given to said provision, it is at least plain that the parties did not therein use language that is susceptible of the construction that the defendant's obligation was to cease upon the transfer. It may be, as suggested by respondent, that after the sale it would be difficult for him to supply the peaches, but he should have anticipated that difficulty and made provision for it in the contract. That by his sale he has, indeed, made it difficult or even impossible to carry out his agreement is no defense to the action. Klauber v. San Diego Street-Car Co., 95 Cal. 353, 30 Pac. 555.

The cases cited by respondent are not, as we regard them, inconsistent with this view. In Worthington v. Hewes, 19 Ohio St. 66, and Hickey v. Lake Shore R. Co., 51 Ohio St. 40, 36 N. E. 672, 23 L. R. A. 396, 46 Am. St. Rep. 545, for instance, the obligation was to continue in perpetuity, and it constituted a covenant running with the land. These were the circumstances that led the court to the conclusion that the parties did not intend the personal obligation to continue. We may quote from the former as follows:

> "We are bound to conclude that the lessor intended to trust to the land and its owner, and not to the lessee, for his security. He could not have expected the lessee to live forever, or even for 99 years; and the latter could not have intended to make promises so far in the future. * * * No prudent man would make a lease running forever, unless he were willing to trust to the land alone."

Water Co. v. Chavanne, 70 Cal. 616, 11 Pac. 678, is more nearly in point. Therein, however, the contract recited that the water was to be used in running a certain mill, and it recognized the right of the owner to sell said mill. The parties necessarily understood that, if he sold the mill, he would have no further use for the water, and the contract therefore clearly implied that such contingency would terminate his obligation.

It is also to be observed that the Supreme Court attached importance to the fact that the parties themselves had so construed the contract.

We can see nothing in section 1655 of the Civil Code that aids respondent in his contention. Therein it is provided that—

> "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."

It cannot be said that the construction for which appellant contends is unreasonable. It is, indeed, a matter of common knowledge that such contracts for a definite term of years are quite common, and hence it would be fair to conclude that they are reasonable for both parties. Moreover, since the parties have expressly agreed that the contract should continue for the term of 12 years, they have manifested an intention contrary to the implication that respondent would invoke.

[4] Respondent's other main point is that plaintiff's only remedy for a breach is an action for specific performance. But here, again, it must be said that it is not so expressly provided in the contract. If such is to be the holding, it must be by reason of implication. It is significant, however, that the parties have used the term "may," instead of "shall" or "must," and ordinarily this word implies permission, and not a mandate. If the parties had intended to make it exclusive, it would have been a simple task to so provide. Upon the theory that they intended the remedy by specific performance to be cumulative, and not exclusive, it is easy to understand why they mentioned that remedy, and not the other; for generally specific performance would not be allowed in such instances, and the parties believed that the ordinary action would not afford "a full, complete, and adequate remedy," but there was no reason for mentioning the other, which would necessarily be available for a breach of the contract. But, if they had intended to exclude the common-law action, it is reasonable to suppose that they would have adopted apt language to effectuate it. In Feeney & Bremer Co. v. Stone, 89 Or. 360, 171 Pac. 569, the rule is stated as follows:

> "Generally speaking, the parties to a contract for the sale of personal property have a right to agree that a defined remedy shall be exclusive, but in the absence of language evidencing an intention to make a given remedy, like the one in question here, exclusive of all others, it is treated as cumulative and permissive rather than exclusive and mandatory."

As illustrative of instances wherein similar language has been regarded as authorizing an optional and cumulative remedy appellant cites Hefner v. Haynes, 89 Iowa, 616, 57 N. W. 421; Cook v. Lantz, 116 Ill. App. 472; Love v. Ross, 89 Iōwa, 400, 56 N. W. 528; Loisseau v. Gates, 31 S. D. 227, 140 N. W. 258, Ann. Cas. 1915D, 1157; Mandel v. Buttles, 21 Minn. 391.

As stated in this last case, it is difficult to see "why a stipulation that a party may have a remedy not given by law should be held to deprive him of one clearly given by law, in the absence of any agreement to that effect."

Respondent cites certain cases from other jurisdictions which he claims sustain his view, but an examination will show a marked difference between those cases and this. In Goss v. Northern Pacific Hospital Ass'n, 50 Wash. 236, 96 Pac. 1078, the language was "shall be extended."

In Ancrum v. Camden Co., 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029, the question was not of remedy, but of liability, and it was held that, since the parties had stipulated in the contract what the consequences should be of a breach of the agreement, they were not to be held beyond that.

In McCready v. Lindenborn, 172 N. Y. 400, 65 N. E. 208, the parties by their contract provided "for the consequences of a breach" and laid down a rule to "admeasure the damages" and agreed when they were to be paid, and the court properly held that such remedy must be exclusively followed. In that case it is to be observed that the obligation contained the words "shall and will pay."

The question involved in Stuart v. Pennis, 91 Va. 688, 22 S. E. 509, and St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967, was whether an action for specific performance would lie, and in neither was any doubt expressed that an action for damages might have been brought.

[5] But, if it should be thought that the parties intended to make said remedy mandatory and exclusive, it would be unreasonable to suppose that they contemplated such to be the case after that remedy had ceased to be available. Having sold the property, respondent could not be compelled to specifically perform. Upon the theory, therefore, that the contract was to continue in force for 12 years, if respondent's position as to the exclusive character of the remedy can be maintained, then after the sale of the land appellant would be without any remedy for the breach of the contract, a condition which it is hardly to be supposed the parties contemplated.

It may be that it was unwise for respondent to bind himself for so long a period, but we are, of course, not concerned with that. If he desired to be released upon a sale of the premises, he should have so provided. He did indeed stipulate that both parties should be released from their obligations upon certain contingencies as above set forth: "If the party of the first part shall be unable to deliver fruit," etc. The implication would follow, under the familiar rule, that no other condition would affect the absolute promise to sell for the term of 12 years.

We can understand how difficult it may be for appellant to prove any future damage. The evidence may be uncertain even as to the extent, if any, that detriment has been suffered, but we think the complaint warrants an opportunity to offer proof of its claim.

The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

On Petition for Rehearing.

PER CURIAM. [6] We find nothing in respondent's petition for a rehearing to affect the views we expressed in our opinion in this case. The points made herein were contained in the former briefs and received our careful attention. Of course, we agree with petitioner in the statement of the familiar rule that all parts of a contract should be considered in the effort to arrive at the intention of the parties. We had and have no desire to ignore this fundamental rule; but manifestly it is impossible to appraise the cumulative effect of all the provisions of the contract without considering those provisions severally. We are satisfied that, construing the contract according to the natural import of the terms used by the parties, no other conclusion can be reached than the one heretofore announced by us. As to the form of the judgment, there may be some question as to whether it should not specifically direct the lower court to overrule the demurrer and permit defendant to answer.

The petition for rehearing is therefore denied, and the judgment heretofore entered is modified so as to read as follows:

"The judgment is reversed, with directions to the lower court to overrule the demurrer and permit defendant to answer."

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55 Cal. App. 698

BECKER v. SUBMARINE OIL CO.

(Civ. 3565.)

(District Court of Appeal, Second District, Division 2, California. Dec. 19, 1921. Hearing Denied by Supreme Court Feb. 16, 1922.)

1. Landlord and tenant 🔑83(1)—Perpetuities 🔑6(17)—Right of renewal in perpetuity enforceable.

While leases which are intended to be renewable in perpetuity, if at all uncertain in that regard, will be construed as importing but one renewal, provisions for perpetual renewals at the option of the lessee are enforceable, where it is clearly the intention of the parties that the lessee shall have that right.

2. Mines and minerals 🔑75—Lease held to give right of perpetual renewal.

An oil lease, "to have and to hold the same unto the party of the second part, his heirs and assigns, for the term and period of 10 years from date hereof, with the right of renewal for a further term of 10 years at the end of such term, or at the end of any subsequent term for which it may be renewed," *held* to give lessee right of renewal in perpetuity.

3. Mines and minerals 🔑75—Written notice sufficient to extend lease.

Written notice of intent to exercise right of renewal was all that was necessary to extend an oil lease giving lessee right of renewal in perpetuity.

4. Mines and minerals 🔑78(1)—Agreement to drill additional oil wells not implied.

There was no implied agreement to drill oil wells in addition to those specified in an oil lease, in which it was agreed that 3 wells should be drilled within 90 days and 10 wells within one year, on pain of forfeiture, nothing being left to implication.

5. Mines and minerals 🔑78(1)—Covenant demanding reasonable diligence in development implied.

In the absence of express and definite stipulation in an oil lease as to the measure of diligence to be used in development, an implied covenant exists demanding reasonable diligence, and, in determining whether or not other wells should have been drilled, consideration must be given to the result of operations on adjacent premises, extent of subterranean oil reservoir, contour, quantity, quality, etc.

6. Mines and minerals 🔑78(1)—Diligence required of lessee defined.

Lessee in an oil lease has a right to regard his own interest, as well as that of lessor, and the diligence required of him involves such a course of conduct on his part as operators of ordinary diligence would pursue, having in mind the securing of financial benefits sought by both parties; and to warrant a forfeiture for lack of diligence it must affirmatively appear that the lack of diligence is both certain and substantial.

Appeal from Superior Court, Santa Barbara County; Merle J. Rogers, Judge.

Action by Agnes S. Becker, as administratrix of the estate of Henry L. Williams, deceased, against the Submarine Oil Company. Judgment for defendant, and plaintiff appeals. Affirmed.

G. H. Gould and Harry W. T. Ross, both of Santa Barbara, for appellant.

John C. Benton, of Santa Barbara, for respondent.

CRAIG, J. In 1908 a lease of certain land in Santa Barbara county was made by Henry L. Williams, then the owner, to Thomas D. Wood. Plaintiff is the administratrix of the estate of Williams, and defendant is the successor in interest by two assignments of Wood. The contention centers upon a clause of the lease which reads as follows:

> "To have and to hold the same unto the party of the second part, his heirs and assigns, for the term and period of 10 years from date hereof with the right of renewal for a further term of 10 years at the end of such term, or at the end of any subsequent term for which it may be renewed."

It is further provided that the lessee shall drill certain wells upon the property and shall pay certain royalties to the lessor. These obligations were fulfilled by the lessee. But the complaint alleges that the defendant has not developed or prospected for oil upon any part of the premises for more than 10 years nor further east than 600 feet from the westerly end of the premises leased. No express provision of the lease is claimed by appellant to require such development, but she contends that an implied covenant exists which required the lessee to diligently prospect for oil upon the premises and that the evidence shows a failure to perform this implied agreement.

Before the expiration of the first 10-year period of the lease, the lessee notified the lessor that it exercised its option of renewal. Before the expiration of the next preceding term the defendant served a written notice upon the plaintiff stating that defendant elected to exercise its "right of renewal for a further term of 10 years." Respondent contends that this notice extended the term. Appellant claims that a provision for a renewal of a lease in perpetuity is against public policy and will be construed as providing for but one renewal and therefore the defendant is now holding over without right after the expiration of its renewal of term of 10 years.

[1] It is true that while not within the purview of the rule against perpetuities, leases which may have been intended to be renewable in perpetuity, if at all uncertain in that regard, will be construed as importing but one renewal. This principle is announced in Diffenderfer v. Board, etc., 120 Mo. 447, 25 S. W. 542, and Syms v. Mayor of New York, 105 N. Y. 153, 11 N. E. 369. However, in each of these cases the language of the lease was sufficiently uncertain to permit of the application of the rule.

[2-4] On the other hand, a clause providing for perpetual renewals at the option of the lessee is held to be enforceable when it appears that it was clearly the intention of the parties that the lessee should have that right. Burns v. City of New York, 213 N. Y. 516, 108 N. E. 77, Ann. Cas. 1916C, 1093; Blackmore v. Boardman, 28 Mo. 420. This provision is also clearly stated in Diffenderfer v. Board, supra. In the instant case the language is so plain that no room is left for construction. The parties have made it clear that it was their intention that the lessee should have the right of renewal in perpetuity. The lessee exercised his right by giving the lessor a written notice to that effect. This was all that was necessary to extend the lease for another term. Howell v. City of Hamburg, 165 Cal. 172, 131 Pac. 130; Wiener v. Graff, 7 Cal. App. 580, 95 Pac. 167.

This lease contains the following stipulation, assuring and at the same time limiting the right of the lessor to declare a forfeiture:

> "It is further agreed that the party of the second part shall complete three wells within 90 days from the date hereof and 10 wells within one year, and the failure on the part of the party of the second part to comply with any of the terms of this agreement or an abandonment of work for 60 days shall, at the option of the first party, work a forfeiture of this lease and the parties of the first and third parts may upon a 30 days' written notice re-enter said premises and remove all persons therefrom."

Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 74 Pac. 296, goes no further than to hold that in an oil lease which provides for the drilling of certain wells—

> "There is an implied covenant, not only that the wells be sunk, but that if oil is produced in paying quantities they will be diligently operated for the best advantage * * * of the lessee and lessor."

It does not state the proposition that there is an implied covenant to sink more wells than those specified. In the instant case the required number of wells were drilled within the period provided, and no complaint is made that diligence was not shown in their operation. But it is contended that the law implies an agreement to add other wells in addition to those stipulated by the parties. McIntosh v. Robb, cited by appellant, is also a case where the lessee for a period of a year and a half had failed to operate the mine in dispute and to pay the royalties agreed upon, and the decision is squarely placed upon the ground of the defaults by the lessee in complying with express covenants.

Another case relied upon by appellant is Indiana Oil, Gas & Development Co. v. McGrory, 42 Okl. 136, 140 Pac. 610. The lease there is construed as containing no agreement as to how the development was stipulated to be done by the lessee beyond one that drilling should "commence within 90 days from the date of said lease." The measure of the diligence to be used by the lessee was not agreed upon by the parties and in the absence of such an agreement an implied covenant to use reasonable diligence in the development of the property mentioned was held to exist. But where, as in the case at bar, the parties have defined the measure of diligence to be required of the lessee, the case last referred to is not in point.

This lease under consideration by us made definite provision for the development work which the lessee is required by its terms to do. The parties left nothing to implication. To remove all doubt in that regard, they have also made a clear stipulation concerning the conditions under which there may be a forfeiture of the lease. Where it appears, as it does here, that the parties considered the matter of forfeiture and agreed as to what acts or omissions on the part of the lessee should give the lessor the right to claim a forfeiture, and where it further appears that their minds have met upon the character and amount of the drilling for oil that the lessee must do, it would be usurping the right of the parties to contract for the court to insert other requirements and provisions concerning these important considerations. The court found that the defendant "has fully performed the covenants by said lessee to be performed," and it is not claimed that there was a default in the matter of compliance with any express covenants. But it is contended by appellant that the evidence is insufficient to sustain this finding, because of alleged default in the performance of an implied covenant to drill other wells than those specified in the lease and generally to continue prospecting and developing the property for oil. In Phillips v. Hamilton, 17 Wyo. 41, 95 Pac. 846, and Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895, the court held an implied covenant to exist of the character contended for by appellant; but these were cases in which the parties themselves had done nothing more than to stipulate that the lessee would prosecute the work of development with reasonable diligence and had left for implication the measure of diligence to be used in carrying out such agreements.

[5, 6] Proof that the lessee had drilled no other wells than the 10 sunk during the first term is not sufficient to establish a lack of reasonable diligence. As a net result of consideration of the cases which hold that, in the absence of express and definite stipulation as to the measure of diligence, an implied covenant exists demanding reasonable diligence in the development of the premises leased, it may be fairly said, in determining whether or not other wells should have been drilled, consideration must be given to a number of facts regarded collectively. Some of these are: The result of oil operations on adjacent premises; the extent of the subterranean oil reservoir; also its character and contour as affecting the question of drainage to and from the property in question; market conditions; the quantity and quality of oil thus far produced; the prospects for further production as indicated, and the knowledge possessed by those expert in locating oil bodies; the demands made upon the lessee in the maintenance of the wells already drilled, and his diligence in operating them to secure the greatest possible production. The record contains no information concerning many of these important considerations. Leases are intended for the benefit of both parties. The lessee has a right to regard his own interest as well as that of the lessor. In short, the diligence required of the lessee involves such a course of conduct upon his part as operators of ordinary diligence would pursue having in mind the securing of the financial benefits sought by both lessor and lessee. To warrant a forfeiture upon this ground in any case it must appear affirmatively from all the circumstances that the lack of diligence "is both certain and substantial." Brewster v. Lanyon Zinc Co., 140 Fed. 810, 72 C. C. A. 213.

The transcript shows that the defendant company had expended about $100,000 upon the property, and that the wells never produced any more oil than enough to pay expenses; no dividends had ever been paid; that its wells had become impaired through the accumulation of sand, and the company effectively relieved these conditions; that it suffered misfortunes in the loss through the elements of its wharves and most of its wells; that it made one attempt to obtain oil in the eastern part of the territory (in which appellant especially insists exploration should have been carried on), which resulted in failure; and that another party made a like attempt, with similar fruitless results, near the eastern line. We cannot say that the evidence presented would not justify the trial court in concluding that there had been no breach of covenant, even assuming the existence of the implied one contended for by appellant, and in further finding that there had been no default on the part of lessee warranting forfeiture.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

55 Cal. App. 741

WOLTZ v. E. F. HUTTON & CO. (Civ. 3752.)

(District Court of Appeal, Second District, Division 1, California. Dec. 22, 1921. Hearing Denied by Supreme Court Feb. 20, 1922.)

1. Trover and conversion 🔑49 — Statutory rule of damages applicable to conversion of oil stock.

Civ. Code, § 3336, authorizing recovery, by a plaintiff who exercises reasonable diligence, of the greatest market value of the property at any date between the conversion and the commencement of the action, applies to an action for the conversion of oil stock by brokers of the plaintiff.

2. Brokers 🔑35—Plaintiff held never to have become owner of stock ordered by defendant brokers for him, so that they were not liable for its conversion.

Where plaintiff directed defendants, as stockbrokers, to purchase for him certain oil stock, expressly stipulating that the purchase should be governed by the rules of the exchange where executed, and the brokers contracted for the purchase of such stock on the New York Stock Exchange, whose regulations and customs provided that such contracts should not be consumated until the day following that of purchase, at which time the stock was to be delivered on payment of the purchase price, but on the day of purchase the brokers, after plaintiff refused to put up more margin, contracted to sell an equal amount of the stock, which offset their purchase, so that the stock was never delivered, the plaintiff never became the owner of the stock and it never came into defendants' possession, so that defendants were not liable for its conversion.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Fred Woltz against E. F. Hutton & Co. for the conversion of oil stock. Judgment for the plaintiff, and defendants appeal. Reversed.

John A. Percy, of San Francisco, and Benjamin E. Page, Arthur C. Hurt, and Eugene D. Williams, all of Los Angeles, for appellants.

Maurice C. Sparling and Edward G. Deery, both of Los Angeles, for respondent.

SHAW, J. Action for the alleged conversion by defendants of certain oil stock owned by plaintiff. Plaintiff had judgment, from which defendants appeal.

It appears that at the times in question defendants were engaged in the business of stockbrokers, having offices in both the city of Los Angeles and the city of New York; that prior to August 7, 1919, they had, in acting for plaintiff, bought and sold stock for his account, as a result of which he, on August 7th, had on deposit with defendants the sum of $850, at which time he gave to defendants, at their Los Angeles office, a written order to buy for him 50 shares of Mexican Petroleum stock at the market price; that this order, containing a provision that "It is understood and agreed that all purchases and sales made by us for you are subject to the rules, regulations, and customs of the exchange or board of trade where order is executed," was given by plaintiff to defendants' telephone operator, who immediately transmitted the same by wire to defendants' New York office, which executed with the sellers, Carlisle, Mellick & Co., who were New York stockbrokers, a contract for the purchase at $181 per share; that the execution of the order in accordance with his instructions was promptly reported to plaintiff; that later, on the same day, defendants' manager, upon learning of the matter, notified plaintiff that the acceptance of the order was a mistake, for the reason that the margin deposited was insufficient to protect so large a deal, and demanded an additional deposit of $1,000, which plaintiff refused to make; that thereupon the manager told plaintiff they would sell the stock, and immediately, through defendants' New York office, sold the 50 shares of Mexican Petroleum stock at the then market price of $171 per share, which sale was made to the brokers through whom the purchase was made, namely Carlisle, Mellick & Co., notice of which fact was given to plaintiff on the morning of the following day; that the price of the stock continued to depreciate, reaching a price of $163 per share on August 21st, and thereafter the market price advanced to $264 per share on October 2, 1919.

Plaintiff, claiming that, as provided in section 3336, Civil Code, he had prosecuted his action with reasonable diligence, sought recovery of the difference betwen the value of the property at the date of the alleged conversion, to wit, August 7, 1919, and the highest market value thereof prior to the commencement of the action on December 19, 1919.

[1] The court, upon sufficient evidence, found the action had been prosecuted with reasonable diligence, and, as prayed for, gave judgment for plaintiff, as provided in section 3336, Civil Code, for the difference between the price at which the stock was purchased and the highest market price, which on October 2d was $264 per share. That such arbitrary rule fixing the measure of damages for conversion of personal property is applicable to the case seems to be well settled by the decisions of this state. See Dent v. Holbrook, 54 Cal. 145; Fromm v. Sierra Nevada S. M. Co., 61 Cal. 629; and Potts v. Paxton, 171 Cal. 493, 153 Pac. 957.

In support of the judgment the court found that at 12:30 o'clock p. m. on August 7, 1919, plaintiff was the owner of 50 shares of Mexican Petroleum stock of the value of $9,050, which said shares were then in the possession of defendants; that on said day and at said time defendants wrongfully converted said shares of stock to their own use. Appellants' chief contention is that such findings are not supported by the evidence, for the reason that there is no evidence that plaintiff was the owner of the stock in question, or that the same was at any time in the possession of defendants.

[2] It appears from the undisputed evidence that plaintiff in writing stipulated that the purchase of the stock ordered should be subject to the rules, regulations, and customs of the stock exchange where the order was executed; that the purchase was made on the New York Stock Exchange, the rules, regulations, and customs of which provided that such contracts were not to be consummated until the day following that of the purchase, at which time the transaction was to be closed by the seller delivering the stock upon payment therefor by the purchaser. In accordance with these rules and customs, defendants, as agents of plaintiff, on August 7th, entered into the contract with Carlisle, Mellick & Co., whereby the later agreed that on August 8th they would deliver to defendants 50 shares of stock upon payment in cash therefor. Defendants, however, never paid for the stock, without which no title or right to possession was acquired. Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080. No stock was ever delivered to them, without which the doctrine announced in Markham v. Jaudon, 41 N. Y. 235, as to the rights of a pledgor of stock bought on margin, is inapplicable. The contract, clearly executory in its nature, was never executed, for the reason that defendants, as plaintiff's agents, whether rightfully or wrongfully is immaterial, refused to consummate the deal made for their principal with Carlisle, Mellick & Co., but instead, on the day of the purchase, sold to them a like number of shares of stock at $171 per share, the effect of which was by mutual consent to rescind and cancel the contract, in consideration of which defendants paid to Carlisle, Mellick & Co. the difference in price of the stock as purchased and that at which it was sold. Obviously, if defendants acquired no title or right to possession of the stock, plaintiff could have, as against them, neither title nor right of possession, and hence he could not maintain an action for the conversion of the same.

The agreement made by defendants with Carlisle, Mellick & Co. was an executory contract which, subject to the payment therefor, contemplated the delivery at a future time of the stock so agreed to be purchased. This payment was not made and the stock was never delivered, and hence, as defendants never acquired the stock or right thereto, they could not be guilty of its conversion. Cardinell v. Bennett, 52 Cal. 476; Yukon River, etc., Co., v. Gratto, 136 Cal. 538, 69 Pac. 252; Clarkson v. Stevens, 106 U. S. 505, 1 Sup. Ct. 200, 27 L. Ed. 139; Hilmer v. Hills, supra.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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55 Cal. App. 784

LEAK v. COLBURN. (Civ. 2385.)

(District Court of Appeal, Third District, California. Dec. 28, 1921. Hearing Denied by Supreme Court Feb. 23, 1922.)

1. Appeal and error 🔑1011(1)—Findings on conflicting testimony not disturbed.

Finding of facts by the trial court on conflicting evidence cannot be disturbed on appeal.

2. Evidence 🔑424—Rule as to parol evidence inapplicable to action between one party and third person.

The rule prescribed by Code Civ. Proc. § 1856, as to admissibility of parol evidence changing terms of written agreement, is inapplicable in a controversy between one of the parties to the writing and a third party.

3. Appeal and error 🔑1058(2)—No prejudice from exclusion of evidence subsequently admitted.

Ruling out testimony, afterwards admitted, was not prejudicial.

4. Appeal and error 🔑221—No error in failing to relieve from forfeiture of contract in absence of prayer or request.

In action to declare forfeited an agreement to sell real property, defendant cannot complain that trial court did not give him an opportunity to pay the amount due the plaintiff, where he did not, by the answer, motion, or oral suggestion, ask the court to grant such relief, though the court, in the absence of the parties, suggested that if he had authority to do so, he would give the defendant 10 days in which to make such payment.

5. Vendor and purchaser 🔑335—Court may relieve vendee from forfeiture of contract.

Forfeiture of rights of vendee under a contract of sale of land will be considered only when time is of the essence of the contract, and facts may be shown under which the court will relieve the vendee from a forfeiture, even where time is of the essence of the contract.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by L. W. Leak against Lynn H. Colburn. Judgment for plaintiff, and defendant appeals. Affirmed.

Andrew Johnston and W. Coburn Cook, both of Turlock, for appellant.

Wm. N. Graybiel, of Turlock, for respondent.

FINCH, P. J. The plaintiff recovered judgment declaring forfeited his agreement to sell certain real property to the defendant and restoring the plaintiff to the possession thereof.

Prior to the execution of the agreement the plaintiff had conveyed the property to the defendant for the sum of $2,200, a part of which had been paid. For reasons not material and concerning which the parties are not in agreement, the defendant reconveyed the property to the plaintiff, and the contract in question here was executed, by the terms of which the plaintiff agreed to convey the property to the defendant upon payment by the latter of $1,620.80 in installments of $15 a month, with interest at 7 per cent. per annum, payable annually. The agreement was dated October 19, 1917. The defendant made the payments up to and including that of July, 1918, but he paid no interest due under the contract. He claimed credit for the additional sum of $109.75 paid for the plaintiff's benefit. This claim need be given no further consideration, however, because its allowance would leave him still in default on January 28, 1920, when the complaint was filed.

The appellant contends that he was entitled to a credit of $500 as his share of the proceeds of a sale, alleged to have been made by the plaintiff, of 20 acres of land described as lot 5, in which the defendant claimed an interest. By written agreement between the parties dated October 23, 1917, the plaintiff agreed to pay the defendant $500 when the former sold lot 5. The agreement contained the following:

> "This agreement is binding for one year from date and if the ranch is not sold within one year from date this agreement is null and void, and all interest of the party of the second part is canceled if the ranch is not sold within said time."

This agreement was one-sided in that it imposed no obligation upon the plaintiff to sell the land within the year and left it within his power to wholly defeat whatever interest the defendant had therein by failing to sell the land during the time specified. The appellant contends and respondent denies that lot 5 was so sold.

The plaintiff owned an adjoining 20 acres described as lot 4. December 14, 1917, he entered into two written agreements with Florence V. Cheney. By the first he agreed to sell her lot 4. The second was in the form of a lease to her of lot 5 for a term ending December 1, 1918, with an option to purchase the land, on terms stated in the agreement, at any time during the life of the lease. It fairly appears from uncontradicted evidence that in their oral negotiations leading up to the execution of these agreements the parties thereto had come to the understanding that the plaintiff was to execute an agreement of sale of both lots to Mrs. Cheney, but that no consideration had passed between them. The plaintiff, however, prepared agreements in the form stated, and, while they were not satisfactory to Mrs. Cheney, she signed them with knowledge of their provisions. Under the circumstances stated, the plaintiff was not legally bound by the oral understanding to execute an agreement to sell lot 5 to Mrs. Cheney, and it must be assumed that the parties substituted the lease contract for the prior oral understanding as to lot 5.

[1] Mrs. Cheney and her husband testified, though rather indefinitely, that she exercised the option to purchase lot 5 at an early period within the life of the lease contract. This testimony was squarely contradicted by that of the plaintiff, who testified further that she did not indicate to him "in any way that she wished to exercise her option to purchase. * * * On the contrary she wanted to give it up and cancel her agreements"—and that the option had not been exercised or the land sold up to the time of the trial. From this conflicting testimony the court found that lot 5 had not been sold, and such finding cannot be disturbed on this appeal.

The court found that at the time of the execution of the contract of October 23, 1917, the defendant did not own or have any interest in lot 5. This finding is attacked as unsupported by the evidence. It is at least doubtful whether this finding is sustained by the evidence. The finding is not necessary to support the judgment, however, because if the lot was not sold within the year specified the defendant was not entitled to the $500 payment provided for in the contract.

[2, 3] The agreement to sell lot 4 to Mrs. Cheney provides for the giving of a mortgage by her to plaintiff on other property to secure payment of $1,000 of the purchase price of that lot. Mrs. Cheney testified that the mortgage so provided for was made "as a part payment on the 40. The whole—everything was included." The court struck out this testimony, saying: "The contract provides for that, and you cannot change the terms of a written agreement by some oral understanding or oral agreement." This ruling is assigned as error. The court, for the moment, seems to have been unmindful of the fact that the controversy was not between the parties to the contract mentioned, and that therefore the rule prescribed by section 1856 of the Code of Civil Procedure was not applicable. The court freely admitted evidence as to the oral negotiations and understanding of the parties to the lease contract, and the ruling complained of must have been made through inadvertence. The $1,000 mortgage was executed at the same time as the agreements to sell lot 4 and to lease lot 5, and the testimony stricken out would only tend to show that the written agreements were not in accordance with the prior oral understanding, a fact established by uncontradicted testimony independent of that stricken out. A few other rulings of the

court in sustaining objections to questions propounded by the defendant are assigned as errors, but the testimony so ruled out was afterwards admitted, and hence no prejudice was sustained.

[4] Appellant contends that the court should have relieved him from the forfeiture of his contract, and given him a reasonable time after judgment in which to pay the amount due the plaintiff thereunder. Neither by the answer, by motion, nor by oral suggestion of appellant was the court asked to grant such relief. At the time of the announcement by the trial judge of his determination of the case, he suggested that if he had authority to do so he would give the defendant 10 days in which to make such payment. Neither appellant nor his counsel was present at the time of such announcement, or knew of the court's suggestion until after entry of judgment. This announcement was made in open court on July 19, 1920, and findings and judgment were filed August 30, 1920. It must be assumed, in the absence of anything in the record to the contrary, that the appellant knew, prior to the entry of judgment, of the court's determination of the issues against him. If appellant desired to pay the balance due under the contract and be relieved from the forfeiture, he should have taken appropriate steps to that end prior to the rendition of judgment. Had he done so the court would have been enabled to make findings from which it could be determined whether the facts warrant the relief suggested on this appeal for the first time. The fact that appellant did not know what the attitude of the trial court would be toward the granting of such relief furnishes no reason for reversing the judgment.

[5] The contract upon which suit was brought provides:

> "In the event of a failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligation in law or equity to convey said property, and the party of the second part shall forfeit all right thereto and all moneys theretofore paid hereunder shall be treated as liquidated damages for the nonfulfillment of this contract. * * * Time is of the essence of this agreement."

The effect to be given such terms in a contract is stated in section 816 of Pomeroy's Equitable Remedies (2d Ed.) as follows:

> "Contracts often contain a clause that if payment is not made at the day, the defaulting vendee shall forfeit all payments previously made and lose his right to the land. The courts of equity, in England and most American jurisdictions, deal with such a forfeiture clause on the principle that equity abhors a forfeiture and will relieve from it. * * * In a few American jurisdictions, on the other hand, it is held that since the parties have deliberately stipulated for a clause of forfeiture, equity has no power to make a new contract for them, and cannot relieve the party in default, however severe the forfeiture may be. Illinois, Iowa, Oregon, Indiana and California are among this minority, which compel the vendee in default to lose his bargain and all his payments previously paid, in strict accordance with the agreement. But California enforces a forfeiture only when time is of the essence of the contract."

The California decisions fully support the rule as stated by the learned author. Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 Pac. 420; Fresno Irrigated Farms Co. v. Canupis, 39 Cal. App. 184, 178 Pac. 300. That facts may be shown which would justify a court in relieving a vendee from a forfeiture even where time is of the essence of the contract is not doubted, but the facts of this case are not such as to require the trial court to grant such relief, in the absence of any request therefor or any suggestion that the vendee is either able or willing to make payment of the amount due.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

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56 Cal. App. 5

RAMSAY et al. v. CULLEN et al.
(Civ. 3578.)

(District Court of Appeal, Second District, Division 2, California. Dec. 29, 1921.)

Mandamus 🔑12—Irrigation district cannot be compelled to repeal ordinance enacted for fraudulent purpose.

Under Code Civ. Proc. § 1085, directors of irrigation district cannot be compelled by mandamus to repeal an ordinance passed as the result of fraud, notwithstanding moral duty of directors of district to repeal ordinance, since the performance of a moral duty cannot be compelled by mandate.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Petition for writ of mandamus by Frederick J. Ramsay and others against J. Frank Cullen and others, as Directors of the Cardiff Irrigation District of the County of San Diego, state of California. From judgment granting writ, defendants appeal. Reversed.

Claude L. Chambers, of San Diego, for appellants.

George H. Stone, of San Diego, for respondents.

WORKS, J. Judgment went for petitioners on an application for the issuance of a writ of mandate, and defendants appeal.

Appellants, directors of the Cardiff irrigation district, adopted a certain ordinance. Respondents by this proceeding sought to compel them to pass a second ordinance repealing the first, alleging in the petition that the first was passed with a fraudulent intent to accomplish an unlawful object. If we grant the existence of the fraud for the purpose only of laying a foundation for a disposition of the appeal, we can see no ground upon which respondents were entitled to judgment. It is provided, looking to so much of the statute as by any possibility could be imagined to apply to the present controversy, that the writ of mandate will issue "to compel the performance of an act which the law specially enjoins." Code Civ. Proc. § 1085. The law does not specially enjoin legislative bodies to repeal ordinances which have sprung from their counsels as the result of frauds, no matter how strongly it may be asserted that it is as much their moral duty to repeal them, once passed, as it was their moral duty not to have enacted them originally. It is trite to assert that the performance of a moral duty may not be compelled by mandate.

Judgment reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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56 Cal. App. 31

LAYNE & BOWLER CORPORATION v. GROGAN. (Civ. 3410.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1921.)

1. Appeal and error 🔑1008(1)—Whether buyer of pump made suitable attempts to remove it from well held for court in action for rescission.

In a buyer's action against the seller to rescind a contract for the purchase of a pump on the ground that it was impossible to remove it from the well and casing, whether the means employed by plaintiff were mechanically proper for the purpose of removing the pump, and whether it could have been removed had other means been employed, *held* for the trial court.

2. Evidence 🔑570—Court need not accept uncontradicted conclusion of expert witness.

It is not mandatory that the trial court accept the conclusion of an expert, even though it is not contradicted.

3. Sales 🔑181(12)—Finding that purchaser of pump failed to use proper efforts to remove it from well sustained.

In an action by a buyer against a seller of a pump to rescind the sale on account of the impossibility of removing the pump from the well and casing, evidence *held* to sustain a finding that plaintiff did not use all reasonable efforts and devices in attempting to remove the pump.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Layne & Bowler Corporation against Charles P. Grogan to rescind a contract. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert L. Williams, of Los Angeles, for appellant.

Lucius K. Chase, of Los Angeles, for respondent.

CRAIG, J. This is an action to rescind an executed contract for the purchase of a pump. The complaint alleges that the defendant misrepresented the condition of the pump and stated to the plaintiff that it was in good condition; that it was free and loose in the well and casing, and could be drawn from said well and casing without difficulty. It is further alleged that the defendant had no knowledge or information concerning said pump, and had made no examination of it, and relied upon the representations of the defendant; that the plaintiff paid the defendant the full purchase price agreed upon, which was $750, and thereafter went on the premises and "made use of all reasonable efforts and devices used in the drawing of pumps of the make and manufacture and type of the aforesaid pump; that the aforesaid pump was so constricted by the walls and casing of the said well, and was so securely impigned upon the sides and casing of the said well, and was so securely fastened in said well, by causes unknown and unascertainable, that the plaintiff was unable to raise or lift the said pump from the said well, and was compelled, after the exhaustion of all reasonable expense, effort, and the use of proper mechanical devices, to abandon the aforesaid pump in the said well; that it is impossible to draw said pump from said well and casing." The case was tried before the court without a jury.

Finding 4 reads:

"That it is not true that after the payment of the aforesaid $750 the plaintiff went upon the premises of the defendant and made use of all reasonable efforts and devices used in the drawing of pumps of the make and manufacture and type of the aforesaid pump; that it is not true that the aforesaid pump was so constricted by the walls and casing of the said well and was so securely impigned upon the sides and casing of the said well, and was so securely fastened in said well, by causes unknown and unascertainable, that the plaintiff was unable to raise or lift the said pump from the said well, and was compelled, after the exhaustion of all reasonable expense and effort and the use of proper mechanical devices, to abandon the aforesaid pump in the said well; that it is not true that it is impossible to draw said pump from said well and casing."

Appellant insists that there is no evidence to support this finding, but in this we think he is in error. Plaintiff placed witnesses upon the stand who were expert in such matters, who detailed what they did in an effort to remove the pump. Railroad ties and similar objects were cribbed around the well. Upon this jacks were placed. A tripod was also used on the shafting of the pump. The witness Fessendon testified that a stress of something less than five or six tons was used on the tripod, and about 100 tons on the jacks. The result was that the timbers were pushed down into the ground. On cross-examination this witness said that if more stress had been used the pump might have been removed. But allowing the full force of the statements of the expert when he testified most favorably to plaintiff, the most that can be said is that he gave it as his opinion that if more stress had been used something would have broken, and that he considered that it would not have been policy to have applied greater force. It might be inferred, although the witness did not directly so state, that he believed that all reasonable methods and devices were employed to remove the pump. Defendant offered no evidence upon this phase of the case.

[1, 2] It was within the province of the trial court to decide whether or not the means employed were mechanically proper for the purpose of removing the pump, and whether or not it could have been removed had other means been employed. It is not mandatory that the trial court accept the conclusion of an expert, even though it is not contradicted. Spencer v. Collins, 156 Cal. 298, 104 Pac. 320, 20 Ann. Cas. 49; Linforth v. S. F. Gas & Elec. Co., 156 Cal. 63, 103 Pac. 320, 19 Ann. Cas. 1230, 22 C. J. 729.

[3] We cannot therefore say that the trial court was incorrect in concluding, as it did, that plaintiff did not use all reasonable efforts and devices used in drawing pumps of the type of this one.

It follows that we need not consider the sufficiency, as a ground for rescission, of the proposition argued in plaintiff's brief, but not pleaded in his complaint, that the movability of the pump was an essential condition of the contract, and that the agreement was entered into by reason of a mutual mistake of the parties, both of whom, it is asserted, believed the pump to be movable, for the trial court found that the plaintiff failed to show it to be immovable. Whether the action is treated as one for rescission upon the sole ground of fraud, as respondent contends it must be, or upon the basis of mutual mistake concerning the movability of the pump, there can be no recovery.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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56 Cal. App. 1

KIRKMAN NURSERIES v. THORWALDSON et al. (Civ. 4011.)

(District Court of Appeal, First District, Division 1, California. Dec. 28, 1921. Hearing Denied by Supreme Court Feb. 23, 1922.)

1. Pleading 🔑248(17)—New cause of action held not set up by amended complaint in action on redelivery bond.

In an action on a redelivery bond to secure release of certain nursery stock, a new cause of action was not set out in the amended complaint merely because the word "merchantable" was included in the description of the trees.

2. Replevin 🔑123—Redelivery bond in claim and delivery held to cover valuation of property set up in amended complaint.

In an action on a redelivery bond to secure release of certain nursery stock, where the undertaking by defendants for the delivery of a certain sum to plaintiff, if delivery be adjudged, provided "for the payment to plaintiff of such sum as may, for any cause, be recovered against the defendant," *held*, that the sureties were not exonerated on the ground that in an amended complaint, filed after the undertaking was given and upon which judgment was entered, the valuation of the property had been increased over that in the original complaint.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by the Kirkman Nurseries against Horace Thorwaldson, M. Madsen, and Ray H. Humphreys, on redelivery bond to secure release of personal property. Judgment for plaintiff, and the two last-named defendants appeal. Affirmed.

See, also, Kirkman Nurseries v. Sargent, 42 Cal. App. 290, 183 Pac. 591.

Savage & Lovejoy and Milton M. Dearing, all of Fresno, for appellants.

Short, Lindsay & Woolley, of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the Kirkman Nurseries, respondent herein, in an action against the defendants and appellants, who were sureties on a redelivery bond given to release personal property seized by the sheriff.

A thorough understanding of the case necessitates a recital of the facts in the original claim and delivery action in which judgment was given in favor of the plaintiff and against J. J. Sargent. Those facts as found by the court are: That in February, 1915, the nurseries company entered into a written contract with one Rose, by the terms of which the said nurseries company was to deliver to Rose 100,000 fig cuttings of assorted varieties, free of charge, which Rose was to plant and care for upon his land, and during the winters of 1915–16 and 1916–17 was to deliver to the nurseries company such of said cuttings as should have developed into trees three feet high, free from pests or injury of any kind, at the agreed price of $30 per thousand; that in the summer following Rose transferred his interest in the land on which the fig trees were growing to Sargent, who took the land with full knowledge of the contract existing between the nurseries company and his predecessor; that Sargent performed his part of the contract for a time, but later abruptly discontinued to perform, and refused to deliver any more trees to the nurseries company. Thereupon the nurseries company brought suit against Sargent in claim and delivery. Judgment for possession of the property, or for the value thereof, was returned in favor of the nurseries company. Execution was levied and returned unsatisfied, whereupon the nurseries company brought this action against these defendants as sureties on the redelivery bond. Trial was had before the court; a jury having been expressly waived. From the judgment entered in favor of plaintiff this appeal is prosecuted.

The appellants first attack the finding of the trial court that the property described in the bond and pleadings in this action is the same property described in the judgment in the original action of the nurseries company against Sargent, claiming that the finding is not supported by the evidence and is in conflict with the findings in the original case. We have carefully examined each description and admit that the trees are not described in identical terms, but there is ample evidence for the conclusion that the same property was involved in each case. The record discloses that the trees levied upon by the sheriff were included in the trees described in the contract between Rose and the nurseries company; that there was no other nursery stock than the trees described in the contract growing upon the parcel of land described therein at the time the original complaint was filed; and that none was planted in the interim between that date and the date of filing the amended complaint. We are unable to perceive any conflict with the findings in the original case. Under such evidence the finding of the trial court will not be disturbed.

[1] Appellants next contend that a new cause of action was stated in the amended complaint, in that, the description of the property therein included different trees than those described in the complaint, and that the valuation and damages sued for were increased. They complain of the inclusion of the word "merchantable" in the description, contending that it is a broader classification than was used in the original complaint. The argument of counsel, in our opinion, is without merit. A careful comparison of the complaint with the amended complaint convinces us that no new cause of action was stated. Both involved the same contract, the same property, and the same controversy. The trial court in fact found:

> "That the descriptions, and each of the descriptions, of the personal property contained in the complaint, affidavit on claim and delivery, amended complaint, and judgment in the action of plaintiff against J. J. Sargent (being the action referred to in the second paragraph of the complaint in this action), referred to and described the same and identical property; that the description of the personal property set forth in said amended complaint and judgment included no property in addition to the property described in the said complaint and affidavit on claim and delivery, and said judgment was for the recovery of the same property described in said affidavit, complaint, and amended complaint."

This finding is abundantly supported by the evidence, and is, we think, conclusive on this phase of the case. This view is strengthened by the admission of appellants in their opening brief that the nurseries company "need not take or pay for any other trees, making it optional with plaintiff not to take or pay for any trees that did not come up to the above specifications." If further proof is necessary, the sheriff's return presents it. The property seized is described as "all of the merchantable nursery stock fig trees two years old or thereabouts, grown from cuttings and intended for transplanting, now situated," etc. Both the complaint and the amended complaint had the same object in view, viz. the recovery of possession of the trees or their value. The cause remained the same, whether the case went to trial on the original or the amended complaint. It follows that there was no error in entering judgment on the amended complaint. Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53.

[2] The final contention of the appellants is that the court erred in entering said judgment, it having been found by it that the undertaking had been given after the original case was wholly at issue, and that thereafter the amended complaint was filed, upon which the judgment was finally entered, the said judgment varying in many respects from the original demand of the plaintiff. They argue that the increase in valuation of the property involved and the damages prayed for in the amended complaint over the demand made in the original complaint exonerates these appellants. They cite a number of cases in support of their contention, but we are of the opinion that the bond is the governing element in this case. The binding clause of the undertaking reads:

> "Now, therefore, the undersigned, J. J. Sargent, principal, and M. Madsen and Ray H. Humphreys, sureties, do hereby undertake and acknowledge that we are jointly and severally bound in the sum of $4,500, being double the value of said property, as stated in the affidavit of plaintiff, for the delivery thereof to plain-

tiff, if such delivery be adjudged, and for the payment to plaintiff of such sum as may for any cause be recovered against the defendant."

We find no error. Judgment is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

(55 Cal. App. 483)

BENSON v. HARRIMAN et al. (Civ. 2375.)

(District Court of Appeal, Third District, California. Dec. 1, 1921. Hearing Denied by Supreme Court Jan. 30, 1922.)

1. Appeal and error 🔑1039(2)—Incompleteness of complaint held without prejudice.

If a complaint in an action to set aside fraudulent conveyances was incomplete in failing to show an exhaustion of legal remedies, it was without prejudice to defendant where the evidence showed that he had transferred, or had attempted to transfer, all of his property prior to issuance of execution, and that plaintiff also resorted to supplementary proceedings contemplated by Code Civ. Proc. § 714 et seq.

2. Fraudulent conveyances 🔑58—Conveyance fraudulent though debtor has other property.

If a conveyance is made with intent to defraud creditors, it is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors.

3. Fraudulent conveyances 🔑57(3)—Insolvency "contemplated" by making transfer.

Where debtor renders himself insolvent by transferring property, his insolvency is "contemplated" by the very act of making the transfer, within Civ. Code, §§ 3439, 3442.

4. Fraudulent conveyances 🔑64(1)—Intent immaterial where transfer without consideration is made.

Intent is immaterial where a transfer of property by a debtor is made without consideration, and in contemplation of insolvency, under Civ. Code, § 3442.

5. Appeal and error 🔑1043(5) — Error in granting preliminary injunction immaterial where perpetual injunction granted.

Any error of the court in granting a preliminary injunction was immaterial where the court, after full hearing, properly granted a perpetual injunction.

6. Judgment 🔑721—Merits of judgment not relitigated in creditor's subsequent action to set aside fraudulent conveyance.

In action by judgment creditor to set aside as fraudulent a transfer of property, defendant could not retry issues raised and decided in the former action, in the absence of "extrinsic" fraud in obtaining former judgment.

7. Fraudulent conveyances 🔑295(1)—Finding that transfer of bonds was fraudulent sustained.

In action to set aside as in fraud of creditors a transfer of securities, evidence *held* sufficient to support finding that transfer was made without consideration, and for the purpose of defrauding plaintiff, under Civ. Code, § 3442.

8. Fraudulent conveyances 🔑74(3)—Voluntary conveyance prima facie fraudulent.

The existence of an indebtedness at the time of a voluntary conveyance creates at least a prima facie presumption of fraud.

9. Fraudulent conveyances 🔑110(4)—Transfer in consideration of future support fraudulent.

No one can transfer all his property in consideration of future support so as to defeat enforcement of claims of existing creditors.

On Hearing in Supreme Court.

10. Fraudulent conveyances 🔑259(2)—Pleading held sufficient to show plaintiff entitled to appeal to equity.

Complaint of judgment creditor in action to set aside a transfer of property, alleging that plaintiff recovered a judgment on his debt, that it was unpaid, and that an execution was issued and returned unsatisfied, was sufficient to show that plaintiff was entitled to appeal to equity, under Civ. Code, §§ 3439, 3442.

11. Fraudulent conveyances 🔑216—Unliquidated debt for value of services sufficient to support action to set aside conveyance.

In an action to set aside a fraudulent conveyance, a judgment for plaintiff, an attorney, in a prior action for services, was proof that defendant was indebted to plaintiff on a contract of employment at the time that action was begun, and it was immaterial to the right to bring the later action that the debt was for the reasonable value of the services, and to that extent unliquidated.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by B. M. Benson against Frank G. Harriman and others. Judgment for plaintiff, and defendants appeal. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

Albert L. Johnson, of Modesto, for appellants.

Hawkins & Hawkins, of Modesto, for respondent.

BURNETT, J. The action was brought by a judgment creditor to set aside an alleged fraudulent transfer, and from the judgment in favor of plaintiff, the appeal has been taken.

[1] A general demurrer was interposed to the complaint, and the first point made is that the trial court erred in overruling it. The objection upon which appellants seem to rely chiefly is that it does not appear in the complaint that there was an exhaustion of legal remedies so as to authorize the equitable action. The allegation in that respect is:

"That execution was issued upon said judgment on the 21st day of December, 1917, and placed in the hands of the sheriff of the county of Stanislaus, state of California for execution, and said execution was returned unsatisfied."

This seems to be sufficient to make out a prima facie case of insolvency. Calkins v. Howard, 2 Cal. App. 233, 83 Pac. 280. But, if it should be thought that the complaint was incomplete in that respect, it is quite apparent that it was entirely without prejudice to appellants, since the evidence shows that the judgment debtor had transferred or, at least, had attempted to transfer, all of his property prior to the issuance of said execution. Since he had in fact rendered himself insolvent, he cannot complain because greater efforts were not made by the creditor to collect his judgment by legal proceedings before resorting to an action in equity. According to appellants' own theory of the case, any additional effort would have been entirely unavailing, and the failure to do an idle act cannot be the basis for a valid objection. We may add that the evidence shows that respondent resorted also to the supplementary proceedings contemplated by sections 714 et seq. of the Code of Civil Procedure, and thereby any defect in the complaint in its failure to so allege was effectually cured.

[2] Moreover, the rule in this state is that, if a conveyance is made with intent to defraud creditors, it is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors. Bekins v. Dieterle, 5 Cal. App. 690, 91 Pac. 173; Slade Lumber Co. v. Derby, 31 Cal. App. 155, 159 Pac. 881; Johns v. Baender, 40 Cal. App. 790, 182 Pac. 55; First National Bank of L. A. v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64. The authorities are fully reviewed in the foregoing decisions, and the conclusion reached as stated in 2 Bigelow on Fraud, p. 393:

> "Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm any one, by reason of the fact that the debtor has other property ample in amount within the reach of his creditors."

These authorities hold that the possession of other means, though competent as evidence to rebut the inference of fraudulent intent, is not conclusive against it, and, if the fraudulent intent exists, the conveyance is void, notwithstanding the debtor may own other property. In this connection we may say that the complaint is full and explicit in its allegations of the fraudulent intent with which the transfer was made.

Appellants are mistaken in the assertion that these earlier cases have been overruled by Evans v. Sparks, 170 Cal. 532, 150 Pac. 372. On the contrary, the court held therein that fraud may be shown, and may invalidate the deed, even where the grantor does not entirely strip himself of assets, citing First National Bank v. Maxwell, supra; but the evidence was considered insufficient to support the finding that a fraudulent intent existed.

In fact, however, the complaint is broad enough to fall within the contemplation of section 3439, and also section 3442 of the Civil Code. As to this latter consideration, we notice that the complaint alleges that the transfer was made "without any consideration, and that, by reason of said conveyance and transfer, the defendant Frank G. Harriman rendered himself insolvent." Said section 3442 provides that a transfer of property without valuable consideration "by a party while insolvent or in contemplation of insolvency shall be fraudulent and void as to existing creditors."

[3] Where the transfer renders one insolvent his insolvency is contemplated by the very act of making the transfer. Knox v. Blanckenburg, 28 Cal. App. 298, 152 Pac. 59.

[4] It is also true that the intent is immaterial where the transfer is made without consideration, and in contemplation of insolvency. Atkinson v. Western D Syndicate, 170 Cal. 503, 150 Pac. 360.

Upon either of these theories, we think the complaint is amply sufficient to state a cause of action.

[5] Some objection is made to the action of the court in granting a preliminary injunction restraining the defendant "from disposing of, selling, making away with, secreting, assigning, hypothecating," said bonds, but, since the court, after full hearing, granted a perpetual injunction, the action as to the former becomes unimportant, and the inquiry here should be limited to the final determination of the controversy. Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439; County of Tehama v. Sisson, 152 Cal. 167, 92 Pac. 64; Knight v. Cohen, 5 Cal. App. 296, 90 Pac. 145.

[6] There is no merit in the claim that the court erred in striking out portions of the answer of appellants. The character of such averments may be shown by the following quotation:

> "That on or about the 17th day of January, 1917, plaintiff commenced an action in the superior court of the state of California in and for the county of Stanislaus against said defendants Frank G. Harriman and John T. Harriman and the Modesto Bank, a corporation, for damages for an alleged breach of contract for an alleged violation of the said purported contract heretofore mentioned. That said action was subsequently dismissed as to the defendants John T. Harriman and the Modesto Bank, and, upon trial before a jury, a verdict was rendered by said jury in favor of plaintiff and against the defendant for the sum of $4,489.85 damages and costs, and judgment was entered in said action accordingly. That it was owing to the said fraudulent acts of plaintiff, and false testimony given by him and in his behalf, and the bias and prejudice of said jury against this defendant and in favor of said plaintiff, that such verdict was rendered. That

by reason of said facts said judgment was and is inequitable and unjust, and should not be enforced by a court of equity."

They all embrace matters of defense to the action which resulted in a verdict and judgment for plaintiff, and, manifestly, such issues could not be retried in this action based upon said judgment. Frank G. Harriman had full opportunity to present his defense, and it could not be relitigated in a subsequent action in the absence of any allegation of "extrinsic" fraud in obtaining said judgment.

[7] Likewise we think there is no merit in the contention that the evidence is insufficient to support the findings of the court that the transfer of the bonds, stocks, and securities was made without consideration, and for the purpose of defrauding plaintiff, and while the said Benson was a creditor of said Frank G. Harriman, and that, by said transfer, and others which are set out in the findings, the said Harriman "became insolvent and rendered himself insolvent, and the said Frank G. Harriman has no property of any kind whatever, and by reason of said transaction thereby rendered himself execution proof; that, by reason of the transfer of said bonds, stocks, and securities to the defendant John T. Harriman, he thereby placed without his possession all of the property subject to execution in this state, and the transfer of said bonds, stocks, and securities to the said John T. Harriman proximately resulted in depriving B. M. Benson from collecting his judgment from the defendant Frank G. Harriman."

We have carefully read the record, and can readily understand how the trial court reached such conclusions. The evidence warrants this statement of the facts substantially as made by respondent: The plaintiff was an attorney at law residing at Portland, Or., in April, 1914, at which time he was employed in writing by said Frank G. Harriman to act for him as his attorney in all matters relating to the settlement of the estate of one C. H. Fellows, deceased, in the state of Massachusetts. After plaintiff had performed certain services in pursuance of said employment, he was discharged without cause, and other attorneys employed by said Frank G. Harriman. Thereafter, on January 17, 1917, plaintiff commenced an action against the said Harriman in the superior court of Stanislaus county for the recovery of his attorney's fee. Harriman having left the state, plaintiff followed him to Massachusetts, and there brought suit for the same purpose. After Harriman was served in Massachusetts he came back to California, and immediately attempted to deliver $15,000 worth of bonds to his son, John T. Harriman. The defendant Frank G. Harriman answered the complaint filed in Stanislaus county, and the case was tried before a jury, and a verdict rendered for the plaintiff for $4,439 on November 28, 1917, and judgment was entered and docketed on the same day. On December 21, 1917, an execution was issued and placed in the hands of the sheriff of said county for service, and was returned unsatisfied, the defendant being a resident of the county at the time. Just prior to said trial Harriman claims he sent to his sister-in-law in Massachusetts $11,000 worth of bonds, and assigned all his interest in the Fellows estate to his son, Alfred Harriman. Thus did he attempt to divest himself of all his property within a period of time between the bringing of said action in Stanislaus county and the trial of the same—to render himself entirely insolvent. On July 26, 1919, he was before said superior court in proceedings supplementary to execution, and the complaint in this action was filed on the succeeding day. As to the delivery of the bonds to his son, John T. Harriman, it appears that, while a resident of Stanislaus county, the father went to Sonora and placed the bonds in a safe deposit box in a bank in that city, to which box he had a key. He thereafter took the bonds to another bank in Sonora and put them in a safe deposit box which he took in the name of his sister-in-law, Martha Dewey, who lived in the east at that time and never had a key to the box. Thereafter he took the bonds from that box, and placed them in the Jamestown National Bank in a safe deposit box in the name of said sister-in-law, and retained the key to the box. After the commencement of this action he transferred the box to his said son, but left the bonds therein.

Quite naturally, the defendant Frank G. Harriman denied that he had any intention of defrauding the plaintiff, and he even went so far as to claim that he was able and willing to pay the plaintiff what he owed him. But his actions speak louder than his words, and his declared willingness to pay could avail nothing in the face of the determined efforts that were required to collect the judgment.

Again, the court was justified in concluding that the attempted transfer of the bonds in question was voluntary, although he testified it was to secure his care and support—an explanation, it may be said, similar to that given for the other transfers. In this connection it is well to note that, at said supplementary hearing, he virtually admitted that it was a gift. At any rate, the trial court was in a better position than this court to properly appraise his veracity.

[8] As to this, the rule is that the existence of an indebtedness at the time of a voluntary conveyance creates at least a prima facie presumption of fraud. 12 R. C. L. 476.

[9] Furthermore, "as against existing creditors no one can transfer all his property in consideration of future support, so as to defeat any such creditor in enforcing his claim, but under such circumstances the law pre-

sumes the act to be done with fraudulent intent to hinder and delay the creditor in the collection of his debt." This is by reason of the fact that every person is presumed to know what the direct results of his act will be. Baxter v. Baxter, 19 Cal. App. 238, 125 Pac. 359. And, assuredly, it would make no difference whether the property is all disposed of in one transaction, or in several, as in the case at bar.

The other theory, to which we have adverted, that the transfers were all voluntary, and that thereby he rendered himself insolvent, and hence, subject to the provisions of said section 3442 of the Civil Code, finds support also in a rational inference from the evidence.

We deem it unnecessary to comment specifically upon the so-called "badges of fraud," recognized by the authorities and enumerated in 12 R. C. L. pp. 478, 485, 496, 545, and 546, which respondent claims are all present herein, as we think sufficient has been said to vindicate the view of the trial court as to the fraudulent character of the transaction.

One other contention of appellants worthy of some consideration is that the evidence is insufficient to show that plaintiff was a creditor at the time of said transfer; the argument being that the judgment introduced in evidence would be proof only that he was a creditor at that date, and not before. Certain authorities from other states are cited to support this view by appellants, and others against it by respondent. But, as to this, the record shows that the entire judgment roll was received in evidence, and it is not disputed that the complaint alleged that the breach occurred and the obligation accrued in November, 1916. At any rate, the complaint was filed prior to said transfer, and, unless the relation of debtor and creditor existed at the time the complaint was filed, it is difficult to understand how legally there could be a money judgment rendered in favor of the plaintiff. As to the decisions applicable to the situation, counsel have apparently overlooked the case of Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62, wherein we find this:

> "Mr. Freeman says 'that one having a claim for a tort is a creditor before the commencement of an action thereon, as well as after, and, as such creditor, is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of this action.' Freeman on Execution (4th Ed.) § 137a. See Bump on Fraudulent Conveyances, §§ 502, 503; Waite on Fraudulent Conveyances (3d Ed.) § 90; 8 Am. & Eng. Ency. of Law, p. 750. See, also, sections 3429 and 3430 of the Civil Code, as to who are creditors and debtors, and Melvin v. State, 121 Cal. 16, where it is said that the term 'debt,' used in our statutes, 'should be given its modern legal significance, as including any sort of obligation to pay money.' The cases are very numerous where it is held that a cause of action based upon a tort is within the statute against fraudulent conveyances, and that a person having such a cause of action is a creditor of the wrongdoer before judgment is obtained. The following are cases where it was so held, and where the liability was for slanderous words: Walradt v. Brown, 1 Gil. 397; Lillard v. McGee, 4 Bibb, 165; Langford v. Fly, 7 Humph. 585; Shean v. Shay, 42 Ind. 375; Jackson v. Meyers, 18 Johns. 425; Boid v. Dean, 48 N. J. Eq. 193; Cooke v. Cooke, 43 Md. 522; Miller v. Dayton, 47 Iowa, 312."

There is also a finding, as we have seen, that there was no actual delivery and continued change of possession of said stocks and bonds, thus bringing the case within the provisions of section 3440 of the Civil Code. We cannot say that the court was not justified in this conclusion, but it is unnecessary to consider this feature more specifically.

The judgment seems to be just and legally sound, and it is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a rehearing of this cause in the Supreme Court is denied.

[10] The opinion seems to be in doubt on the proposition that, in a complaint by a creditor to set aside a transfer made with intent to defraud creditors, the allegation that plaintiff has recovered a judgment on his debt, that it is unpaid, and that an execution has been issued thereon, and has been returned unsatisfied, is sufficient to show that plaintiff is entitled to appeal to equity. We do not share in the doubt. The proposition has been settled by many decisions. Thornburg v. Hand, 7 Cal. 561; Bickerstaff v. Doub, 19 Cal. 112, 79 Am. Dec. 204; McMinn v. Whelan, 27 Cal. 315; Ohm v. Superior Court, 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245; Blanc v. Paymaster M. Co., 95 Cal. 533, 30 Pac. 765, 29 Am. St. Rep. 149; Brown v. Campbell, 100 Cal. 644, 35 Pac. 433, 38 Am. St. Rep. 314; Sewell v. Price, 164 Cal. 270, 128 Pac. 407; Sewell v. Johnson, 165 Cal. 767, 134 Pac. 704, Ann. Cas. 1915B, 645.

[11] The suggestion that the action in which the plaintiff recovered judgment against Frank G. Harriman was an action in tort for damages may be misleading. It was an action to recover of the defendant Frank G. Harriman a debt owing by him to plaintiff on agreement whereby plaintiff was employed by Harriman to render certain services to Harriman as an attorney at law, and it was an action in contract, not in tort. The judgment therein was proof that the defendant was indebted to plaintiff on the contract at the time the action was begun. The fact that the debt was for the reasonable value of the services, and to that extent unliquidated, was immaterial on the question of the

right of the plaintiff to maintain this action to set aside the fraudulent conveyance.

SHAW, C. J., and SHURTLEFF, SLOANE, LAWLOR, WILBUR, and WASTE, JJ., concur.

(55 Cal. App. 573)

MARIS v. H. CRUMMEY, Inc. (Civ. 3998.)

(District Court of Appeal, First District, Division 1, California. Dec. 8, 1921. Rehearing Denied Jan. 7, 1922. Hearing Denied by Supreme Court Feb. 6, 1922.)

1. Negligence 🔑134(11)—Evidence held to show engine caused fire.

Evidence *held* sufficient to warrant a finding that property was destroyed by fire caused by defendant's donkey engine.

2. Negligence 🔑134(4) — Evidence held to show negligent operation of engine causing fire.

In an action for damages for destruction of property by fire caused by sparks from defendant's donkey engine, evidence *held* sufficient to show that the engine was negligently operated.

3. Appeal and error 🔑1004(1) — Value of property destroyed by fire matter for jury.

In action for destruction of property by fire, it was the special province of the jury to determine from the evidence what the actual values of the damaged properties were on the date of the fire, and its finding on that subject was conclusive on appeal.

4. Evidence 🔑543(1)—Insurance adjusters competent to testify to value of property destroyed by fire.

Fire insurance adjusters were competent to testify as to the value of property destroyed by fire.

5. Insurance 🔑606(1)—Proofs of loss held admissible in action by insurer for destruction of property by fire.

In action against owner of donkey engine causing fires in behalf of insurers who had paid fire losses, proofs of loss made by the owners were admissible for the purpose of showing compliance with the terms of fire policies, so as to entitle them to be paid and to entitle insurance companies to pay the losses.

6. Appeal and error 🔑216(1)—No complaint first on appeal of failure to limit scope of evidence.

Parties cannot for the first time on appeal complain that the court should have given an instruction limiting purposes for which certain evidence should be considered, where no such instruction was requested.

7. Appeal and error 🔑970(2)—Exclusion of evidence of experiments discretionary with trial court.

In action for destruction of property by fire claimed to have been caused by sparks from a donkey engine, where defendant offered evidence showing that it was burning lampblack, exclusion of testimony of experts concerning experiments made in an attempt to show the burning qualities of sparks from lampblack was a matter resting largely within the discretion of the trial court, and will not be reviewed in the absence of a clear showing of an abuse of that discretion.

8. Appeal and error 🔑206(2) — Objections must be made to questions asked court by jurors.

Complaint cannot be made on appeal that improper questions were asked by the jury in response to a suggestion of the court that the jury were entitled to ask questions, where no objection was urged at the time.

9. Negligence 🔑139(1) — Instruction on responsibility for fire from engine held proper.

In an action for destruction of property by fire from defendant's donkey engine, it was proper for the court to modify instructions requested by defendant by omitting therefrom the statement that "the mere emission of sparks from the donkey engine in question is not of itself evidence of negligence," and to give the instruction as modified, "I charge you that the defendant cannot be held to be guilty of negligence in this case by the mere fact, if you find it to be a fact, that the engine in question was emitting sparks at the time of the alleged fire, unless you find from the evidence that the sparks were the direct and proximate cause of the fire, and also that the defendant was thereby guilty of negligence, and thereby occasioned the fire in question."

10. Trial 🔑244(2)—Not error to refuse instructions with reference to particular evidence.

In action for destruction of property by fire claimed to have been started by sparks from a donkey engine, where the court specifically instructed that it was the duty of the jury to take into consideration all of the evidence in the case in determining the issues presented before them, and particularly in determining the question as to whether or not the defendant was guilty of negligence in using and operating its engine under the circumstances of this particular case, it did not err in refusing to instruct that it would be proper for the jury to consider the evidence of general custom with reference to the use of spark arresters in determining whether defendant was guilty of negligence in operating without an arrester.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by William Maris against H. Crummey, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; Wilbur and Shurtleff, JJ., dissenting.

Randolph V. Whiting, of San Francisco, for appellant.

Frank J. Fontes and Henry F. Boyen, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action brought to recover damages for the destruction of property by fire caused by the alleged negligent operation of a donkey engine belonging to defendant and being operated by it near the location of the property so destroyed by fire. For the purposes of this appeal the parties thereto have stipulated as to certain matters, such as the ownership of the property, the insurance thereof, payment of premiums, filing of the proofs of loss, payment of the claims by the insurance companies, subrogation of the alleged causes of action to the insurance companies, and the assignments thereof to the plaintiff, thus eliminating the necessity of presenting much of the pleadings and evidence upon the appeal, and confining the questions presented thereby to three groups, namely: (1) The insufficiency of the evidence to show that the engine operated by the defendant caused the fire, to show that such engine was negligently operated, and to prove the amount of damages sustained; (2) errors in the admission or rejection of certain evidence to be hereafter specifically referred to; and (3) errors in the giving of certain instructions and in the refusal of certain other requested instructions of the defendant. The trial was had before a jury, which returned a verdict in favor of the plaintiff, and from the judgment entered thereon this appeal has been prosecuted.

[1] The appellant's first contention is that the evidence was insufficient to show that the engine operated by the defendant caused the fire. Upon this branch of the case the evidence sufficiently discloses that on June 3, 1918, the defendant, through its agents, was operating a donkey engine in the course of making certain repairs upon a street in the city of San Francisco; that said engine was not equipped with a spark arrester, and that during the operation of the said engine on the day in question sparks and cinders were observed by several witnesses to be rising from the smokestack of said engine, and that these sparks and cinders were being carried by the wind and deposited upon nearby property, and that thereby several grass fires had been started; that a cinder from the engine had burned a hole in the coat of a person standing on his porch near where the engine was being operated, and that gas escaping from a nearby broken gaspipe had been ignited. There was, of course, no witness who could testify that a particular spark which had arisen from said engine had been deposited upon the house of any one of plaintiff's assignors, setting it afire, but, since no other plausible explanation was offered for the origin of these various fires or for the fire which destroyed the property of the plaintiff's assignors, the jury were entitled to draw the natural inference that the fire by which the property was destroyed had found its origin in the sparks which had arisen from the defendant's engine, and which had caused the several fires above referred to.

[2] The appellant's further contention is that the evidence was insufficient to show that its engine was being negligently operated. This contention is entitled to little consideration in view of the foregoing reference to the evidence in the case, since the jury would be entitled to draw the inference that the emission of sparks and cinders in a thickly populated neighborhood to an extent sufficient to cause the several fires above adverted to would be attributable to the negligent operation of said engine in such a locality and with such consequences. The defendant offered no evidence tending to show that it had taken any precautions to prevent these dangerous sparks and cinders from arising from its engine or from being carried to places where such fires occurred. In the absence of such showing, we think the jury were entitled to infer the negligent operation of said engine. Appellant, however, contends that when it had shown that the engine in question was clean and in good working condition, that it had just come from the shop, that it was operated by a man who had had long experience in the operation of such engines, that it was burning lampblack in lump form, which was a less dangerous substance than wood or coal, and that it was almost entirely consumed in the process of burning, it had sufficiently shown that it was not guilty of negligence in the operation of said engine. This evidence might well have been considered by the jury to have been offset by the fact that the engine was emitting sparks and cinders which, within the observation of those who were operating the same, were being deposited upon, and were causing fires in, nearby places, and that these latter facts would of themselves be sufficient to raise the imputation of negligence on the part of the defendant in the operation of the engine causing these obvious and imminent consequences. We are of the opinion, therefore, that the evidence sufficiently shows that the engine in question was being negligently operated, and the fire upon the premises of plaintiff's assignors was directly caused thereby.

[3-6] The final contention of the appellant under the head of insufficiency of the evidence is that the evidence was insufficient to prove the amount of damages suffered. In support of this contention the appellant offers an argument which might well have been made to the trial jury with reference to the values of the various items of property embraced in the several claims assigned to plaintiff, but which has little value upon this appeal, since it was the special province of the jury to determine from the evidence presented before it what the actual values of these damaged properties were upon the date of

the fire, and its finding upon that subject is conclusive upon this appeal.

The appellant's second main contention is that the court committed certain errors in the admission and rejection of evidence; the first of these alleged errors being that of the alleged improper admission of the testimony of certain adjusters of the damages caused by said fire, and also of the admission in evidence of the proofs of loss presented to the insurance companies after the occurrence of the fire, and in order to collect the insurance thereon. As to the first of these objections, it sufficiently appears that the adjusters who were called to testify were experts in the matter of determining values of property damaged or destroyed by fire, and that they had examined the particular property so damaged or destroyed. They were thus, we think, sufficiently qualified as experts to give evidence upon this subject, and we can see no objection to the admission of their testimony in this capacity. As to the proofs of loss, these were admissible for the purpose of showing that the persons insured had complied with the terms of their respective policies so as to entitle them to be paid and to entitle the insurance companies to pay the losses which had been sustained by the fire. The defendant's only objection to this evidence which properly could have been made would have been that it should be confined to this limited purpose. It did not make this requirement, nor did it request an instruction to the jury that the evidence should be confined to this limited scope. It cannot, therefore, make that objection here.

As to the appellant's next contention that evidence was improperly admitted with reference to the emission of sparks from some donkey engine other than the engine which is alleged to have caused the fire, we do not find that this objection is borne out by the record in the case.

[7] As to appellant's contention that the court improperly rejected the testimony of experts concerning certain experiments made in an attempt to show the burning qualities of sparks from lampblack, it is sufficient to say that the admission or rejection of evidence of this character lies so largely within the discretion of the trial court that its action thereon will not be reviewed on this appeal, in the absence of a clear showing of an abuse of that discretion. There is no such showing made.

[8] The final contention of the appellant under this head is that certain improper questions were asked by the jury in response to a suggestion of the court that the jury were entitled to ask questions. A sufficient answer to this contention is that no objection was urged by the defendant at the time to the propounding of these questions by the jurymen, and that it is too late now to urge such objection thereto. The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection, or of offending the jurors by making the objection, and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other. There is no merit, therefore, in this contention.

[9] The appellant's final contention is that the court committed certain errors in the giving of certain instructions and in the refusal to give certain other instructions requested by it. As to the instructions which the court gave, we are satisfied from a careful examination of the whole body thereof that they embraced a fair and full statement of the law applicable to the case, and that the objections which the appellant now urges to particular portions thereof are sufficiently answered by a consideration of the instructions as a whole. In so far as the appellant's contention that the court erred in refusing to give certain instructions requested by it is concerned, it may be said that the defendant insisted upon requesting several instructions embracing the statement that "the mere emission of sparks from the donkey engine in question is not of itself evidence of negligence." The court modified these instructions so as to eliminate this phrase, and gave to the jury the following modified instruction:

> "I charge you that the defendant cannot be held to be guilty of negligence in this case by the mere fact, if you find it to be a fact, that the engine in question was emitting sparks at the time of the alleged fire, unless you find from the evidence that the sparks were the direct and proximate cause of the fire, and also that the defendant was thereby guilty of negligence, and thereby occasioned the fire in question."

We are of the opinion that the modified instruction of the court as given embraced a correct expression of the law, and that the instructions requested by the defendant embracing without qualification the above objectionable phrase were properly refused.

[10] The appellant also contends that the court committed error in refusing to give to the jury a special instruction that it would be proper for them to consider the evidence of general custom with reference to the use of spark arresters upon such engines in de-

termining whether the defendant was guilty of negligence in operating the same without such spark arrester. The court gave to the jury specific instructions that it was their duty to take into consideration all of the evidence in the case in determining the issues presented before them, and particularly in determining the question as to whether or not the defendant was guilty of negligence in using and operating its engine under the circumstances of this particular case. When the trial court has thus generally instructed the jury as to its duty in these regards, it is not error on its part to refuse instructions with reference to particular portions of the evidence which they are thus generally instructed to consider.

We think that the foregoing sufficiently embraces and disposes of the instructions, whether given or refused, of which appellant complains.

Finding no error in the record before us, the judgment is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

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55 Cal. App. 704

PACIFIC ELECTRIC RY. CO. v. COMMONWEALTH BONDING & CASUALTY INS. CO. et al. (STATE OF CALIFORNIA, Intervener). (Civ. 4048.)

(District Court of Appeal, First District, Division 2. California. Dec. 19, 1921.)

1. Contracts 🔑138(1)—Illegal contracts not enforced.

Where a contract is illegal or against public policy, the courts will refuse to enforce it, and will leave the parties where it finds them, regardless of the fact that one of them may be retaining benefits received thereunder.

2. Master and servant 🔑388½, New, vol. 14A Key-No. Series—Assignment of compensation award "paid" by assignee held invalid as within prohibiton against assignment of "claim."

The provision of Workmen's Compensation Act 1913, § 29a, that no "claim" for compensation shall be assignable "before payment," covers both claims and awards; the word "claim" being used in this broad sense. Where an award against an insurer becoming a bankrupt was paid by the state by an appropriation act, claimant's assignment of the award to the state by reason of the payment to him was contrary to the statute and void; the award not being "paid," within the meaning of the act, until paid by the employer or person against whom it was made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Claim; Paid.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Pacific Electric Railway Company against the Commonwealth Bonding & Casualty Insurance Company and others, in which the State intervened. From an adverse judgment, intervener appeals. Affirmed.

See, also, 42 Cal. App. 573, 184 Pac. 29.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the State.

E. B. Drake, of Los Angeles, for respondent Makley.

Newlin & Ashburn, of Los Angeles (J. W. McKinley, of Los Angeles, of counsel), for respondents Lennox and Los Angeles Stone Company.

LANGDON, P. J. This action was brought by the plaintiff by complaint in interpleader to determine ownership of certain moneys owing by the plaintiff by reason of a judgment against it. The state of California intervened and the trial court found in favor of the defendants George L. Makley, Los Angeles Stone Company, and E. J. Lennox, and against the intervener. This appeal is taken by the intervener. The facts are:

On or about the 29th day of August, 1914, George L. Makley, was injured through the negligence of the Pacific Electric Railway Company, a corporation. At that time the Commonwealth Bonding & Casualty Insurance Company, a corporation, was a duly empowered and acting insurance company in the state of California and was carrying the liability insurance covering the injuries received by the said Makley. In November, 1914, Makley filed his application with the Industrial Accident Commission of this state for compensation under the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), and after due and proper proceedings upon said application the Industrial Accident Commission made an award against said bonding company in favor of said Makley of $8.44 a week for 240 weeks. Under this award the bonding company paid $422 in cash and various sums to doctors, hospital, etc., in payment of bills growing out of said injuries, and amounting in all to the sum of $1,509.95.

In October, 1915, James L. Boone was appointed receiver for and on behalf of the bonding company in proceedings duly and regularly taken to have said bonding company declared a bankrupt. Subsequently, and on April 27, 1916, the Industrial Accident Commission, by an amended finding, made an award to Makley against the said bonding company and its receiver in the sum of $3,613.21, which compensation was in addition to the sums already paid by the said bonding company for and on account of said Makley.

On January 28, 1915, by reason of the provisions of said Workmen's Compensation, Insurance, and Safety Act, the bonding company filed an action in the superior court of the state of California in and for the county of Los Angeles to recover the sum of $30,000 from Pacific Electric Railway Company because of the injuries to Makley. Said cause resulted in a judgment for $8,000 in favor of plaintiff entered therein on November 22, 1915. Before the trial of said action James L. Boone, the receiver, and George L. Makley were substituted as plaintiffs in the place and stead of the bonding company. In said action an appeal was taken by the defendant to the Supreme Court of this state, and said judgment was affirmed on August 7, 1919. Following this affirmance, the Pacific Electric Railway Company paid into court the amount of the judgment, with interest, and filed its complaint in interpleader herein.

On August 25, 1917, the state of California paid to Makley the sum of $3,613.21, by virtue of an act of the Legislature which recited that the said amount was appropriated to pay a claim of said Makley. On the same day, by reason of said payment to him, Makley made and executed an assignment to the state of California; said assignment being in words and figures as follows:

> "For and in consideration of the sum of $3,613.21, lawful money of the United States, to me in hand paid by the state of California, the receipt whereof is hereby acknowledged, I hereby sell, assign, transfer, and set over unto the said state of California all that certain award heretofore made and rendered in my favor and against Commonwealth Bonding & Casualty Insurance Company, a corporation, and J. L. Boone, the receiver of said corporation, by the Industrial Accident Commission of the said state of California, on or about the 23d day of January, 1915, and 1st day of May, 1916, together with all moneys due and to become due to me under and by virtue of said award, and all claims demands and causes of action, of every kind and nature whatsoever, in any manner arising from or growing out of said award, against said Commonwealth Bonding & Casualty Insurance Company, a corporation, and the said J. L. Boone as receiver thereof, as well as against all other receivers and stockholders of said corporation.
>
> "And I hereby authorize my said assignee to take any and all such steps, actions, and proceedings, both legal and equitable, in my name or otherwise, as it may be advised, which are or may become necessary or proper to recover from said corporation, its receivers and stockholders, all moneys due and to become due me under and by virtue of said award, and to retain for the use and benefit of said state of California all moneys and other things of value which may be so recovered."

Because of the foregoing assignment, the state of California claims an interest in the money paid into court by the Pacific Electric Railway Company in satisfaction of the judgment against it. The award of $3,613.21 made against the receiver for the bonding company was never paid by him, or any one, and said receiver did not claim reimbursement for payment of said award in this suit, but merely asked for and received, by the judgment, reimbursement for the amount paid by the bonding company to Makley for weekly compensation, doctors' bills, etc., under the first award, together with interest thereon. The portions of the judgment in favor of defendants Lennox and Los Angeles Stone Company do not concern us here, as these defendants received the amount of their claims by reason of stipulations entered into between them and the defendant Makley. The only possible theory upon which the appellant would have an interest in this fund would be based upon the contention that the assignment of the award was a valid one, and that the receiver was bound to pay the amount of the award to appellant and to be reimbursed for such payment out of the money paid by the Pacific Electric Railway Company, and that, the receiver failing to set up such matters and protect the rights of appellant, it was entitled to protect its own interests in the present action by reaching the fund directly instead of indirectly.

[1, 2] So we are brought squarely to the question of the validity of said assignment. Let us concede, for the purposes of this opinion, the appellant's contention that the act of the Legislature was valid on its face and is conclusive on this court. We may also concede the rule to be well settled that a party to an ultra vires contract will not be allowed to plead ultra vires while at the same time retaining benefits thereunder. This, however, only in part meets the objections made by Makley to the validity of the assignment. For there is a limitation upon the above rule to the effect that, where the contract is illegal or against public policy, the courts will refuse to enforce it and will leave the parties where it finds them, regardless of the fact that one of them may be retaining benefits received thereunder. Visalia Gas, etc., Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105. A contract that is unlawful as being against the express provisions or general policy of any particular statute is void and will not be enforced by the courts. See note to In re Assignment Mutual Guaranty Fire Insurance Co., 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149, at page 170, and cases cited thereunder. These legal principles become decisive of the present appeal, bcause, under the Workmen's Compensation Act as it stood at the time of this purported assignment, there was the following provision:

> "No claim for compensation shall be assignable before payment. * * *" Section 29a, 1913 W. C., I., and S. Act (St. 1913, p. 294).

Appellant contends that this refers only to "claims" as distinguished from "awards."

There is much reason in his argument that a restriction upon the assignment of "claims" which are uncertain in amount is more necessary than a restriction upon the assignment of "awards" which are fixed amounts, under technical definitions of these terms. We are not concerned with this argument here, however, and this court is bound to hold that the above provision obviously was intended to cover both claims and awards, and that the word "claim" is used in this broad sense. The act states that no assignment shall be made "before payment." Claims are not paid until they become awards, and it is clear that the only thing payable under the provisions of the act is awards. It is evident that the Legislature intended that there should be no assignment of claimant's rights whatsoever, and that the award should be paid by the one against whom it was made directly to the claimant and to no one else.

Appellant argues that, as the state paid the full amount of the award to Makley, his award or claim was paid, within the language of the act, and thereafter could be assigned. Such reasoning is, we think, fallacious, and would give to the language of the act no force and effect. The award is not "paid," within the clear meaning of the act, until it is paid by the person against whom it is awarded. Any payment of the same amount or of double or triple the amount by an outsider would not discharge and pay the award, but the award would still be due and unpaid, and would always remain so until paid by the person against whom it was made.

We are of the opinion that the assignment upon which the appellant bases its contention is contrary to the express provisions of the Workmen's Compensation Act, and is therefore illegal and of no force and effect under the authorities above cited, and the appellant could acquire no rights thereunder.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

55 Cal. App. 695

SPRING ESTATE CO. v. COHEN.
(Civ. 3946.)

(District Court of Appeal, First District, Division 1, California. Dec. 16, 1921. Hearing Denied by Supreme Court Feb. 14, 1922.)

1. Vendor and purchaser 🔑95(2)—Where no payments made on substituted contract, acceptance of delayed payments on original held not to affect vendor's rights in new contract.

Where a lot sale contract, on which payments had been accepted after they were due, was canceled by agreement and a new contract made, dividing the payments and applying them on the new contract, no payments having been made under the new contract, acceptance of delayed payments under the first contract cannot affect the vendor's rights under the new agreement.

2. Vendor and purchaser 🔑95(2), 101—Acceptance of payments after due suspends right of forfeiture till notice of strict compliance in future.

Where time is of the essence of a contract requiring periodical payments, the acceptance of payments after their due date creates a temporary suspension of the right of forfeiture arising upon such delay, which can only be restored by giving definite notice of the creditor's intention thereafter to require strict compliance.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by the Spring Estate Company against Charles A. Cohen. From a judgment for plaintiff and cross-defendant, defendant and cross-complainant appeal. Affirmed.

Raymond Perry, of San Francisco, for appellant.

Redmond C. Staats, of Berkeley (George L. Hughes, of Berkeley, of counsel), for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff and cross-defendant and against the defendant and cross-complainant, by which the rights of the latter in three several agreements to purchase real property were declared to be forfeited, and quieting the plaintiff's title thereto.

On July 1, 1912, plaintiff's predecessor in interest sold to defendant and defendant agreed to buy three lots of land in a suburban subdivision named Thousand Oaks, situated in the county of Alameda, for $6,500, payable in installments. During the years 1912 and 1913 defendant paid on account of said purchase the sum of $1,700, this sum being the aggregate of several installments, many, if not practically all, of which were paid after their due date and were accepted by the vendor. On July 1, 1914, the parties entered into a new arrangement, under the terms of which a separate contract was executed for each of said three lots, and the aforesaid sum of $1,170 paid on account of the contract of July 1, 1912, was divided and applied about equally as a credit upon these several new contracts. Thereafter no further payments were made, and on August 26, 1919, the plaintiff in writing notified defendant of his default, and that unless he complied with the terms and conditions of the contracts on or before September 5, 1919, plaintiff would take such steps as it deemed necessary to protect its interests. Defendant made no reply to this letter, and on September 5, 1919, plaintiff notified defendant that it elected to stand on the terms of the contracts, to retain to its own use the amounts paid by defendant on account thereof, and to treat defendant's rights thereunder as terminated.

The contracts provided that if the purchaser should be in default in any of the payments provided to be made under the contracts for the period of 60 days the purchaser should forfeit all rights thereunder, and all payments theretofore made should be regarded as liquidated damages, to be retained as such by the vendor, and that the latter was entitled at once upon demand and without further notice to the possession of said lots. The contracts also provided that a notification to that effect in a registered letter from the vendor to the purchaser, mailed to the address given in the contracts, should constitute legal notice of the forfeiture. Time was expressly made of the essence of the contracts.

[1, 2] If this were an action on the contract of July 1, 1912, there would be room for the application of the doctrine that, when time is of the essence of a contract requiring periodical payments, the acceptance of payments after their due date creates a temporary suspension of the right of forfeiture arising upon such delay, which can only be restored by giving definite notice of the creditor's intention thereafter to require strict compliance with the terms of the contract. But the contract of July 1, 1912, had been canceled by mutual agreement, and for it there had been substituted three several written agreements, one relating to each lot. On these no payments had been either tendered or accepted; and we think it cannot be held that the acceptance of delayed payments under the first contract can affect the respective rights and obligations of the parties under the new agreements. Under these there must be on the part of the vendor a new waiver of strict compliance with the terms of payment, in the absence of which it was entitled to enforce the right reserved in the agreements to declare a forfeiture upon the defendant's noncompliance with their terms regarding payment. Los Molinos Land Co. v. Mackay, 175 Cal. 305, 165 Pac. 926; Hyman v. Harbor View Land Co., 188 Pac. 828.

It is true, as claimed by defendant, that the plaintiff paid taxes on the lots each year as they became due, charging them to the defendant upon its books; but these payments certainly cannot be regarded as made for the benefit of the defendant and to bring about the suspension of the forfeiture clause of the contracts.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

188 Cal. 109

In re WITHENBURY'S ESTATE.

(L. A. 6980.)

(Supreme Court of California. Feb. 3, 1922.
Rehearing Denied March 2, 1922.)

1. Wills 🔑355—Court may relieve petitioner for revocation of probate from failure to issue citation within one year if failure was result of excusable neglect.

On petition for revocation of probate of will, the issuance of citation within one year after probate of will under Code Civ. Proc. § 1328, is not jurisdictional, and the trial court has the power to relieve the petitioner from the failure to issue such citation within the year, if such failure was the result of excusable neglect.

2. Wills 🔑355—Failure to issue citation on petition for revocation of probate until after year following probate held excusable.

Where attorney with large practice placed in the hands of a clerk who had been admitted to practice the matter of filing of petition for revocation of probate of will, and the clerk was ignorant as to necessity of issuing citation within one year after probate under Code Civ. Proc. § 1328, but where mistake was discovered so that citation was issued within 10 days after the petition was filed and within 3 days after the expiration of the year, the failure was excusable, and dismissal of petition was an abuse of discretion.

3. Wills 🔑355—Matter of relief from failure to issue citation on petition for revocation of probate within year after probate largely discretionary.

Under Code Civ. Proc. § 473, the court had wide discretion in the matter of granting or refusing relief from failure to issue citation within one year after probate of will, on petition for revocation of probate, as required by section 1328.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Marion M. Withenbury, deceased. Petition by Clara Leland Pabodie for revocation of probate of will. From order dismissing petition, petitioner appeals. Reversed.

Anderson & Anderson, of Los Angeles (Edw. F. Wehrle and W. H. Anderson, both of Los Angeles, of counsel), for appellant.

J. P. Chandler, of Los Angeles, for respondent.

WILBUR, J. On November 17, 1920, appellant served and filed a petition for the revocation of the probate of the will of the deceased, probated November 24, 1919, alleging that the will was procured by fraud and undue influence. Citation thereon was issued November 30, 1920. The executor moved to dismiss the petition for revocation on the ground that no citation had been issued within one year after the probate of the will as required by section 1328, Code of Civil Procedure. The appellant upon affidavits moved for relief from such failure on the ground of excusable neglect, and the court, after finding the facts as hereinafter stated, denied appellant relief and ordered the dismissal of the petition for revocation. The petitioner appeals from this order.

[1, 2] The question for our consideration is this: Was the delay of the petitioner for more than five days after the expiration of the year from the time of the probate of the will so far justified by the circumstances found by the trial court as to require a reversal of its order denying petitioner the relief sought and dismissing the petition. The issuance of the citation is not jurisdictional, and the trial court had the power to relieve the petitioner from the failure to issue such citation within a year, if in its opinion such a failure was the result of excusable neglect. Estate of Simmons, 168 Cal. 390, 143 Pac. 697. The facts found by the trial court and the facts relied upon by the appellant to constitute excusable neglect, briefly stated, are as follows: That J. A. Anderson, a member of the firm of Anderson & Anderson, appellant's attorneys, had been absent from the office of the firm for more than two weeks prior to November 17, 1920, and had not participated in the business of said firm during that period, and that the entire burden of the business and affairs of said office had fallen upon and were attended to by W. H. Anderson; that on November 17, 1920, said W. H. Anderson had just completed the trial of and was engaged in briefing two cases of importance, one of which had occupied more than four weeks in its actual trial and was very much engrossed in that matter, and in addition thereto had a large number of matters pertaining to the business of his office, including the matter of the contest of the will in this proceeding, on his hands for disposition; that on November 17, 1920, affiant placed the petition for revocation of probate in the hands of a clerk duly admitted to practice as an attorney at law and employed in the office of said firm of Anderson & Anderson, with instructions to file and serve the same; that said clerk has had some practice and has always proved himself to be most efficient and conscientious in the performance of all the duties assigned to him by said firm, but was unfamiliar with the provisions of section 1328, Code of Civil Procedure, and assumed and believed that the only service of the petition for revocation of the will necessary was service by delivery to the party or attorney for the executor under the provisions of section 1011, Code of Civil Procedure, and served a copy of said petition for revocation upon the executor upon November 17, 1920, and thereupon filed the petition for revocation; that W. H. Anderson be-

lieved that the matter had been properly attended to and gave no further attention to the matter until November 29, and immediately thereafter, on November 30, 1920, caused a citation to be issued and served as required by section 1328, Code of Civil Procedure; that said clerk had been engaged in attending to the filing and serving of various papers and records in the various courts and had practically exclusive charge of that branch of the business of said firm; that said clerk was ignorant as to the requirements of section 1328, Code of Civil Procedure, with reference to the issuance of citations, and assumed that the only service necessary was upon the executor of the estate under section 1011, Code of Civil Procedure, and did not become aware of his mistake until November 27, 1920.

It appears from the foregoing findings that the attorney representing the petitioner either overlooked the requirements of section 1328, Code of Civil Procedure, or failed to call the attention of the clerk serving the papers to such provision.

In considering whether excusable neglect was shown, it should be observed that within ten days after the filing of the petition, and within three days after the expiration of the year from the probate of the will, the clerk discovered that the required citation had not been issued within the time required by law, and within three days thereafter the attorney secured and served such citation. The requirement with reference to the issuance of citation within a year after probate upon such a petition for revocation differs from the ordinary rule with reference to the issuance of summons upon the commencement of the action and from the ordinary requirement with reference to the service of papers upon an adverse party who has appeared in the action, so that the special requirement might well have been overlooked or forgotten unless an examination of the Code was made at the time of the institution of the proceedings for the revocation of the will.

It would seem clear that, unless the entire burden of attending to every detail of practice is to be borne by the attorney in charge of litigation as distinguished from his clerks and employees, the neglect of the attorney in this case was excusable. It must be conceded that any attorney having a large practice must rely to some extent upon his employees for the conduct of the litigation intrusted to him, and the issuance and service of a citation is one of the matters which an attorney would be justified in confiding to a trusted employee, who was himself an attorney. In this case there is no reason for penalizing the petitioner because the delay was slight and the service of the petition for revocation upon the executor gave prompt notice of the pending contest.

[3] It is true that the trial court has a very wide discretion in granting or refusing relief under section 473 of the Code of Civil Procedure, but there is in this case no dispute as to the facts, and the case is before us upon the broad proposition of whether or not the denial of relief by the trial court was a proper exercise of judicial discretion. While we are reluctant to interfere with the conclusion of the trial court upon a matter of this sort, involving as it does the expeditious disposition of a probate matter, we feel that the appellant ought not to be deprived of her right to contest the will because of the slight delay, if any, brought about by the neglect of her attorney, which, under the admitted facts, we think was excusable and should have been so held by the trial court.

Order reversed.

We concur: SHAW, C. J.; LENNON, J.; SHURTLEFF, J.; WASTE, J.; SLOANE, J.; LAWLOR, J.

188 Cal. 102

COTTON-MACAULEY CO. v. DE SHIELDS, County Auditor (LUTEN, Intervener).

(Sac. 3205.)

(Supreme Court of California. Feb. 2, 1922. Rehearing Denied March 2, 1922.)

1. Bridges 🔑20(2)—Intervener whose plans were not used in building bridge held not entitled to statutory notice to withhold payment.

Where plaintiff, seeking to compel the county auditor to issue a warrant for the construction of a bridge, had entered into a contract with the county to use intervener's plans and to pay therefor, and subsequently new contracts were made, and the bridge was constructed thereunder without reference to or use of intervener's plans, *held*, that intervener had no claim upon which he could base a statutory notice to the auditor to withhold money for him, under Code Civ. Proc. §§ 1183, 1184, since he had not performed labor, or furnished material, or agreed to do so.

2. Mandamus 🔑187(9)—Clause of garnisheeing creditor having failed, determination of other issues on his intervention not necessary.

Where intervener, claiming against plaintiff, who was seeking a mandate to compel a county to issue a warrant to pay plaintiff's demand on a contract, gave the county stop notice under Code Civ. Proc. §§ 1183, 1184, providing for equitable garnishment, but failed to establish a valid claim, his contentions affecting the validity of the transaction between plaintiff and county need not be determined on his appeal.

In Bank.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the Cotton-Macauley Company, a copartnership against George M. De

Shields, auditor of the County of Tehama, Cal., in which Daniel B. Luten intervened, and from a judgment granting a writ of mandate directing the defendant auditor to draw a warrant in favor of plaintiff for certain construction work, the defendant and intervener appeal, but the appeal was dismissed as to the defendant upon his own motion. Judgment affirmed.

See, also, 198 Pac. 1026.

M. J. Cheatham, of Red Bluff, for appellant De Shields.

V. L. Hatfield and W. H. Hatfield, both of Sacremento, and James T. Matlock, of Red Bluff, for appellant Luten.

A. E. Bolton and Arthur W. Bolton, both of San Francisco, for respondent.

SHURTLEFF, J. Intervener appeals from a judgment ordering the issuance of a peremptory writ of mandate directed to George M. De Shields, auditor of the county of Tehama, this state, commanding him to draw a warrant on the treasurer of said county in favor of plaintiff for a specified amount.

The material facts are as follows:

In April, 1920, the board of supervisors of Tehama county, by proper notice, advertised for bids for the construction of a reinforced concrete bridge over Deer creek, on the route of the state highway in said county. The notice, among other things, provided for two separate bids, one to be in accordance with plans and specifications of what is known as the "Luten Design," and the other in accordance with plans and specifications prepared by "Messrs. Weeks & Day," engineers. The plaintiff, a copartnership composed of C. E. Cotton and H. E. Macauley, was awarded the contract, the construction to be in conformity with the "Luten Design."

An agreement for the construction of the bridge was entered into between plaintiff and the county on May 21, 1920, the price to be $69,970. The agreement did not, however, specifically mention the "Luten Design," but did recite that the bridge was to be built in conformity with plans and specifications therefor then on file in the office of the county clerk of Tehama county, which resolution of the board of supervisors awarding the contract to plaintiff stated were those of Luten. These plans and specifications expressly required that the construction should be of the "Luten Design," and that the successful bidder should pay Daniel B. Luten, the owner of such design, 10 per cent. of the contract price of everything included in such plans and specifications promptly on award of the contract.

C. E. Cotton, who signed this contract for the plaintiff, Cotton-Macauley Company, died May 22, 1920, the day following the date of the contract. Thereafter, on June 25, 1920, the county of Tehama and the plaintiff entered into a second agreement providing for the construction of a bridge at the same point at which the bridge covered by the contract of May 21, 1920, was to be built, to which the partnership name was signed by H. E. Macauley, the surviving partner; the terms of this contract were similar to those of the first, with the exception that the construction was to be in accordance with revised plans and specifications, the maker of said revised plans not clearly appearing. A bond was given for the faithful performance of each of these contracts. Subsequently, on July 6, 1920, with the proper consent of the surety, a third contract for the building of a bridge at the same point was executed between the same parties, to which contract the name of plaintiff was signed by H. E. Macauley. This latter contract, with the exception of the substitution of apparently further revised plans and specifications, was in its general terms substantially similar to the first. In other words, the contract of June 25, 1920, and the contract of July 6, 1920, contemplated the construction of the bridge pursuant to plans and specifications different from those of the "Luten Design."

On September 2, 1920, there was due plaintiff, under said contract of July 6, 1920, the sum of $15,375, and a claim for that amount was duly presented to, and allowed by, the board of supervisors of Tehama county, payable out of the Deer creek bridge fund, which claim, duly attested and signed, was presented to the defendant De Shields as such auditor for his approval and for the issuance by him of a warrant for the amount thereof. The issuance of this warrant was refused. Thereupon the plaintiff filed the complaint herein against the auditor, praying for the writ of mandate herein referred to.

On October 1, 1920, in obedience to an order of the superior court of Tehama county, in which court the complaint was filed, an alternative writ of mandate was issued, directed to, and which was served upon the said defendant George M. De Shields, as such auditor, commanding him, immediately after the receipt of the writ, to issue and deliver to plaintiff a warrant upon the treasurer of said county for $15,375, or show cause on a designated date why he had not done so. On October 9, 1920, Daniel B. Luten, upon motion duly made, was granted leave to intervene in the action, and in due time served and filed his complaint in intervention.

It is not essential to state in detail the allegations of the plaintiff's complaint. It was based upon the contract of July 6, 1920, the execution of which was duly alleged, and made no reference whatever to the contracts of May 21, 1920, and of June 25, 1920. It further alleged that on the 2d day of September, 1920, there became due and payable under said contract of July 6, 1920, to plaintiff the sum hereinbefore mentioned, and also alleged the presentation to, and allowance by, said board of supervisors of a claim for such amount, and its presentation to the auditor for his approval and for the issuance of a warrant therefor on the treasurer of the county of Tehama, and the refusal of said auditor to issue the same.

The complaint in intervention set forth that on the 21st day of May, 1920, the board of supervisors of the said county of Tehama entered into a contract with said Cotton-Macauley Company for the construction of the bridge, and that intervener, Daniel B. Luten, had furnished materials and performed labor consisting of engineering designs "to be used in the construction" of said bridge; that they "were furnished for and delivered to said Cotton-Macauley Company," and that said Luten was to be paid by said Cotton-Macauley Company for said designs and labor "10 per cent. of the contract price upon the award of said contract"; that said Luten had duly performed "all of his part of said contract"; and that the sum of $6,997 was due and payable to him. It was further alleged in said complaint in intervention that a withhold notice was, on or about the 11th day of September, 1920, filed by the intervener with said auditor, and that thereafter in September, 1920, a second withhold notice was filed with said auditor, and that on or about the 9th day of October, 1920, a third withhold notice was filed with said auditor. A copy of the last-mentioned withhold notice was attached to the complaint in intervention.

The answer of the intervener to the complaint of plaintiff denied that the contract between plaintiff and the county of Tehama for the construction of the bridge in question was entered into on the 6th day of July, 1920, and alleged that it was entered into on the 21st day of May, 1920.

It should be noted that the complaint in intervention makes no mention of the said contracts of June 25, 1920, and July 6, 1920.

The withhold notice filed on the 9th day of October, 1920, and which, as just stated, was the third filed with the auditor, referred to and was predicated upon the contract of the 21st day of May, 1920, and no other, and it sets forth the furnishing of materials, consisting of engineering designs to be used in the construction of the bridge to be erected pursuant to the contract of May 21, 1920, and also affirms that the value of the material, labor, and services furnished and performed by the intervener was $6,997.

Plaintiff's answer to the complaint in intervention denies all the allegations of the latter, with the exception that the filing of the alleged withhold notices is admitted, but it is affirmed that each of them was in certain particulars insufficient to constitute a compliance with the provisions of section 1184 of the Code of Civil Procedure of this state, or any other provision of law.

The auditor, in his answer to the plaintiff's complaint, also denied that the contract for the construction of the bridge was entered into on the 6th day of July, 1920, but alleged, as did the complaint in intervention, that the plaintiff and the county of Tehama entered into the contract for the building of the bridge on May 21, 1920.

Upon the hearing the court found that the contract under which the bridge was built was the one of July 6, 1920, and there was ample evidence to sustain such finding. The judgment was that the plaintiff was entitled to have and receive said sum of $15,375, and that a peremptory writ issue, directed to said auditor, to draw and deliver a warrant in favor of plaintiff for such amount. From this judgment both the auditor and intervener appealed, but the appeal of the former, upon his motion, was heretofore dismissed, leaving the intervener the sole appellant. Cotton-Macauley Co. v. De Shields et al., (App.) 198 Pac. 1026.

[1] There was no finding nor evidence that such bridge was constructed in accordance with the "Luten Design" plans or specifications, or that the intervener, Daniel B. Luten, furnished any materials to be used in, or performed any labor in connection with, the construction thereof. Upon the contrary, the proof was that the bridge was constructed under what were termed the Leonard plans and specifications, which embodied a method of construction other than that called for by, and which counsel for intervener declared constituted a change from, the Luten plans.

From what precedes, it is obvious that the intervener had no claim upon which he could base the statutory notice to withhold. Under the law in force at the time the contract we are considering was executed, and in which respect it remains unchanged, in order to resort to and enlist the aid of a notice to withhold sufficient funds to meet the demand of the claimant, and which notice is in effect an equitable garnishment, it was essential that the party filing the same should have performed labor for, or furnished materials, or both, or agreed to do so, to the contractor or other person acting by the authority of the owner, in connection with the work done or to be done under the contract by the terms of which the funds sought to be impounded are or will become due and payable. Code Civ. Proc. §§ 1183, 1184.

The fact that the board of supervisors of the county of Tehama on the 21st day of May, 1920, may have entered into a contract with plaintiff to build a bridge of the "Luten Design" over Deer creek, and which bridge was never constructed as so designed, would not give Luten the right, through the medium of the statutory notice to withhold, to garnish funds due or to become due under an agreement between the same parties for the construction of a bridge at the same point, but of another design, prepared by a different engineer, which did not embrace any of the inventions and devices of Luten.

[2] The foregoing views render it unnecessary to consider at length the further contentions of intervener. Whether or not the contract of July 6, 1920, was made by the board of supervisors without authority, and is therefore void, is not a problem in the case. Assuming, but not deciding, that intervener, who was not a party thereto, can attack its validity, the fact still remains that, even though the contention be sustained, intervener performed no labor for, and furnished no materials to, the plaintiff in connection with the bridge as finally constructed, which, as we have seen, is indispensable to his right to a notice to withhold. The same is true of the contention that the surviving partner was without authority to enter into the contract of July 6, 1920, which the intervener declares was a "new contract," and under which the court found the bridge was constructed, and which findings, as we have said, is supported by the evidence, and hence is conclusive here. While we cannot agree with this contention, its determination one way or the other is immaterial, for the contract of May 21, 1920, upon which intervener predicates his claim, was never performed—such is the implied finding of the court, and such is the proof. It is true that counsel for intervener affirm "that as a matter of fact the work was actually done" under the last-mentioned contract, but such was not the finding of the trial court.

Finally, counsel upon both sides devote a considerable portion of their respective briefs to the discussion of the question as to whether, under the provisions of the Code already alluded to, or any provision of law, the intervener was entitled to a withhold or stop notice, but in view of the conclusion reached by us, it is needless to determine that question.

Judgment affirmed.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; WASTE, J; LAWLOR, J.

WILBUR, J. I concur. In view of the fact that the trial judge felt that the case of Slayden v. O'Dea, 182 Cal. 500, 189 Pac. 1066, was controlling in this case and that this view was shared by the District Court of Appeal, First District, I think it is proper to say that that case turned entirely upon the construction to be placed upon the term "wagon road," and it was held that the term "wagon road," in view of the history of the section, meant a private wagon road. The statute, however, also gives a lien for work done upon a bridge, and the contract here was for the construction of a bridge, which would, of course, include either a public or a private bridge. In case of a public bridge there could be no lien, but, as we have held in such cases, there could be an effective stop notice.

(188 Cal. 131)

HYGIENIC HEALTH FOOD CO. v. GRANT.
(S. F. 10054.)

(Supreme Court of California. Feb. 7, 1922.)

1. **Courts ⟹487(3)—Supreme Court will order cause transferred within 60 days after decision of District Court of Appeal, notwithstanding rule requiring petition for rehearing to be filed within 10 days after judgment of district court has become final.**

Under Const. art. 6, § 4, authorizing the Supreme Court to order any cause pending before the District Court of Appeal to be heard by the Supreme Court before judgment has been pronounced by the District Court of Appeal, or within 30 days after such judgment shall have become final, without limiting the power to causes in which a petition for rehearing has been filed, the Supreme Court had the power to transfer the cause to the Supreme Court after decision in the District Court of Appeal at any time within 60 days after such decision, notwithstanding rule requiring petition for a rehearing to be filed within 10 days after the judgment has become final, since Supreme Court could have ordered cause transferred for a rehearing on its own motion without a petition for rehearing.

2. **Courts ⟹487(5)—Supreme Court could order cause transferred after decision of District Court of Appeal though petition for rehearing was typewritten.**

That petition to Supreme Court for a rehearing by such court after decision of the District Court of Appeal was in typewriting did not preclude the Supreme Court from ordering the cause transferred, under Const. art. 6, § 4, notwithstanding rule requiring printed petitions for rehearing, since Supreme Court could have ordered cause transferred on its own motion.

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

On motion to vacate decision. Motion denied.

For former opinion, see 202 Pac. 653.

Welles Whitmore, of Oakland, and Cyril C. Lotz, of Berkeley, for appellant.

Greene & Sinclair, of Berkeley, for respondent.

PER CURIAM. In this case an order for a rehearing was made by the Supreme Court after decision in the District Court of Appeal, and within the 60 days allowed by the Constitution. Prior to the making of the order a petition for a rehearing in typewriting was filed after the time fixed by the rules.

The plaintiff moves to vacate our subsequent decision on the ground that the Supreme Court had no jurisdiction to make the order granting the rehearing, because the petition was filed too late, and on the further ground that it was in typewriting, and contrary to our rules. The claim on which the motion is founded is that the Constitution does not empower the Supreme Court to order a rehearing after decision of a cause by the District Court unless a petition therefor has been filed by an interested party.

[1, 2] The Constitution provides that—

> "The Supreme Court shall have power to order any cause pending before * * * a District Court of Appeal to be heard and determined by the Supreme Court." Article 6, § 4.

By clear implication this confers power to make such order at any time during the pendency of the cause in the District Court of Appeal. This would extend the time for 30 days after the decision by the District Court of Appeal, for the cause is pending therein until it becomes final by the expiration of said period of 30 days. Immediately following the above-quoted clause, the Constitution declares that the order referred to "may be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein." This extends the time for an additional 30 days. The power is not limited to causes in which a petition for rehearing is filed. Therefore the court may make an order of its own motion where no petition has been filed. The rule of the court requiring the petition for a rehearing to be filed within 10 days after the judgment of the District Court has become final therein was made for the convenience of the court, so as to give it time to consider the petition and to give the opposing party time to answer the same. Neither this rule nor the rule requiring printed petitions in any wise affects the power of the court to order a rehearing and transfer the cause.

The motion is denied.

SHAW, C. J., SHURTLEFF, LAWLOR, WILBUR, WASTE, and SLOANE, JJ., and RICHARDS, Justice pro tem., concur.

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188 Cal. 15

PETERSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(S. F. 9927.)

(Supreme Court of California. Jan. 28, 1922. Rehearing Denied Feb. 27, 1922.)

Master and servant 🔑388—Compensation as "total dependents" justified; "partial dependents."

Where deceased employee maintained a home for his sister and her minor son, and made regular contributions, averaging between $40 and $50 per month, and additional sums when necessary, for their support in his home as good-faith members of his household within Workmen's Compensation Act, § 14(c), and they had no means or income except small sums earned at uncertain and irregular employment during a few summer months, they were entitled to compensation as total dependents within section 9(c)1 of the act, and not as partial dependents within section 9(c)2.

In Bank.

Proceeding by Berta E. Griffin and Edward Griffin, a minor, by Berta E. Griffin, his guardian ad litem, for an award under the Workmen's Compensation Law for the death of Adolphus N. Gibson, opposed by A. E. Peterson and the Employers' Liability Assurance Corporation, Limited, of London, England. From an award of the Industrial Accident Commission, the employer and insurer bring certiorari. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

LENNON, J. Petitioners in this proceeding seek by certiorari to annul a death benefit award of the Industrial Accident Commission in the sum of $4,900, made to Berta E. Griffin and Edward Griffin, a minor, the sister and nephew, respectively, of Adolphus N. Gibson, who died as the result of an injury received while in the employ as an electrical engineer of the petitioner, A. E. Peterson.

The Commission found that the sister and nephew were totally dependent upon Gibson (hereinafter referred to as the deceased employee), and directed that the sum awarded as a death benefit be paid to the sister, who appeared in the proceeding before the Commission as the guardian ad litem of the minor nephew.

The sole question presented here for determination is as to the sufficiency of the evidence to warrant the finding of the Commission that the sister and nephew (hereinafter referred to as the applicants) were totally dependent for their support upon the deceased employee. It is conceded that if the applicants were, as found by the Commission, totally dependent, they were entitled to the award made, which was well within the limitation of three times the annual earnings of the deceased employee provided by the Workmen's Compensation Act in the case of total dependence. Workmen's Comp. Act of 1917 (St. 1917, p. 839) § 9 (c) 1.

It is contended, however, that the evidence adduced before the Commission shows that the applicants were in fact no more than partial dependents of the deceased employee, and, therefore, in keeping with the provisions of section 9 (c) 2 of the Workmen's Compensation Act, were entitled to a death benefit award no greater in amount than the sum annually contributed to their support by the deceased employee, which, it is conceded, would not have exceeded the sum of $1,800.

The evidence shows that in 1913 the applicants came to California at the request of the deceased employee, and up to the time of his death he provided a home for them and the means to operate and maintain it. He made this home his home during all of said time, save and except during 1919, when he was attending night school in San Francisco. During this time, however, he invariably spent the week-ends at his home in Palo Alto.

During all of this time the deceased employee contributed regularly to the support and maintenance of the family as thus constituted, such contributions averaging between $40 and $50 per month. With the money thus received, the applicant, Mrs. Griffin, paid household bills and bought clothing for herself and her son. Whenever necessary for the support of the family, the deceased employee furnished additional sums, and frequently brought home groceries and other foodstuffs, as well as articles of clothing for the applicants. In short, it is apparent from a consideration of the evidence adduced upon the entire case that the deceased employee at all times contemplated the maintenance and support of the applicants in his home as members of his household. It is not disputed but that under the circumstances the applicants were in good faith members of the deceased employee's family and household, within the meaning of the Workmen's Compensation Act, and came specifically within the relationship defined in that act. Workmen's Comp. Act of 1917, § 14 (c).

The claim of partial dependency is made and based on that portion of the evidence adduced before the Commission which shows that one of the applicants, Mrs. Griffin, at irregular periods during the summer months of 1919 and 1920, was employed in taking charge and care of the children of neighbors at a fixed rate of 25 cents per hour, and earning thereby, during the times stated, an average of between $10 and $15 per month. The other applicant, the nephew of the deceased employee, so the evidence shows, also worked for three or four months during the year 1919 delivering a daily paper, for which service he received an amount approximating $5 a month during that period. Until that summer of 1919, applicant Mrs. Griffin had not done any work other than that of caring for the deceased employee's household. Her health generally had been poor, and she had not worked for three or four months prior to the time of the deceased employee's injury. Such small amounts as she had earned had been paid into the general family fund, and her son was allowed to keep for his own amusement and pleasure the $5 a month he had earned, amounting in all to not more than $15 or $20.

The fact of the applicants' employment in the manner and at the times above stated, which concededly was uncertain and irregular, and at best continued only through a few months of a designated period, did not tend, in our opinion, in and of itself, to fix and limit their status as partial dependents of the deceased employee at the time of the latter's injury.

The Workmen's Compensation Act of this state, after specifying who shall be conclusively presumed to be wholly dependent for support on a deceased employee—and the applicants here do not come within the classification of that specification—provides that—

> "In all other cases, questions of entire or partial dependency * * * shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee." Stats. 1917, sec. 14(b), p. 844.

There is nothing in the act requiring that a person must be physically or mentally incapable of supporting himself in order to be adjudged a dependent. It is but a truism to say that total dependency exists where the applicants subsist entirely on the earnings of the deceased employee, but in applying this rule courts will not deprive applicants of the rights accorded total dependents, when otherwise entitled thereto, merely because of minor considerations or benefits which do not substantially affect or modify the status of the applicants toward the deceased employee. Bloomington-Bedford Stone Co. v. Phillips, 65 Ind. App. 189, 116 N. E. 850.

The case of In re Lanman, 65 Ind. App. 636, 117 N. E. 671, is not, in its facts, unlike the instant case. In that case Lanman, the deceased employee, was unmarried at the time of his death, and he, at that time and for a number of years prior thereto, had been the owner of residence property in which he and his mother and two sisters lived together until about six years before his death, during which time he provided the home and furnished it and supplied food and clothing for his mother and sisters. One of the sisters, Alice Lanman, died about five years prior to his death. Upon the death of his mother—about six years before his own death—the deceased advised the other sister, Luella Grace Lanman, the applicant in that case, not to worry, that he would furnish her a home and provide for her so long as he was able. They thereupon entered into an arrangement whereby he was to furnish the home and provide for applicant, and she, in return, was to act as his housekeeper, which arrangement was carried out and continued in effect up to the time of his death, except for a period of three weeks, during which time she worked at her profession as a stenographer, but was compelled to give up the work on account of her health. The court held that the sister was a total, rather than a partial, dependent, saying in this behalf that—

> "If she was a dependent of her deceased brother in any degree, she was a total dependent. This would be true, although she may have been able to work for others, and thereby earn wages with which to support herself."

Inasmuch as the deceased employee in the instant case died in the month of January, 1920, the applicants' subsequent employment during the summer of 1920 can have no bearing upon the state of their dependency "at the time of the injury of the employee," but must be regarded only as the performance of an act of necessity to enable them to live.

The cases cited by petitioners in support of the writ are to be distinguished from the situation presented here in this, that in all of those cases it appeared that the applicants were held to be partial dependents because of the fact that, as shown in evidence, they were possessed of an income, more or less substantial and permanent, from outside sources or investments.

It appearing that at the time of the deceased employee's injury the applicants were dependent upon his earnings and contributions for shelter, food, and clothing, and had no independent means of their own, it must be held that they were total dependents.

Award affirmed.

We concur: WASTE, J.; LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.

SHAW, C. J. (concurring). It appears that Berta E. Griffin, sister of the deceased, earned about $60 during the year preceding her brother's death, and by fair inference that she could continue to earn that much or more. The brother contributed to the support of himself, his sister and nephew about $720 a year, besides house rent and clothing, the cost of which was not proven. She cannot be said to have been "wholly" dependent, unless the case comes within the rule that the law disregards trifles. No rule can be laid down that will in all circumstances determine what constitutes a "trifle." The compensation law is an innovation upon rights of property in the interest of the general welfare, and it cannot be stretched to fit all cases merely for the purpose of showing liberality. One cannot be liberal in the use of the money of others. I am willing to allow this case to go on the judgment of the Commission, but I do not think the Commission should go much farther. For these reasons, I concur.

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188 Cal. 99

SON v. ADAMSON et al. (L. A. 5939.)

(Supreme Court of California. Feb. 2, 1922.)

Public lands 🔑35(5)—Placer mining locator entitled to machinery placed on land before withdrawal as against homestead entryman.

A homestead entryman of land, withdrawn from placer oil locations by order of the President, ratified by Congress by Act Cong. June 25, 1910 (U. S. Comp. St. §§ 4523–4525), did not acquire the right to oil well machinery and a derrick erected by claimant prospecting for oil under locations made before the withdrawal order and before the homestead entry, where claimant had not abandoned his rights and was seeking to maintain them as against the homestead entryman and the government, since entryman secured no right to the oil below the surface, nor to the right to prospect therefor, which was reserved to the United States government, under Act Cong. July 17, 1914, §§ 1, 2 (U. S. Comp. St. §§ 4640a, 4640b) and since, under such statute and Civ. Code, § 661, the machinery was appurtenant to the mining rights and not to the land.

In Bank.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Charles A. Son against Nellie Adamson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Alfred Siemon, of Bakersfield, for appellants.

C. L. Claflin, of Bakersfield, for respondent.

WILBUR, J. This action involves the right of the parties to improvements consisting of oil well machinery and a derrick upon government land. Plaintiff relies upon a placer mining location of the land made in May, 1908, by plaintiff's predecessor and the defendants rely upon a homestead entry made November 3, 1916, by defendant Nellie Adamson. Judgment was entered enjoining the defendants from interference with the oil well machinery. The defendants appeal upon the ground that the improvements are fixtures, and that by virtue of the homestead entry of Nellie Adamson she has acquired title thereto. The plaintiff has not abandoned his right to the land, and was still in possession thereof at the time of the trial, except in so far as a portion thereof had been occupied by the defendant Nellie Adamson under and by virtue of her homestead entry.

In January, 1909, the plaintiff erected an oil well derrick upon the land, and on December 6, 1910, leased the land to the Midway Southern Oil Company, which company, during the year 1910, took possession of the land and began drilling for oil thereon. That company drilled two wells for oil on the land, and remained in possession until January 31, 1914, at which time plaintiff secured possession of the land by virtue of a decree of court forfeiting the lease to said company and restoring the right of possession to the plaintiff. After the erection of the oil well derrick on September 27, 1909, the President of the United States made an order withdrawing said land from placer oil locations, which was ratified and confirmed by Congress June 25, 1910 (36 U. S. Stats. at Large, 847 [U. S Comp. St. §§ 4523–4525]). The withdrawal order and the act of Congress recognized the right of a bona fide placer mining locator to continue with due diligence to perfect such location by discovery. The trial court does not specifically find as a fact that any discovery of oil was made upon the premises in question nor that the work of the locator to make a discovery was being prosecuted with due diligence at the time of the withdrawal order. The court does, however, find that the occupation by the plaintiff was bona fide, and not in violation of the withdrawal order.

The question thus submitted for our consideration is this: Does a homestead entryman of land covered by such withdrawal order of the President and such act of Congress acquire the right to an oil well derrick and other fixtures erected by a mineral claimant prospecting for oil under locations made before the withdrawal order and before the homestead entry, where the mineral claimant has not abandoned his rights and is seeking to maintain them as against the homestead entryman and the government? In determining this question it should be stated that the homestead entryman acquires no title to the minerals in the land either by the entry or by the patent issued in pursuance thereof. These are reserved to the government.

The act of Congress authorizing such location of lands so withdrawn provides:

> "That lands withdrawn * * * as * * * oil [land] * * * shall be subject to * * * entry * * * under the nonmineral land laws of the United States, whenever such * * * entry * * * shall be made with a view of obtaining * * * title with a reservation to the United States of the deposits on account of which the land was withdrawn * * * together with the right to prospect for, mine, and remove the same: * * * Provided, that all applications to * * * enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this act." 38 U. S. Stats. at Large, 509, § 1 (U. S. Comp. St. § 4640a).

The patent issued in pursuance of the location must contain a similar reservation. The act also authorizes persons acquiring the mineral rights therein from the United States "to mine and remove the reserved deposits" and "re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom." Section 2 (section 4640b). This act of Congress, therefore, does not offer to the homestead entryman a title to the fee, but only to the surface of the ground, reserving such rights in the surface as may be necessary to develop the oil underlying the land. The plaintiff, therefore, is not encroaching upon defendant's rights, but upon the rights reserved to the government. Defendant's claim to the fixtures is upon the theory that they are attached to her land. As a matter of fact they are appurtenant to the mineral rights in the land, and defendant has secured no interest in these rights by her homestead entry. We are not called upon to consider plaintiff's right of possession as against the United States government. The title to both the surface and to the oil rights is still in the United States government. People v. Shearer, 30 Cal. 645; Hutchings v. Low, 82 U. S. 77, 21 L. Ed. 82.

The defendant Nellie Adamson by her homestead entry secured no right to the oil below the surface, nor to the right to prospect therefor which was reserved to the United States government. 38 U. S. Stats. at Large, 509. It follows that she obtained no right to the oil well and mining machinery located upon said claim for the purpose of prospecting for oil, which under our statute (Civ. Code, § 661), and we think under the United States statute (38 U. S. Stats. at Large, 509), were appurtenant to the mining rights and not to the land.

Judgment affirmed.

We concur: SHAW, C. J.; LENNON, J.; SHURTLEFF, J.; SLOANE, J.; LAWLOR, J.

188 Cal. 20

OLSEN v. STANDARD OIL CO.
(S. F. 9311.)

(Supreme Court of California. Jan. 30, 1922. Rehearing Denied Feb. 27, 1922.)

1. Appeal and error 🔑1003—Verdict not disturbed because of weight of evidence.

A verdict in a personal injury action cannot be disturbed on appeal on the ground that the evidence for defendant is of greater force than that for plaintiff.

2. Municipal corporations 🔑706(5)—Finding for plaintiff in automobile collision as to negligence and contributory negligence sustained.

Where plaintiff sustained personal injuries while riding a motorcycle in a collision with defendant's truck, suddenly stopping at a street intersection, evidence *held* to support a verdict based on negligence of defendant and want of contributory negligence of plaintiff.

3. Trial 🔑359(1)—Special finding must be construed in harmony with general verdict if possible.

A special finding must always be construed so as to be in harmony with the general verdict if such construction is reasonably possible.

4. Municipal corporations 🔑706(9) — Special finding in collision case held not inconsistent with general verdict.

Where plaintiff was injured in a collision between the motorcycle whereon he was riding and defendant's truck, suddenly stopping at a street intersection, a special finding, when construed so as to mean that the truck driver gave a stop signal, *held* not inconsistent with a general verdict for plaintiff.

5. Municipal corporations 🔑706(3)—Presumption as to obedience of law held evidence in collision case.

In an action for injuries in a collision between plaintiff's motorcycle and defendant's truck suddenly stopping at a street crossing, the presumption is that plaintiff was traveling at a lawful rate of speed, and on the proper side of the highway, and such presumption is itself a species of evidence.

6. Trial 🔑296(4, 5, 7)—Instruction as to contributory negligence and burden of proof in collision case held not misleading when considered with other instructions.

In an action for injuries sustained in a collision between plaintiff's motorcycle and defendant's truck stopping without warning at a street intersection, an instruction as to contributory negligence and the burden of proof *held* not misleading in view of other instructions given.

7. Negligence 🔑141(8)—Instruction that contributory negligence must "directly" and "proximately" contribute to accident held not erroneous.

An instruction that contributory negligence was not a defense unless it appeared from the evidence that the negligence "directly and proximately contributed to the accident" *held* not erroneous in adding the word "directly" to the word "proximately," the word "proximately" being defined as that which in ordinary natural sequence produces a specific result, no independent disturbing agency intervening, and the word "directly" being defined as "in a direct way, without anything intervening, not by secondary, but by direct, means."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Directly; Proximately.]

8. Appeal and error 🔑1170(9)—Instruction as to contributory negligence if erroneous held harmless under the evidence.

In an action for personal injuries sustained in a collision between plaintiff's motorcycle and defendant's truck at a street intersection, an instruction that to constitute a defense contributory negligence must directly and proximately contribute to the accident, if erroneous, *held* harmless in view of Const. art. 6, § 4½, where there was a special finding that plaintiff could not, even by the exercise of ordinary care, have avoided the collision.

9. Appeal and error 🔑207—Arguments of counsel referring to defendant's wealth not ground for reversal in absence of objection or request for instructions.

In a personal injury accident against a corporation, remarks by plaintiff's attorney in his argument referring to defendant's vast wealth and plaintiff's poverty *held* not ground for reversal, in the absence of objection or request for an instruction to disregard.

In Bank.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by John Olsen against the Standard Oil Company, to recover for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Hans C. Nelson and Redman & Alexander, all of San Francisco, for appellant.

Pierce H. Ryan, of Eureka, for respondent.

SHAW, C. J. The defendant appeals from a judgment in favor of the plaintiff.

The cause of action was for damages alleged to have been caused by the negligence of the defendant, resulting from a collision between the plaintiff, who was riding on a motorcycle, and a truck belonging to the defendant, driven by one of its servants, at the intersection of D street and Sixth street in the city of Eureka. D. street runs north and south. Sixth street runs east and west. Plaintiff was going east on Sixth street toward D street. The truck, going north on D street toward Sixth street, reached the intersection first. It was traveling on the driver's left-hand side of the center line of D street, contrary to law. The truck was 21 feet long, and weighed over 9,000 pounds. When the front end of the truck was a few feet north of the center line of Sixth street, on the intersection, it suddenly stopped. The complaint alleged that the driver gave no signal of his intention to stop. The plaintiff was going at a speed of about 13 or 14 miles an hour, and was expecting to pass to the rear of the truck in crossing the intersection. The motorcycle struck the truck immediately in front of the rear wheel, about 7 feet from the rear end thereof. The plaintiff's contention is that the collision was caused by the negligence of the truck driver in suddenly stopping the truck without giving any adequate signal of his intention to do so. The defendant contends that it was caused by the plaintiff's contributory negligence in traveling along the street at an unlawful rate of speed, and also in approaching the truck at a speed so fast that he would be unable to stop it or turn it in time to avoid the collision in case it had suddenly stopped without warning.

[1] The general verdict of the jury must have been based on the conclusion of the

jury from the evidence that the defendant's truck driver was guilty of negligence as claimed by plaintiff, and that the plaintiff was not guilty of negligence proximately contributing to the accident. The evidence on all the material facts in dispute is in substantial conflict. We cannot disturb the verdict on the ground that the evidence for the defendant is of greater force or weight than that for the plaintiff.

This renders it unnecessary to consider at all the parts of the argument for the defendant based on statements in the testimony favorable to the defendant, but inconsistent with evidence on the same point favorable to the plaintiff. Every fact in favor of the plaintiff which is supported by substantial evidence tending to prove it must be taken as true.

[2] The defendant contends that there is no evidence that the defendant was guilty of negligence, or that the plaintiff was free from contributory negligence. Plaintiff testified that he was traveling at a lawful speed. not exceeding 13 or 14 miles per hour, in approaching and entering upon the crossing; that he saw the truck as he approached and as it was entering the intersection; that the driver gave no motion or other sign indicating his intention to stop; that he intended to pass the intersection to the rear of the truck, and would have done so if the truck had continued on its course, but that the truck suddenly stopped without warning when he was so near to it that he was unable to stop his motorcycle or turn the same to avoid a collision, and that the collision was caused by this sudden stopping of the truck. In this he was corroborated by his sister, Alice Olsen, who was riding behind him on the motorcycle at the time. This evidence is sufficient to support the verdict both with regard to the negligence of the defendant and the contributory negligence of the plaintiff. All the other evidence on the subject merely made it a question for the jury to determine the facts, and its verdict is conclusive on this subject.

Particular questions of fact were put to the jury, and were answered by them. Thereby they found (1) that the plaintiff in the exercise of ordinary care could not have avoided the collision; (2) that the plaintiff would have collided with the truck regardless of whether the driver of the truck had or had not given a stop signal; (3) that at the time of the collision the truck was not moving; (4) that the plaintiff was not going in excess of fifteen miles an hour in approaching the intersection and at the time of the collision; and (5) that the plaintiff was traveling on his right-hand side of the street—that is, on the south of the center line of Sixth street.

The second question and answer aforesaid were as follows:

> "Would plaintiff have collided with said motor truck and sustained the injury complained of regardless of whether the operator of said motor truck had or had not given any warning or audible or visible signal of his intention to stop said truck? Answer: Yes."

[3, 4] Defendant claims that this answer was in effect a finding that the truck driver did give an audible and visible signal of his intention to stop, and that it is inconsistent with any finding of the jury that the defendant's truck driver was negligent. A special finding must always be construed so as to be in harmony with the general verdict if such construction is reasonably possible. The defendant interprets this finding to mean that the truck driver gave an audible and visible stop signal. Even if this be so, it is not necessarily inconsistent with the general verdict. The jury may have concluded that the signal was given too late to enable the plaintiff to operate his motorcycle so as to avoid the collision. In that event the truck driver would be guilty of negligence proximately causing the collision, and the plaintiff would not necessarily have been guilty of contributory negligence. The statute requiring such warning to be given implies that it shall be given at such a time and in such a manner as to be of some use to other persons. If it is not so given it will not constitute the "plainly visible and audible signal" to others likely to be affected by the intended stop that the statute requires. If the jury believed it was given too late it might well have found that the collision would have occurred regardless of the giving of the signal. The form of the question gave the jury no opportunity to find directly upon the question whether it was or was not given. We cannot say, therefore, that this special finding is contrary to the general verdict.

[5] Instruction 20 was as follows:

> "The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence."

The defendant claims that this is erroneous. We think it is correct. The rule that contributory negligence of the plaintiff must be alleged in the answer, or it will not be available to the defendant as a defense, is based on this presumption. So, also, is the rule that the burden of proving it by a preponderance of the evidence is on the defendant. The Code expressly declares that this presumption is disputable that it "may be controverted by other evidence," and that unless so controverted, the jury is bound to find in accordance with it. Code Civ. Proc. §§ 1961, 1963, subds, 1, 33. The instruction is therefore strictly in accordance with the Code on the subject.

[6] The defendant criticizes the instruction that the contributory negligence was an affirmative defense which the defendant must prove by a preponderance of the evidence. That it is so is not disputed. The argument apparently assumes that the jury must have understood it to mean that in deciding the question they could consider only the evidence introduced by the defendant, and that evidence produced by the plaintiff tending to show contributory negligence could not be considered. There was nothing in the instruction on the subject that could be so understood. The court instructed the jury to take into consideration all the evidence in the case, and "consider it all together, and determine from all the evidence in the case and from all the circumstances proven on the trial, as to the weight of the evidence, and return a verdict accordingly." In view of this instruction, it cannot be supposed that the jury could have misunderstood the instruction criticized.

[7] The court further instructed the jury that contributory negligence was not a defense "unless it also appears from the evidence that such negligence of plaintiff, if any, directly and proximately contributed to the accident." Defendant criticizes this instruction on the ground that it adds the word "directly" to the word "proximately." It contends that it is only necessary for the defendant to show that the plaintiff's negligence contributed "proximately" to the accident. The court throughout the instructions on the subject used the phrase "direct and proximate cause" in describing the necessary relation between the negligence proven and the injury. This occurs in the instruction regarding the negligence of the defendant, as well as in that regarding the contributory negligence of the plaintiff. While it may be that the word "directly," in that connection, if taken in some of its meanings, may not accurately describe the idea that the negligence charged and proven must be the proximate cause of the accident, and that it might be advisable, for that reason, not to use it, yet it has a meaning in strict harmony with the word "proximately." The word "proximately" is defined as:

> "That which in ordinary natural sequence produces a specific result, no independent disturbing agency intervening."

The word "directly" is defined as follows:

> "In a direct way, without anything intervening, not by secondary but by direct means." (Webster's Dict.)

[8] The respective definitions are almost identical, and it is not reasonable to suppose that the jury would perceive the difference, when used in the connection in which they appear in the instruction. There is nothing in the character of the evidence which indicates that the jury had any difficulty in the matter. The first special finding was that the plaintiff could not, even by the exercise of ordinary care, have avoided the collision. Consequently, under section 4½, art. 6, of the Constitution, this instruction would not justify a reversal of the judgment, even if it failed to precisely state the causal relation between the negligent act and the injury.

[9] The defendant complains of the misconduct of plaintiff's attorney. The misconduct consisted of references by the plaintiff's attorney in his argument to the jury to the vast wealth of the defendant and the poverty of the plaintiff. These remarks of the plaintiff's attorney were all based on the assumption stated in the argument that the truck driver was guilty of the negligence which caused the accident, and that defendant was clearly responsible for the plaintiff's injuries, and that the plaintiff should not bear all the burden thereof. Defendant's attorneys objected to the remarks, but did not ask the court to instruct the jury to disregard them. This, of itself, is a sufficient answer to the point. Scott v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 682, 12 A. L. R. 1007; People v. Shears, 133 Cal. 159, 65 Pac. 295; People v. Babcock, 160 Cal. 545, 117 Pac. 549.

We find no error sufficient to authorize a reversal.

The judgment is affirmed.

We concur: LENNON, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; WILBUR, J.

188 Cal. 27

SCHWAB v. RICHARDSON, State Treasurer.
(S. F. 2659.)

(Supreme Court of California. Jan. 30, 1922. Rehearing Denied Feb. 27, 1922.)

1. Pleading ⚿350(3)—Submission of case on pleadings without evidence held admission of affirmative allegation of answer.

In an action to recover a franchise tax paid under protest by a domestic corporation engaged in foreign commerce, where defendant's answer denied plaintiff's allegation that the value of its intangible property properly taxable in the state did not exceed $500, and affirmatively alleged the value to be $120,000, the amount of the assessment, plaintiff's submission of the case on the pleadings without evidence was an admission of such affirmative allegation and that the tax was not excessive.

2. Commerce ⚿72—Taxation of intangible property of domestic corporation engaged in interstate commerce not interference with such commerce.

The United States Supreme Court having held that courts look to the substance and effect, rather than the form, of taxation of intangible property of domestic corporations engaged in interstate or foreign commerce, in determining whether interstate commerce is interfered with, in violation of Const. U. S. art. 1, § 8, cl. 3, state taxation of such property located in the state at its actual value does not constitute such interference, though the property derives its value from interstate and foreign commerce, but a different rule prevails as to a foreign corporation the business of which in the state is exclusively interstate commerce.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Edwin Schwab against Friend W. Richardson, as Treasurer of the state of California. Judgment for defendant, and plaintiff appeals. Affirmed.

Morrison, Dunne & Brobeck, of San Francisco (H. W. Clark, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondent.

WILBUR, J. This is an action to recover taxes paid under protest by the Oceanic Steamship Company to the state of California. After answer plaintiff moved for a judgment upon the pleadings, which was denied. At the trial plaintiff submitted the case upon the admission in the pleadings, without offering any evidence upon the issues, and judgment was rendered in favor of the defendant. Plaintiff appeals.

The Oceanic Steamship Company is a corporation organized under the laws of the state of California and engaged exclusively in the business of transporting freight and passengers between San Francisco and the Hawaiian islands and certain foreign countries. The company has maintained offices in San Francisco for the transaction of its interstate and foreign business, but has conducted no other business in this state except the purchase of its fuel and supplies used in its transportation business.

[1] The state board of equalization assessed the franchise of the company, or its "corporate excess" (Miller & Lux, Incorporated, v. Richardson, 182 Cal. 115, 187 Pac. 411), at $800,000, and apportioned $120,000, or 15 per cent. thereof, to California, as representing in the judgment of the board of equalization the proportion of the intangible property of the corporation properly taxable in California. Plaintiff alleged that this value did not exceed $500, but the answer denied that allegation, and affirmatively alleged the value to be the amount of the assessment, to wit, $120,000, and the submission of the case by the plaintiff upon the pleadings without evidence was an admission of this affirmative allegation. See Hale v. Gardiner, 200 Pac. 598. It therefore stands admitted that the tax was not excessive, and if the state has jurisdiction to impose the tax it is a proper exercise of that jurisdiction.

[2] It is contended by appellant that, as the state has imposed a property tax upon the tangible property of the corporation within the state, this tax upon the intangible property of the corporation is, in effect, a tax upon interstate commerce, and therefore violative of the interstate commerce clause of the Constitution of the United States. U. S. Const. art. 1, § 8. Inasmuch as the Supreme Court of the United States has uniformly held that courts look to the substance and effect of such taxation rather than its form in order to determine whether or not interstate commerce is illegally interfered with (Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 698, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 85, 86, 34 Sup. Ct. 15, 58 L. Ed. 127; Kansas City Ry. Co. v. Kansas, 240 U. S. 227, 233, 36 Sup. Ct. 261, 60 L. Ed. 617; Looney v. Crane Co., 245 U. S. 178, 189, 38 Sup. Ct. 85, 62 L. Ed. 230), it would seem clear that state taxation of corporate intangible property of a domestic corporation located in a state at its actual value would not, in fact, constitute such interference, regardless of the fact that such intangible property derives its value from interstate and foreign commerce. See Pullman Co. v. Richardson, 197 Pac. 346, for a discussion of this matter. A different rule prevails as to a foreign corporation when its business in this state is exclusively interstate commerce. People v. Alaska, etc., Co., 182 Cal. 207, 187 Pac. 742. If this question was at any time doubtful, it has been set at rest by decisions of the United States Supreme Court since this case was on appeal.

The decision of that court in Cream of Wheat Co. v. County of Grand Forks, N. D., 253 U. S. 325, 40 Sup. Ct. 558, 64 L. Ed. 931, clearly upholds the authority of the state in imposing the tax in the case at bar. There a domestic corporation which had no tangible, real, or personal property within the state of its domicile, and no paper evidence of intangible property therein, was held taxable in the state of its domicile for its intangible property, which we have called the "corporate excess" or "franchise." Miller & Lux v. Richardson, supra. In the opinion it is said:

> "Its manufacturing, commercial and financial business was conducted wholly without the state; and it had not at any time during any of those years within the state either any tangible property real or personal or any papers by which intangible property is customarily evidenced. Its property, as distinguished from its franchise, is alleged to have been taxed in states other than North Dakota. * * *
>
> "The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that state. As said by Mr.

Chief Justice Taney, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' Bank of Augusta v. Earle, 13 Pet. 519, 588. The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a state may not tax a resident for property which has acquired a permanent situs beyond its boundaries. * * * The limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicile if, like a seagoing vessel, the property has no permanent situs anywhere. Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68. *Nor has it any application to intangible property,* Union Refrigerator Transit Co. v. Kentucky, supra, p. 205; Hawley v. Malden, 232 U. S. 1, 11, even though the property is also taxable in another state by virtue of having acquired a 'business *situs*' there, Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 59. As stated in that case: 'It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint v. Stone Tracey Co., 220 U. S. 107, 146, 162, et seq. Whichever this tax technically may be, the authorities show that it must be sustained." (Italics ours.) Cream of Wheat Co. v. County of Grand Forks, supra.

The power of the state to make this assessment is fully sustained in Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. Ed. 165. In that case the corporation was taxed 2 per cent. upon its net income claimed by the state to have been earned from business carried on within the state. The amount of this business was required by statute to be ascertained in the following manner:

"If the company's net profits are derived principally from ownership, sale, or rental of real property, or from the sale or use of tangible personal property, the tax is imposed on such proportion of the whole net income as a fair cash value of the real and the tangible personal property within the state bears to the fair cash value of all the real and tangible personal property of the company. If the net profits of the company are derived principally from intangible property, the tax is imposed upon such proportion of the whole net income as the gross receipts within the state bear to the total gross receipts of the company."

It was thus determined by the state authorities that 47 per cent. of the net receipts of the company were attributable to business done in Connecticut, although its net receipts in Connecticut were only $42,942.18, as compared with $1,293,643.95 received in other states. It was claimed that the state authorities had violated the interstate provisions of the United States Constitution and the Fourteenth Amendment thereto. Upon the first proposition the Supreme Court said:

"A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commence, even if it takes the form of a tax for the privilege of exercising its franchise within the state. Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 695. This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled. U. S. Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, 252 U. S. 37, 57; Peck & Co. v. Lowe, 247 U. S. 165. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

On the question of the alleged violation of the Fourteenth Amendment by taxing property outside the state, the court in that case said:

"But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in the state. The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state."

It was also held that the taxpayer had the burden of proving that 47 per cent. of its profits was not reasonably attributable to the business within the state. Underwood Typewriter Co. v. Chamberlain, supra. This principle would lead to the conclusion in the case at bar that the admission of the plaintiff that 15 per cent. of its intangible property was located within the state was fatal to its recovery, because there is not only no proof of an unreasonable or unjust application of the law to the facts, but, on the contrary, an express admission of its just application.

The fact that the corporation involved is engaged in interstate commerce does not deprive the state of the power to tax the franchise of a domestic corporation, even though the privilege of being a corporation derived its value in part from interstate commerce. Kansas City, etc., Ry. Co. v. Botkin, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617; Pullman Co. v. Richardson, supra.

The case of Looney, Attorney-General of the State of Texas, v. Crane Co., 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230, relied upon by the appellant, is not inconsistent with the conclusion we have reached in this case. It was held in that case that the proportion of the assets of the corporation taxed in Texas was so greatly in excess of the amount which was justly taxable therein, or could be justly deemed to be located therein, as to constitute a burden upon interstate commerce. It was held that under the facts there presented the tax was a direct burden upon interstate commerce and was imposed upon property which was wholly beyond the confines of the state and not subject to its jurisdiction, and was thus a taking of property without due process of law. No such case is presented here.

From the foregoing decisions it is clear that the state had authority to tax the intangible property of the Oceanic Steamship Company within the state, and that such tax was not a burden upon interstate or foreign commerce prohibited by the federal Constitution.

Judgment affirmed.

We concur: SHAW, C. J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

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55 Cal. App. 760

BAISLEY v. HENRY et al. (Civ. 3559.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1921. Hearing Denied by Supreme Court Feb. 20, 1922.)

1. Municipal corporations 🔑744 — Trustees not liable for acts of policeman appointed by marshal without authority.

The trustees of a city, who were empowered to appoint policemen both under an ordinance and under General Municipal Corporation Act, § 852, as amended by St. 1919, p. 19, are not chargeable with the negligence of a policeman who was appointed by the city marshal without authority.

2. Municipal corporations 🔑183(1)—Appointment of marshal held authorized either by ordinance or general statute.

Even if an ordinance of a city of the sixth class authorizing the appointment of a marshal by the trustees was invalid, the trustees had authority to appoint such marshal under General Municipal Corporation Act, § 852, as amended by St. 1919, p. 19, and a marshal appointed either under the ordinance or under the statute is a subordinate agent employed in the service of the common principal.

3. Municipal corporations 🔑744 — Trustees not liable for negligence of coservant or subordinate agent.

The trustees of a city are not liable in an action of tort to a stranger for the negligence of their coservant or agent.

4. Municipal corporations 🔑744—Officer liable for negligence of inferior officer only if appointment was negligent.

A public officer is not personally liable for the negligence of an inferior officer, unless he, having the power of appointment, failed to use ordinary care in the selection.

5. Municipal corporations 🔑744—Complaint held not to allege negligence in appointment of marshal.

In an action for the negligent shooting of plaintiff by a police officer, brought against the trustees of the city, a complaint alleging that the marshal was duly appointed by the trustees as one of their subordinate officers and agents, and that the marshal negligently appointed the policeman who did the shooting, does not allege negligence by the trustees in the appointment of the marshal.

6. Municipal corporations 🔑744 — Allegation of marshal's negligence in appointing policeman held insufficient.

In a complaint for the negligent shooting of a boy by a policeman, allegations that the city marshal negligently and carelessly appointed the policeman, who was a careless and incompetent person, without alleging in what respect the marshal was negligent, or even that he knew the policeman was incompetent, are insufficient.

7. Pleading 🔑8(8) — Legal conclusions add nothing to complaint.

In a complaint against the trustees of a city for the negligent shooting of plaintiff by a policeman, legal conclusions pleaded respecting the duty of defendants to plaintiff add nothing to the force of the complaint.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Cecil H. Baisley, a minor, by Anna E. Baisley, his guardian ad litem, against C. H. Henry and others. Judgment for defendants when plaintiff declined to amend his complaint after demurrer thereto was sustained, and plaintiff appeals. Affirmed.

Marcus A. Woodward, of Los Angeles, for appellant.

Evans & Pearce and W. E. Evans, all of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiff, a minor, who was negligently shot by a patrolman of the city of Glendale, a city of the sixth class, of which the defendants are the duly elected and acting trustees, brings this action against defendants to recover of them damages for the negligent shooting by the police officer. A general and special demurrer was interposed to plaintiff's complaint. The demurrer was sustained. Plaintiff, declining to amend, appeals from the judgment entered after the order sustaining the demurrer.

The complaint alleges that, prior to the time when plaintiff was negligently shot by the patrolman, the defendants, as the city trustees, had adopted an ordinance—a copy of which is attached to the complaint as an exhibit—whereby five city departments for the administration of the business of the city were established, the appointment of certain city officials was provided for, and their powers and duties defined. One of the five departments thus established, or attempted to be established, is designated in the ordinance as the "Public Safety Department." It is provided that one of the officers of that department shall be the city marshal, who shall be ex officio chief of police, who shall have command and control over the police force, and who shall recommend for appointment such officers as are authorized by the board of trustees, and that, upon appointment by the board, such appointees shall be the authorized police officers of the city, and become members of the police force. The ordinance declares that the chief of police shall be appointed by the board of trustees upon the nomination of the city manager.

The case, as alleged in the complaint. omitting all the merely nonessential allegations and the pleader's conclusions of law, is substantially as follows: Defendants, as such city trustees, duly appointed one J. P. Lampert chief of police and city marshal, under the authority assumed by them by reason of the above-mentioned ordinance, under which ordinance, it is alleged, the trustees ran the city and assumed the power of selecting and appointing subordinate officers; Lampert, by virtue of his appointment as chief of police and city marshal, "did, on or about the 9th day of January, 1920, negligently and carelessly select and appoint one Guy Wilson to the position of a patrolman in and for said city, * * * and did * * * permit and allow said Guy Wilson, who was then and there a careless, reckless, and incompetent person for such position, to assume said position and its duties as said patrolman"; prior to the appointment of Lampert as chief of police and city marshal, defendants, as such trustees, had appointed one T. W. Watson city manager; Watson negligently and carelessly approved, at the time thereof, all the acts and omissions of Lampert, and negligently and carelessly reported Lampert's acts to be satisfactory to him as city manager. Then follows an account of the negligent shooting of plaintiff by Guy Wilson, the patrolman.

[1] We fail to see any theory upon which it can be held that a cause of action has been stated. In the first place, it appears from the allegations of the complaint that the patrolman who shot plaintiff was not appointed by defendants, but by the city marshal, notwithstanding that the power to appoint police officers is vested in the board of trustees, whether we refer such appointive power to the ordinance or to the General Municipal Corporation Act (Stats. 1883, p. 93, and amendments, § 852). But, aside from the consideration that they are not chargeable with the negligence of a subordinate whose appointment was the unauthorized act of another subordinate wrongfully usurping an appointing power with which he was not vested, defendants are not liable under the allegations of this complaint, for the further reason that, as we presently shall show, there is no allegation that they were negligent in the appointment of the city marshal.

[2] Appellant's theory seems to be that the ordinance establishing the five city departments was ultra vires, and that therefore the defendants, without any authority whatever, assumed to carry on and conduct the government of the city in their own way and beyond their legal powers. Hence, so it is argued, the doctrine of respondeat superior applies. We fail to see any force in this argument. In the first paragraph of the complaint it is alleged that at all the times in that pleading mentioned defendants were, and still are, "the duly elected, qualified, and acting trustees of said city of Glendale." and that "each and all of their acts and omissions herefuafter complained of were performed by them under color of said office of trustees and board of trustees in and for said city, and while acting in their official capacity." If, as the complaint alleges, defendants, at all times, were the duly elected, qualified, and acting trustees of the city, and if, as alleged, each of their acts was performed by them in their official capacity, then, at all the times mentioned, defendants were, and were acting as, the agents of the city, and the city marshal was a coservant or subagent, as was also the patrolman, if we assume that he ever was appointed by an authorized agency. For if, as appellant asserts, defendants were without power to adopt the ordinance, then that attempted municipal by-law was a nullity, in which event defendants' powers as trustees must be measured by, and their official acts referred to, the General Municipal Corporation Act, which provides for the appointment of a city marshal and police officers. By section 852 of that act, as amended by St. 1919, p. 19, it is provided that the board of trustees of a city of the sixth class "shall appoint the marshal and * * * may also, in their discretion, appoint * * * such other subordinate officers as in their judgment may be deemed necessary." Section 880 provides that "the department of police of said city or town shall be under the direction and control of the marshal." So that, whether the municipal affairs of the city of Glendale may be deemed to have been administered under the ordinance, or whether, that ordinance being a nullity, the affairs of the city must be deemed to have been conducted under the General Municipal Corporation Act, in either event it appears from the allegations of appellant's complaint that the defendants were the agents of the municipality, and that the chief of police, the city manager, and the patrolman were subordi-

nate agents employed in the service of the common principal—the city.

[3] This being the situation, the doctrine of respondeat superior is inapplicable. As the agents of the city, defendants are not liable in an action of tort to plaintiff, a stranger, for the negligence of their coservant or agent. The rule is that an agent is not, in general, liable to third persons for the misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the appointment of such subagent, or improperly co-operates in the latter's acts or omissions. 2 C. J. 829.

[4, 5] An application of this principle is found in the rule, uniformly recognized, that a public officer is not personally liable for the negligence of an inferior officer unless he, having the power of appointment, has failed to use ordinary care in the selection. Brown v. West, 75 N. H. 463, 76 Atl. 169; Dobbins v. City of Arcadia, 186 Pac. 190. From this it follows that the complaint fails to state a cause of action against these defendants unless that pleading sufficiently alleges that defendants were negligent in the selection of the careless patrolman, or in the selection of the city marshal by whom the patrolman was appointed. But the complaint utterly fails to allege any such negligence on defendants' part. It is true, it alleges that defendants appointed the city marshal, and that the latter negligently and carelessly selected the patrolman; but nowhere does it appear from the complaint that the defendants were negligent in the selection of the city marshal. The allegation is that—

> "J. P. Lampert was duly appointed by said trustees as one of their subordinate officers and agents with power to act for them as such, under the title or designation of chief of police and marshal in and for the city of Glendale."

This is the sole direct averment of the appointment of Lampert by defendants, and in it there is not even a hint that their choice for the office of city marshal was unfit for that office, or that he was careless, or that defendants knew him to be unfit or careless, or that, knowing him to be unfit or careless, they nevertheless, failing to exercise ordinary care, negligently selected him as the city marshal.

[6] Moreover, the allegation of negligence on the part of defendants' subagent, the city marshal, in appointing the patrolman Wilson is not sufficient as against the special demurrer. The allegation is that Lampert, while acting as city marshal, did "negligently and carelessly select and appoint one Guy Wilson to the position of patrolman," and did permit Wilson, "who was then and there a careless, reckless, and incompetent person for such position," to assume the position of patrolman. The averment that Lampert was negligent and careless in the selection of Wilson fails to allege in what respect the former was negligent or careless. It is not alleged that Lampert knew that Wilson was a careless, reckless, or incompetent person, or that Lampert was negligent or careless in that he negligently or carelessly selected a careless, reckless, or incompetent patrolman. All we have is the bare allegation that Lampert did "negligently and carelessly select and appoint one Guy Wilson," with no attempt to show in what respect the selection and appointment was negligently or carelessly made.

[7] There are certain general averments of the complaint, mere legal conclusions, respecting the duty that defendants, as trustees of the city, owed to plaintiff as a resident of the municipality. These allegations add nothing to the force of the complaint. Defendants' duties as trustees are fixed by statute, and may not be expanded by the pleader's conclusions of law.

The demurrer was properly sustained, and the judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

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55 Cal. App. 748

PEOPLE v. BALLAS. (Cr. 581.)

(District Court of Appeal, Third District, California. Dec. 23, 1921.)

1. Criminal law ⚷112(1)—Deposit of forged check to defendant's account did not make defendant's bank his agent so as to make its collection an uttering by defendant in county of drawee bank.

Where there was no understanding between depositor of a forged check and the bank that the check was taken for collection merely, but it was presented with other checks and money to be credited to defendant's checking account, the transaction merely establish the relation of debtor and creditor, and not that of principal and agent, so as to make an uttering by depositors in the county where the drawee bank was located.

2. Criminal law ⚷112(1)—Deposit of raised check to defendant's bank account completes crime of forgery and superior court of county in which drawee bank located is without jurisdiction.

The crime of uttering a forged or raised check was complete when presented to a bank in one county for deposit to defendant's checking account, and no subsequent action by such bank in procuring payment by the drawee bank in another county formed any ingredient of that crime, and the superior court of the latter county was without jurisdiction, notwithstanding the provisions of Pen. Code, § 781, as to the committing of a part of a public offense in one county and a part in another.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

P. J. Ballas was convicted of forgery, and his motion for a new trial denied, and he appeals. Judgment and order reversed.

See, also, 199 Pac. 816.

Alfred S. Ormsby and E. B. Taylor, both of Martinez, A. G. Bailey, of Woodland, and E. E. Gehring, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted in the superior court of Yolo county of the crime of forgery, and prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

The principal ground relied on for a reversal is that the crime, if any, was committed in Contra Costa county, and that therefore the superior court of Yolo county was without jurisdiction. The defendant was charged with uttering a check which had been raised from 65 cents to $65. The question for determination is whether the check was uttered in Yolo county.

[1] The check was drawn on the First National Bank of Woodland, Yolo county, by Jessa Dunsmore. The defendant presented the raised check to the Bank of Martinez in Contra Costa county, and that bank credited the amount thereof to the defendant's deposit account and mailed the instrument to its correspondent in San Francisco. In due course the check was presented to the First National Bank of Woodland and paid; the amount thereof being charged to the account of the drawer. There was no understanding between the defendant and the Bank of Martinez that the latter was to take the check for collection merely, but it was presented with other checks and money to be credited to the defendant's checking account. The transaction did not create the relation of principal and agent between the defendant and the Bank of Martinez, but that of creditor and debtor. Plumas County Bank v. Bank of Rideout, etc., 165 Cal. 133, 131 Pac. 360, 47 L. R. A. (N. S.) 552; Newark G. Co. v. Merchants' Nat. Bank, 166 Cal. 208, 135 Pac. 958; Gonyer v. Williams, 168 Cal. 454; Cabrera v. Thannhauser & Co., 183 Cal. 607, 192 Pac. 45.

[2] Conceding that the acts of the defendant constituted the crime of uttering the raised check in Contra Costa county, respondent contends that—

> "The crime may nevertheless be continued and be committed in any jurisdiction to which its effect extends."

In the case of In re Carr and Dillon, 28 Kan. 1, Dillon presented forged time checks, which were made payable by the Atchison, Topeka & Santa Fé Railroad at its office in Topeka, Kan., to a bank in Kansas City, Mo., and was there paid the amount of the checks. The bank forwarded the checks to the company at Topeka, where they were paid. The court said:

> "Dillon was certainly guilty of the offense with which he is charged in Missouri; but can it be said he was guilty of a like offense each time the checks were transferred to a new holder? We think not. * * * We fully recognize that the power of the state to punish criminals extends to all persons who, being without the state, commit or consummate violations of the penal statutes within our state, 'by an agent or means within the state.' Such persons, although out of the state, are, in contemplation of law, within the state. But where a forgery is perpetrated and uttered beyond the state, and the forger actually obtains the money thereon in another state, and before the false and spurious instrument reaches the limits of the state, the offense is consummated beyond this state, and the forger is not amenable to the provisions of our statute upon coming within the state."

See, also, Regina v. Garrett, 22 English Law and Equity Reports, 607; Thulemeyer v. State, 34 Tex. Cr. R. 619, 31 S. W. 659; Salas v. United States, 234 Fed. 846, 148 C. C. A. 440; Burton v. United States, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482; State v. Pray, 30 Nev. 206, 94 Pac. 218.

Respondent relies upon the provisions of section 781 of the Penal Code, which reads:

> "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

The crime of uttering the raised check was complete when it was presented to the bank in Contra Costa county. No subsequent acts by any person were ingredients of that crime, but, if criminal, were separate and distinct crimes. They were not "acts or effects constituting or requisite to the consummation of the offense." See State v. Pray, supra. From the foregoing authorities it seems clear that the superior court of Yolo county was without jurisdiction.

Appellant urges that the judgment ought to be reversed on the ground of misconduct of the district attorney in his closing argument to the jury. The defendant is a native of Greece, and the district attorney said to the jury:

> "These Greeks, why will they do these things; why will they come into this country and in a little while own acres and acres of land and have lots of money and steal tobacco and sheep, and sell booze all over the country, blind pigging and bootlegging, and if they are caught, come into court and say, 'Why I didn't have to do it, I had money;' why will they come in

our cities here and in a couple of years get independently rich and wealthy off the earnings and profits of fallen women. I don't know why they do it unless it is their greed for money."

Counsel for defendant here interrupted the district attorney and said:

"I cite that as prejudicial error and misconduct on the part of the district attorney, as it is not an issue in this case."

The court said: "Proceed." Respondent does not atempt to justify the conduct of the district attorney, but contends that the appellant is not in a position to complain because no request was made of the court to instruct the jury to disregard the remarks. That the remarks of the district attorney constituted gross misconduct does not admit of doubt, but by reason of the conclusion reached on the question of jurisdiction it is unnecessary to decide whether the appellant is entitled to a reversal on that ground.

The judgment and order appealed from are reversed.

We concur: HART, J.; BURNETT, J.

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55 Cal. App. 734

BOWMAN et al. v. SOUTHERN PAC. CO.
(Civ. 3760.)

(District Court of Appeal, Second District, Division 1. California. Dec. 22, 1921. Hearing Denied by Supreme Court Feb. 20, 1922.)

1. Appeal and error 🔑1036(4)—Substitution of administrator as party plaintiff held harmless where court was dismissed.

Substituting after two years an administrator as a party in place of plaintiff in cause of action stated in one count under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), which limited actions by administrators to two years, was harmless error where such cause of action was dismissed, and cause proceeded under another count not under such statute, and not subject to objection.

2. Limitation of actions 🔑125—Widow and minor children are real parties in interest, and substitution of administratrix for them is not the beginning of a new action.

In an action against a railroad company for damages for master's negligence in treating servant's injuries at its hospital whereby death resulted, the widow and minor children are the real parties in interest, whether the action be brought in their own names or by an administrator, in view of Code Civ. Proc. § 377, and the substitution of the administratrix for the widow and minor children cannot be regarded as the beginning of a new action as respects limitations.

3. Charities 🔑45(2)—Finding that railway hospitals maintained by fees paid by employees were not charities held justified.

Where defendant railroad company by contracts required its employees to pay 50 cents a month as hospital fees, agreeing to furnish them with medical and surgical treatment in case of injury or illness, and, while there was no evidence of profit, there was none to show that the fund was administered as a trust, or that the employees acquired an interest therein, the jury's finding that they were not charitable institutions, and that defendant was responsible for negligence therein, was justified.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Bertha Bowman, widow, and Julia Bowman and others, minors, by their mother, Bertha Bowman, guardian ad litem, against the Southern Pacific Company, for damages for the death of William Bowman, in which an order was made substituting the name of Bertha Bowman as administratrix of the estate of William Bowman, deceased. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

W. Maxwell Burke and J. B. Tatlow, both of Los Angeles, for respondents.

CONREY, P. J. William Bowman was an employee of the defendant, a common carrier doing an interstate business. While employed in the yards of the defendant, in the city of Los Angeles, on the 6th day of May, 1913, Bowman received certain injuries, followed by his death on the second day thereafter. He left as his surviving dependents the plaintiff Bertha Bowman and three minor children. Thereafter, on April 20, 1914, this action was commenced in the name of the parties as shown in the foregoing title, for the benefit of said widow and minor children. The action was tried on issues presented by the third amended complaint and the answer thereto. In that complaint, as well as the original complaint, two causes of action were stated. The first count in each complaint was based upon negligence of the defendant alleged to have caused the accident and resulting injury and death. The second count alleged negligence of the defendant in its treatment of Bowman at its hospital on Crocker street, in the city of Los Angeles, and in conveying him from that hospital to its hospital in San Francisco, and in treatment of the deceased at the hospital in San Francisco, by reason whereof the death occurred.

On the 30th day of April, 1918, pursuant to notice duly given, the plaintiff asked leave of court to amend her complaint by showing the fact of her appointment as administratrix of the estate of William Bowman, deceased, and by omitting the words "Bertha Bowman, widow of William Bowman, deceased," and substituting therefor the name of Bertha Bowman, administratrix of said estate, for the benefit of Bertha Bowman, widow, Julia Bowman, Elsie Bowman, and

Minehard Bowman, minor children of the deceased. Overruling the objections of the defendant thereto, this motion was granted, and the action was thereafter prosecuted in said substituted name.

At the trial of the action the court, on motion of defendant, granted a judgment of nonsuit as to the first cause of action. On the second cause of action the case was submitted to the jury, which rendered a verdict in favor of the plaintiff. Judgment was rendered accordingly, and the defendant appeals from the judgment.

[1] Appellant's first point is that the court erred in allowing the amendment whereby the personal representative of the deceased was substituted for the original parties after the statute of limitations had run against the cause of action. In support of this proposition we are referred to the federal Employers' Liability Act (35 Stats. at L. 65; 8 Fed. Stats. Ann. [2d Ed.] p. 1208 [U. S. Comp. St. §§ 8657-8665]), which relates to the liability of common carriers by railroad to their employees in certain cases. In case of the death of the employee, the action is authorized to be prosecuted by the personal representative of the deceased employee for the benefit of the surviving widow and children of such employee. Section 6 of the act (section 8662) establishes a limitation of two years within which the action must be commenced, counting from the date cause of action accrued. It has been held that, where the federal statute is applicable, the right to recover, if any, is in the personal representative of the deceased, and that no one else can maintain the action. St. Louis, etc., Ry. Co. v. Seale et al., 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; Pecos, etc., Ry. Co. v. Rosenbloom, 240 U. S. 439, 36 Sup. Ct. 390, 60 L. Ed. 730. It may be conceded that the first cause of action in the complaint arose under the federal Employers' Liability Act, and that, on account of the provisions of that act, and in accordance with the decisions above noted, the court erred in permitting the substitution of parties plaintiff at the time when that was done. But, inasmuch as a judgment of nonsuit on that cause of action was entered in favor of the defendant, the error was without prejudice. The cause of action stated in the second count of the complaint is based upon facts occurring in the hospital when the deceased was not engaged in work as an employee of the defendant in its interstate commerce, or any other business of the defendant. The liability of the defendant under this cause of action arises under the laws of California, and not under the federal Employers' Liability Act. The law of this state permits such actions to be maintained by the heirs or personal representatives. Code Civ. Proc. § 377.

[2] And, in such cases as the one now at bar, the beneficiaries are the widow and minor children. These are the real parties in interest, whether the action be brought in their own names or by an administrator of the estate of the deceased. This being so, the substitution of parties as made by the court in this case, so far as the second cause of action is concerned, cannot be regarded in any sense as the beginning of a new action. Indeed, appellant has not suggested anything to the contrary.

[3] Appellant further contends that the verdict of the jury and the judgment entered thereon are contrary to the evidence and contrary to law. The real question is one of law, requiring that the court ascertain whether there exists any liability of a railroad corporation for negligence of physicians employed by it in the course of their treatment of an injured employee in a hospital maintained by the railroad company under the circumstances exhibited in this case. Counsel for appellant claims that the evidence was not such as to justify the jury in determining that the physicians were negligent, or that either of them was negligent, in the premises. That there is strong evidence in their favor need not be denied. There is definite and sufficient evidence the other way—quite sufficient to sustain the verdict of the jury—upon that issue. It is also perfectly clear and undisputed that the physician who had charge of the deceased in the hospital at Los Angeles was a competent physician and surgeon. The same is true of the physician who took charge of the case when the deceased arived at the hospital in San Francisco. This establishes the fact that the defendant used due care in the selection of these physicians and surgeons. The gist of the matter is that, according to the evidence produced by the plaintiff in support of that contention, the physician in the hospital at Los Angeles was negligent—particularly in causing the patient to be removed from Los Angeles to San Francisco under the conditions existing at the time of such removal, and that, according to this evidence, the death of the patient was proximately caused by such negligence. This brings us to the final question, which is whether or not the defendant, after using due care in the selection of a physician, is liable for his negligence.

The evidence is somewhat vague in its definition of the conditions under which the defendant maintains the hospitals in which Bowman received treatment, and concerning the obligations assumed by the defendant towards its employees with respect to their right to receive medical or surgical care when they have received injuries in the course of their employment. It does appear that the defendant maintained the Crocker Street Hospital in Los Angeles, and also maintained a general hospital at San Francisco "for the entire system of the Southern Pacific," and employed physicians to treat and care for patients in its hospitals; that the employees of defendant paid a hospital fee of 50 cents per month, which was regularly taken out of their pay checks. The deceased made these payments. According to testimony of an employee of the defendant, who was called as a witness by the plaintiff, the defendant was in the habit of taking 50 cents per month from each of its employees to cover hospital, and medical service. The Southern Pacific Company spent that money in support of the hospital, nurses, and all that goes with a hospital. If a man came into the service of the railroad, he did it with the understanding that he would pay this 50 cents a month; and if he did not pay it, he would leave the service of the company. It was a verbal expression between the employing officer and the employee on entering the service. It was for hospital attention whether he was injured in the service or whether he was sick from natural causes. He would get medical treatment that his case called for. They merely told a man that this company maintained a hospital, and that the dues were 50 cents a month.

Apparently the liability of an employer for the negligence of its physicians or surgeons, under the circumstances now presented, has not been limited and defined by decision in this state. In Brown v. La Société Francaise, 138 Cal. 475, 71 Pac. 516, the Supreme Court referred to certain decisions which "relate to hospitals maintained by railroad companies for the free treatment of its employees, partly supported by monthly deductions from the pay of the latter, and partly by the company, which, it was held, are to be regarded as charitable institutions," and the companies were held not liable for the negligence of physicians selected by them for service in such hospitals. The court also noted that these views have been questioned elsewhere, and then remarked that the question need not be determined in the case when under consideration. The same decisions, together with a number of later cases, are brought together in a note found in 14 Ann. Cas. 749. These in large part are identical with the decisions quoted in the briefs of counsel in the present case. According to many decisions, it has been held that, where a master conducts a hospital for the use of his servants, not for purposes of gain, but for charitable purposes merely, he is not liable to an employee for injuries caused by the negligence of the physicians or attendants, unless reasonable care was not used in their selection; that, if a railroad company does not use reasonable care in the selection of the persons who have charge of the patients in such a hospital, and if it fails to select skillful and competent surgeons, physicians, and attendants, it may be required to respond in damages to any employee who has been injured by such incompetent or unskillful physicians, surgeons or attendants; that, if the hospital and medical department of an employer are not conducted for purposes of profit, the enterprise remains a charity, notwithstanding the fact that it is supported by contributions regularly taken by the company out of the pay of its employees. A leading case to this effect is Union Pac. Ry. Co. v. Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581. But there are well-reasoned cases which hold that, where a railroad company, under circumstances like those indicated by the evidence here, conducts a hospital as part of a relief department, such relief department is a business arangement on the part of the company; that the hospital is not a charity; that the contributions of the railroad employees are not voluntary; and that the physicians and attendants of the hospitals are agents of the company. Consequently, it is further held that the company is liable for the negligent acts of the physicians employed. Phillips v. St. Louis, etc., R. R. Co., 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742; Texas & Pacific Coal Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173. In the Texas case last cited, the evidence showed affirmatively that the money paid by the employees or reserved by the company yielded the company a net profit which went to its credit in the bank, together with the other moneys of the company. So it was held that this was not a trust fund in which the employees had any permanent or substantial interest. All the company had to do to rid itself of any such claim was to rid itself of such employee.

> "The true relation between the company and its employees, as we understand it, was this: In consideration of a reduction of the wages of all the men employed and the profit to be made by the company, it bound itself to furnish medical treatment to such of them as should get hurt or become sick while working for the company. It should, therefore, bear the loss of improper treatment, since the law implies in such cases an undertaking to give proper treatment. So far from showing the creation of a trust fund for charitable purposes, the record suggests a monopoly, with accrued profits, in taking care of the sick. At all events, we think it will bear the construction which we understand the jury to have given it."

In the case at bar there is no evidence that there was, or that there was not, any profit in the administration of the relief department of the defendant. In this alone it differs from the Texas case. But, in the absence of any evidence directly on this point, the jury was authorized to infer from the facts which were proved that the defendant collected these contributions from its employees and held the same as its own funds, and that, by the payment of these amounts, the employees did not acquire any permanent or substantial interest in the moneys paid by them as constituting a trust fund. From the employment itself, and the payment of the contribution, the employer bound itself by implied contract to furnish medical or surgical treatment to the employee if he was injured or suffered illness while working for the company. If there were additional facts from which it should have been inferred that the funds collected constituted a trust fund, and that the hospital was operated solely as a charity, those facts should have been shown by the defendant. Prima facie, the inference runs the other way. Upon the record here presented, we are of the opinion that the hospitals of the defendant were not charitable institutions, and that the defendant is responsible for the negligence of the physician employed by it.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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55 Cal. App. 789

BOWMAN et ux. v. PAYNE. (Civ. 2380.)

(District Court of Appeal, Third District, California. Dec. 28, 1921. Hearing Denied by Supreme Court Feb. 23, 1922.)

1. Pleading 🔑427—Striking of issue of fraud from complaint immaterial where contained in answer to cross-complaint.

It could not be contended that issue of fraud was not tendered by plaintiff's pleadings, though on motion of defendant, after the evidence was submitted, allegations of fraud in the complaint were stricken out, where the same averments were found in the answer to defendant's cross-complaint.

2. Pleading 🔑433(6)—Not to be challenged after trial and findings upon theory that it was sufficient.

Where a cause was tried upon the theory that issue of fraud was as definite and complete as found by the court, the pleading could not thereafter be challenged, though defective in not specifically averring that defendant's representation was false and known by him to be false and made to deceive plaintiffs and to induce them to enter into the agreement and that, relying upon such representation and believing it to be true, plaintiffs entered into the agreement.

3. Waters and water courses 🔑158(1)—Evidence as to contract held to sustain finding of misrepresentation and reliance thereon.

In action to have it adjudged that plaintiffs were owners of right to water of a creek, evidence *held* sufficient to sustain a finding that defendant stated that a certain instrument would give plaintiffs the right to use the water, that he knew such statement was false and made it with the purpose of inducing plaintiffs to execute the instrument, and that plaintiff, induced by such representation, signed the instrument in reliance upon such statement, and that plaintiff was justified in relying thereon.

4. Contracts 🔑94(7)—Misrepresentations as to legal effect held fraud warranting setting aside of instrument.

Where defendant fraudulently represented that rights of parties would not be altered by the execution of a certain instrument, knowing such representation to be false and making it with the purpose of inducing plaintiff to sign the instrument, when the instrument in fact deprived plaintiff of his rights, and the result was a misapprehension in the mind of plaintiff, which was known to defendant, the instrument was properly set aside for fraud, under Civ. Code, §§ 1572, 1578, subd. 2.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by A. J. Bowman and wife against H. G. Payne. Judgment for plaintiffs and defendant appeals. Affirmed.

C. S. Baldwin, of Alturas, for appellant.

Oscar Gibbons, of Los Angeles, and A. K. Wylie, of Alturas, for respondents.

BURNETT, J. The action was brought to obtain a judgment of the court that plaintiffs are the owners of a right to the use of the water of Mill creek flowing through a certain ditch, which is described in the complaint, for the irrigation of their lands, and that defendant has no right or interest in said water except as to that part which drains and flows off of plaintiffs' said lands into the South fork of Fitzhugh creek, and that said defendant and his successors be enjoined from interfering in any manner with the use of said water by plaintiffs, or of impeding or obstructing the flow of the same or any part thereof to and upon the said lands of plaintiffs, and that a certain agreement entered into between plaintiff A. J. Bowman and defendant on the 10th day of June, 1918, be adjudged to be fraudulent and void, and that by the decree of the court the said instrument be canceled and set aside. Certain interrogatories were submitted to a jury and were all answered in favor of plaintiffs. These special findings were adopted by the court and a decree entered in compliance with the prayer of the complaint. The appeal is from the judgment. The main controversy revolves around said instrument of June 10, 1918, which is in form as follows:

"This agreement, made the 10th day of June, A. D. 1918, by and between H. G. Payne, of the county of Modoc, state of California, party of the first part, and A. J. Bowman, of the same county and state, party of the second part, witnesseth, that whereas, the party of the first part for many years has claimed and used a water right out of Mill creek, the point of diversion being about 14 miles to the east of the lands of the party of the first part in said county and state.

"And whereas said party of the first part has and claims the right to run the waters thus diverted from Mill creek down the channel of Fitzhugh creek, either through the North fork or through the South fork thereof, to the head of the ditch leading from said Fitzhugh creek to the lands of said party of the first part,

"And whereas the parties hereto have heretofore agreed that if said party of the first part would run said waters down the North fork of said Fitzhugh creek, that the party of the second part would look after and keep in repair the ditch by means of which said waters were diverted from said Mill creek to said Fitzhugh creek.

"Now therefore it is agreed, that if the said party of the first part shall continue to run the waters of Mill creek to which he is entitled down the said North fork of Fitzhugh creek, the party of the second part shall, after the ditch leading from Mill creek to Fitzhugh creek has been opened and put in running condition at the beginning of each irrigating season by the party of the first part, keep said ditch in repair and the waters of the party of the first part running therein during the remainder of each summer season,

"And it is further agreed, that in consideration of the premises, the party of the second part, his heirs and assigns shall and will make no claim whatever to the waters of said Mill creek adverse to the claim and use of the party of the first part, nor to the ditch through which said waters are diverted.

"The party of the second part hereby conveys and concedes that the party of the first part is entitled to divert from the waters of Mill creek for his own use, 117 miners inches of water, measured under a four inch pressure, the same to pass through said ditch and down the channel of the North fork of Fitzhugh creek, and past the premises of the party of the second part, freely and without adverse claim or obstruction on the part of the party of the second part, his heirs and assigns.

"Witness the hand and seal of the party of the second part the day and year first above written. A. J. Bowman."

For the establishment of their claim to the use of the water flowing through said ditch plaintiffs relied principally upon an executed parol agreement with defendant; and as the sufficiency of the evidence to support the finding in that respect is not challenged, we may not notice this feature of the case further than to say that it falls clearly within the principle announced and discussed in Stepp v. Williams, 198 Pac. 661.

As to said instrument of June 10th the jury found that Bowman did not understand the effect of said document, and that he was induced to sign it by the false representations of Payne. The further specific finding of the court was:

"That at the time of the signing of said instrument said Bowman did not understand the same in this:

"That at said time said Bowman believed that by the terms of said instrument, he the said Bowman, was given therein the right in the future to continue to use all of said Mill creek waters under the terms of the agreement of 1899 above mentioned; and he further believed at said time, that said instrument did not affect the existing rights of either of plaintiffs, or of either of them in said waters, or any part thereof.

"That at the time of signing of said instrument, and immediately prior thereto, said H. G. Payne informed said Bowman that by the terms of said agreement, no existing rights of either of plaintiffs in said waters of Mill creek were effected thereby.

"That said statement made by H. G. Payne as to the contents of said instrument, was made by said Payne for the purpose of inducing and did induce said Bowman to sign said agreement.

"That at the time of making said statement, said Payne knew the same to be false."

It is further specifically found that Bowman believed said representation and relied upon it in the execution of said instrument.

[1, 2] One point made by appellant is that the issue of fraud is not tendered by the pleadings of plaintiffs. It is true that, on motion of respondents, after the evidence was submitted, the allegations of fraud in the complaint were stricken out; but the same averments are found in the answer to appellant's cross-complaint, and hence the contention is without merit.

It is also claimed that fraud is not sufficiently pleaded. The substantial part of the criticized paragraph is as follows:

"That the said A. J. Bowman did not know at the time he signed said agreement, that he was conveying away any of the plaintiffs' rights to said waters of Mill creek flowing in said ditch, nor did he intend so to do; and that his signature to the said agreement was brought about and wholly caused by the fraudulent misrepresentations of the said defendant as aforesaid, in this, that the said defendant falsely, and fraudulently taking advantage of the fact, that the said plaintiff A. J. Bowman, did not and could not comprehend the meaning of said agreement, falsely and fraudulently represented to the said A. J. Bowman, that said agreement was simply to evidence the rights of said defendant in the waters of Mill creek, flowing in said ditch, and did not take away from said plaintiffs or either of them any rights they had to the use of the waters of Mill creek, flowing in said ditch, or effect their rights in any way therein; whereas in truth and in fact, the said agreement upon its face shows that the said plaintiffs by the said act of said A. J. Bowman has disclaimed and renounced all right to the use of said water, and has burdened himself with the servitude of keeping said ditch in repair during each and every year without receiving any consideration therefor."

It may be admitted that this statement of fraud is defective; that it should have been more specifically averred that the representation was false and known by Payne to be false; that it was made to deceive Bowman and to induce him to execute the instrument, and that solely relying upon said representation, and believing it to be true, Bowman executed said instrument; but there was an attempt to set out the essential elements of fraud and the imperfection in form was waived by the failure to object to the evidence upon the ground that it was not within the pleadings. In other words, the cause was tried upon the theory that the issue was as definite and complete as found by the court, and, under such circumstances, the pleading is not thereafter allowed to be challenged. It may be added that the finding is not to be overthrown simply because it is more specific than said allegation of fraud.

[3] The question, though, still remains whether the evidence supports the findings which we have set out, and, if so, does the situation therein revealed constitute fraud that will invalidate the instrument?

As to the sufficiency of the evidence we notice, first, the following testimony of Mr. Bowman:

> "Q. Who told you, you were to have the use, if any one? A. Mr. Payne. Q. What did he say as to the effect it would have, or what did he say about what you could or could not do about this water if you signed this? A. If I signed it, I should have the use of the water just the same as I had always had, and if I did not sign it, I would be in a law suit. * * * Q. What did he say about that? A. He told me I should have the same use of the water as I had always had. Q. Did you believe him when he said that? A. Yes, sir; I had no reason to disbelieve him."

The foregoing is sufficient, of course, to show that the false representation was made and that Bowman relied upon it. That Payne knew it to be false follows from the fact that he was familiar with the terms of the instrument, and had consulted with a competent attorney who drew said instrument in accordance with Mr. Payne's direction. Since the trial judge reached the conclusion that Mr. Payne made said representation and knew it to be false, the inference would be irresistible that the representation was made with the purpose and intention of inducing Bowman to execute said instrument. The writing itself indicates, indeed, that some inducement was offered to Bowman for his signature. As we have seen he therein engaged to "keep the ditch in repair and the waters of the party of the first part flowing therein during the remainder of each summer season." There would be no reason why he should do this if he were not to be permitted to use the water. His land was not riparian to either fork of Fitzhugh creek and it would be immaterial to him whether the water should flow through the North or South fork to the land of appellant unless respondents should continue to divert the water from said North fork.

The attorney who drew the instrument testified that there was nothing in the instrument which offered any inducement to Bowman to sign it. As to that the record shows the following:

> "Q. There was not any provision in this document that would assist Mr. Bowman under any condition was there? A. As I understood it, he had to rely on this permission that was given him by Mr. Payne. Q. Why didn't you embody that permission in the contract, so that Mr. Bowman would have something to work on? A. I could not say why I did not do it. Q. As a matter of fact, that was the only paragraph which would bind A. J. Bowman in that instrument, or which would show that he was to get any consideration for signing that agreement at all, wasn't it? A. So far as that agreement is concerned; yes, sir. Q. You knew that paragraph did not really bind Mr. Payne to do anything? A. Yes, sir; I knew it."

It is only fair, however, to say that the witness, by the use of the term "permission," did not refer to the use of the water in controversy by respondent, but of additional water that might be secured by an enlargement of the ditch.

As to the showing of actual fraud, the only possible ground of debate would seem to be whether Bowman was justified in relying upon said representation. In this connection it is to be remembered that he was not represented by counsel and that he had the utmost confidence in the attorney who drew the instrument and appeared for Payne in the whole proceeding. It may be added that said attorney had previously represented Bowman in certain transactions, and the latter had no reason to doubt that he would be correctly informed as to the effect of the instrument. Besides, Bowman was unfamiliar with legal terms and was a man of "meager understanding," as found by the court. Under the circumstances, it cannot be said that his conduct was unreasonable in trusting to the representation, and it would be inequitable to permit Payne to take refuge under the plea that Bowman had no legal right to accept as true the false statement that was made. Bowman, indeed, heard the document read by the attorney, but it can be readily understood how this would not be likely to remove the impression created by the oral representation.

[4] The remaining consideration is whether such fraud justified the court in setting aside the instrument. In this connection, it may be a disputed point whether the representation was as to a matter of fact or a question of law. If the language of Payne is to be interpreted as a statement that the instrument contained a clause that it did not contain, then, of course, it related to a matter of fact and falls within the provisions of section 1572 of the Civil Code. But, as seems more probable, if it related to the legal effect of the instrument, it involves a question of law rather than of fact. At any rate, the result was a misapprehension in the

mind of Bowman as to what his legal rights would be, such misapprehension being known to Payne and caused by his misrepresentation and which he made no effort to rectify; and, in this view of the case, subdivision 2 of section 1578 of said Code may apply.

The decisions are also to the effect that such mistakes furnish sufficient ground for relief. In the early case of Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540, it was held that, a mistake of law, "accompanied with special circumstances, such as misrepresentation, under influence, or misplaced confidence," is a sufficient basis for relief.

As to a misrepresentation in reference to a matter of law, it was said in Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126:

> "Where one who has had superior means of information possesses a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant, and has not been in a situation to become informed, the injured party is entitled to relief, as well as if the matters represented were matters of fact."

See, also, Douglass v. Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; Rued v. Cooper, 119 Cal. 463, 51 Pac. 704; Harding v. Robinson, 175 Cal. 534, 166 Pac. 808.

In the last of these cases is a discussion of the various kinds of mistake touching a written instrument of which a party may complain, and of one of these it is said:

> "It may be a mistake entertained by the plaintiff with the knowledge of the defendant arising under circumstances which impose the duty upon the defendant to correct the plaintiff's error. Defendant's failure to do so is itself a species of fraud and is treated as fraud, and under our definitions, therefore, falls in the category of fraud and not of mistake."

Of course, this case presents a stronger appeal to a court of equity than that situation for the reason that the mistake herein was caused by the willful and false representation of appellant.

Under the facts as we must regard them, in view of the findings of the trial court, it would be a reproach to the law to hold that said instrument could not be set aside.

Other findings need not be considered, as we deem the foregoing decisive of the case. The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

(56 Cal. App. 67)

PEOPLE v. LUSK et al. (Cr. 583.)

(District Court of Appeal, Third District, California. Jan. 6, 1922.)

Criminal law 🔑1130(4)—On failure of defendant to appear after taking an appeal, the judgment must be affirmed.

Under Pen. Code, § 1253, providing that the judgment may be affirmed if the appellant fails to appear, but can be reversed only after argument, though the respondent fails to appear, where defendants appealed, but filed no briefs and made no appearance, the judgment must be affirmed.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Cyrus Lusk and William Earp were convicted of robbery, and they appeal. Affirmed.

S. Luke Howe, of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants appeal from judgments of conviction of the crime of robbery and from orders denying their motions for new trials.

The transcript was filed in this court August 4, 1921. No briefs have been filed in behalf of appellants. The cause was regularly placed on the calendar of January 5, 1922, for oral argument. No appearance was made for either appellant. The appeal is submitted on the record on motion of the respondent without argument. Section 1253 of the Penal Code provides:

> "The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear."

Under the law "but one disposition can be made of the case in its present condition; it can be affirmed." People v. Gehrig, 7 Cal. Unrep. 149, 72 Pac. 717. A careful examination of the record, however, discloses no prejudicial error in the conduct of the trial, the rulings of the court, or the instructions to the jury. The evidence of the defendants' guilt is positive and ample to sustain the conviction.

The judgments and orders appealed from are affirmed.

We concur: BURNETT, J.; HART, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

55 Cal. App. 687

PEOPLE v. WIELER. (Cr. 918.)

(District Court of Appeal, First District, Division 2, California. Dec. 16, 1921. Hearing Denied by Supreme Court Feb. 14, 1922.)

1. Constitutional law 🔑250—Insurrection and sedition 🔑2—Syndicalism statute not invalid.

Criminal Syndicalism Law, penalizing acts done to accomplish an industrial or political change, is not invalid for not penalizing the same acts if done for the purpose of maintaining or perpetuating the same industrial or political condition.

2. Constitutional law 🔑46(1)—Objection to validity of Criminal Syndicalism Law not available where facts present no such question.

Objection that under the terms of Criminal Syndicalism Law one could not destroy his own property without becoming amenable to the statute cannot avail in a prosecution where the facts do not present such question.

3. Criminal law 🔑13—Criminal Syndicalism Law not void for indefiniteness.

Criminal Syndicalism Law is not void for not defining "crime," "unlawful method of terrorism," etc.; the statute being interpreted from decisions and the Code, and there being no constitutional requirement that rules of interpretation be provided within the bounds of each act.

4. Criminal law 🔑619—Consolidating information under Criminal Syndicalism Law with indictment later returned not error.

Consolidating an information charging defendant with violation of Criminal Syndicalism Law, § 2, subd. 3, with an indictment later presented, was not error; such consolidation being authorized by Pen. Code, § 954.

5. Criminal law 🔑1166(1)—Where acquittal was had on information consolidated with indictment, defendant could not complain of consolidation.

Where an information under the Criminal Syndicalism Law had been consolidated with an indictment later returned, any complaint defendant may have had from the consolidation fell with the acquittal charged in the information.

6. Insurrection and sedition 🔑2—Indictment for criminal syndicalism held good.

An indictment for criminal syndicalism charging that defendant did "organize and assist in organizing, and were, are, and knowingly became members of, an organization * * * organized and assembled to advocate, teach, aid, and abet criminal syndicalism," was good against demurrer that it did not give a name to the organization and that it failed to name those "induced to join."

7. Indictment and information 🔑110(3)—Indictment pleading words of statute but not specifying circumstances indicating what was intended held insufficient.

Counts in an indictment for criminal syndicalism, pleading the words of the statute without specifying any particular circumstance to indicate what was intended, *held* insufficient and demurrable.

8. Insurrection and sedition 🔑2—Where defendant stood in position of one indorsing principles of I. W. W., evidence of principles properly received.

In a prosecution for criminal syndicalism, where defendant stood in the position of one indorsing and advocating the principles of the I. W. W. organization, it was proper to receive evidence showing what the principles were.

9. Criminal law 🔑1171(1) — Argument of state in syndicalism prosecution held prejudicial.

In a prosecution for criminal syndicalism, where the evidence showed that defendant justified the tactics of the I. W. W., and the subject-matter of the tactics of that organization was the essence of the prosecution, and where the defendant, as a member of the committee on resolutions, advocated the release of every "political or class war prisoner," the reference in argument by the prosecution to the "Centralia affair" and the "Seattle strike," whether misconduct or not, was not prejudicial.

10. Criminal law 🔑761(6)—Refusal of instruction assuming defendant did not assist in organizing Communist Labor party held not error.

In a prosecution for criminal syndicalism, where there was no evidence that defendant's Alameda branch of Communist Labor party was organized in Chicago, refusal of an instruction that assumed the party had been organized in Chicago and that thereafter defendant joined in Oakland, and therefore did not assist in organizing the party that was already organized, was not error.

11. Criminal law 🔑814(5) — Requested instruction on facts not in issue properly refused.

In a prosecution for criminal syndicalism under the Criminal Syndicalism Law, passed April 30, 1919, where the theory of the prosecution was that defendant committed the acts charged on November 9, 1919, and no evidence was tendered by the prosecution of defendant's acts prior to the passage, refusal of instruction addressed to such facts not in evidence was not error.

12. Insurrection and sedition 🔑2—Requested instruction that conspirator not responsible for acts carrying out conspiracy properly refused.

In a prosecution for criminal syndicalism, request for instruction that a conspirator is not liable for the acts committed by his fellow conspirators during the life of, and in carrying out, the conspiracy, was properly refused because not stating correct law.

13. Criminal law 🔑814(5), 829(3)—Refusal of instruction on facts not in evidence and covered by charge given not error.

In a prosecution for criminal syndicalism, where the offense defendant was on trial for had been affirmatively covered, and the jury were instructed that defendant could not be convicted because he held certain opinions, it was not error to refuse defendant's instruction on facts not brought out by the evidence to the effect that defendant was not on trial for, and could not be convicted for, the opinions which he held.

14. Insurrection and sedition 🔑2 — Refusal of instruction on rights of labor unions not error.

In a prosecution for criminal syndicalism, refusal of an instruction on the rights of labor unions was not error.

15. Criminal law 🔑829(3), 830—In prosecution for syndicalism, refusal of instruction not correctly defining "willfully" not error, when court had fully instructed on the subject.

In a prosecution for criminal syndicalism, where, under Criminal Syndicalism Law, "willfully" was a part of the offense set forth in the indictment, refusal of a requested instruction which did not define "willfully" as provided in Pen. Code, § 7, subd. 1, was not error, where the court had instructed fully on the subject.

16. Insurrection and sedition 🔑2—Refusal of instruction on right to sympathize with Bolsheviks not error.

In a prosecution for criminal syndicalism, refusal of an instruction addressed to the right of the individual to sympathize with the Bolsheviks was not error.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

J. G. Wieler was convicted of criminal syndicalism, and he appeals. Affirmed in part, and reversed in part.

Wm. B. Cleary, of San Francisco, and T. L. Christianson, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

STURTEVANT, J. This is a prosecution for criminal syndicalism. An information was presented against the defendant, J. G. Wieler, charging him with the violation of subdivision 3 of section 2 of chapter 188 of the Statutes of 1919. Later an indictment was presented against the defendant Wieler and seven others.

The defendant demanded to be tried separately on the indictment and his motion was granted; but thereafter, on motion of the prosecution, the action based on the information and the action based on the indictment were consolidated and the trial was had on the consolidated actions. The defendant was acquitted on the charge contained in the information, but was convicted on the charges contained in the indictment. He moved for a new trial, which motion was denied, and he has taken an appeal from the judgment of conviction and the order denying him a new trial. The points on which he bases his application for reversal are: (1) The statute of April 30, 1919, is unconstitutional; (2) the court erred in granting the motion to consolidate the two cases; (3) the court erred in overruling the defendant's demurrer; (4) the court erred in receiving over the objection of the defendant the documents and literature of the I. W. W. and books on syndicalism; (5) the court erred in receiving over the objection of the defendant evidence of the tactics, program, and principles of the I. W. W. organization; (6) the evidence was insufficient; (7) the court erred in denying defendant's motion to advise a verdict of not guilty when the people rested; (8) the court erred in failing to admonish the jury to disregard a part of the closing argument of the district attorney; and (9) the court erred in refusing to give instructions 9, 10, 12, 18, and 19, as requested by the defendant.

[1] 1. Counsel for plaintiff points out that the act of April 30, 1919 (Stat. p. 281), and known as the Criminal Syndicalism Law, penalizes certain acts done to accomplish an industrial or political change, but does not penalize the same acts if done for the purpose of maintaining and perpetuating the same industrial or political condition. In other words, the attack is that certain things could have been penalized which have not been penalized. The same identical argument was made in the case entitled In re Miller, 162 Cal. 687, 124 Pac. 427. The court was considering the act of 1911 (page 437), forbidding the employment of women for more than eight hours and had in certain places. At page 697 of 162 Cal., at page 430 of 124 Pac., the court says:

> "The next objection is that the act is special because there are no reasons for making the restriction as to the particular employments mentioned in the act which do not apply with equal force to other similar occupations. There may be, and probably are, other occupations followed by women which are equally injurious to their health, and which should also be regulated. But if this be true it does not make the law invalid. If there are good grounds for the classification made by the act, it is not void because it does not include every other class needing similar protection or regulation."

See, also, State v. Hennessy, 114 Wash. 351, 195 Pac. 211, 215.

[2] Again, complaint is made that under the terms of the statute one could not destroy his own property without becoming amenable to the terms of the statute. Assuming, for the purposes of this appeal, that the statute may be so construed, the facts of this case present no such questions, and those questions may be taken up when a case arises which involves such matters.

[3] In this same connection it is contended that the statute is void for indefiniteness. Counsel rests this objection on the fact that

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the statute does not define "crime," "unlawful method of terrorism," "terrorism," "justify," "change in industrial ownership or control," "political," etc. If any difficulty arises in the interpretation of the statute, and it becomes necessary to ascertain the meaning of those words, the decisions and Code provisions contain numerous passages to assist the courts, and there is no constitutional requirement that such rules be provided within the bounds of each particular statutory enactment. State v. Hennessy, supra.

[4, 5] 2. The court did not err in ordering the case consolidated. Section 954 of the Penal Code expressly authorized the order. Furthermore, the defendant was acquitted on the charge stated in the information, and if he ever had any cause of complaint the same fell to the ground with such acquittal. Cummins v. People, 4 Colo. App. 71, 34 Pac. 734, is no authority to the contrary. It was based on the Colorado statute that had been construed to mean that "with reference to felonies * * * only one transaction can be embraced in a single indictment." That rule is the same rule that obtained in California before the amendment of 1915 (St. 1915, p. 744), to section 954 of our Penal Code. Before that amendment to our Code the Cummins Case might be said to be in point, but not since the amendment.

[6] 3. *The Indictment.* The act approved April 30, 1919 (Stats. p. 281), in section 2 thereof, provides that a person is guilty of criminal syndicalism (a) if he advocates it; (b) if he justifies it; (c) if he prints it; (d) if he becomes a member of a body of criminal syndicalists; or (e) if he practices criminal syndicalism. In this case the printing of it was covered by an information and the defendant was acquitted thereon. In the indictment the defendant and others were charged with each of the remaining classes of syndicalism, as above enumerated. Each class was the subject of a separate count. To each count contained in the indictment the defendant demurred. It should be stated that the indictment is the same instrument which a codefendant took to the Supreme Court. People v. Taylor (Sup.) 203 Pac. 85.

The first count charged that the defendant did "organize and assist in organizing, and were, are, and knowingly became members of, an organization, society, group, and assemblage of persons organized and assembled to advocate, teach, aid, and abet criminal syndicalism." The defendant complains that the pleading does not give a name to the organization, such as Communist Labor party. It was not necessary to a good pleading that a name be given to the conspiracy. Many conspiracies have no names. It is not to be presumed that every unlawful body necessarily has a name. Moreover, from the very beginning of the trial both counsel and the court at all times spoke of the name of the body, etc. The jurors were examined as to their knowledge of the Communist Labor party, and the opening statement made by the prosecution was full and complete on the subject. It is contended, also, that the indictment does not name those "induced to join." Such element is no part of the statute—the statute does not refer to "inducing new members." The charge is that the defendant "became a member of," and that he "organized," the group. Those two acts were in violation of the terms of the statute. We think that count 1 was well pleaded and that it was not subject to the attack made by the defendant.

[7] The second, third, and fourth counts pleaded the words of the statute without specifying any particular circumstance to indicate to a person of common understanding what was intended. Each of those counts was insufficient, and the demurrers should have been sustained. People v. Taylor, supra.

[8] 4 and 5. We have carefully read the record, and we find no error whatever in the reception of evidence. The defendant, on November 9, 1919, stood in the position of one indorsing and advocating the tactics, program, and principles of the I. W. W. organization. Such being the fact, it was entirely proper to receive evidence showing what were the tactics, program, and principles of the I. W. W. organization. This much the trial court did and nothing more. The court did not err in receiving the evidence complained of. People v. Taylor, supra.

6. *The Sufficiency of the Evidence.* If this were the first appeal based on the matters herein involved, we would consider it necessary to state somewhat at length the evidence. But this appellant was a codefendant with, but tried separately from, John C. Taylor. In the case of People v. Taylor, supra, the evidence is set forth at length. It is sufficient to state that in all material particulars the evidence in this case was the same. The evidence was abundantly sufficient to support the verdict.

7. When the prosecution had closed its case all of the evidence above mentioned had been introduced. When thereafter the defendant made a motion that the trial court should advise a verdict of not guilty, the trial court did not err in denying the motion.

[9] 8. As appears above, the defendant and his associates had justified the tactics of the I. W. W., and the subject-matter of the tactics of that organization was of the essence of the case of the prosecution. The committee on resolutions, of which the defendant was a member, brought in a resolution calling upon the government for the "release of each and every one now serving a sen-

tence as a political or class war prisoner." In short, the evidence was the same as the evidence on which the defendant was convicted and which was considered by the court in People v. Taylor, supra. In his closing argument the district attorney referred to the Centralia affair and to the Seattle strike. To those references the counsel for the defendant objected and assigns the same as misconduct. Be this as it may, considering the whole of the record in this connection, we are unable to reach the conclusion that the act of the district attorney was in any respect prejudicial to a fair and impartial trial.

[10] 9. The court did not err in refusing defendant's proposed instruction No. 8. That instruction assumed that the Communist Labor party was organized in Chicago; that thereafter the defendant joined in Oakland; and therefore that he did not assist in organizing a party that had already been organized. The fallacy in this contention rests in the various uses of the word "organize" and of the word "party." There was no evidence in the record that the Alameda branch of the party had been organized in Chicago.

[11] Defendant's proposed instruction No. 9 was addressed to a fact not in evidence. The Criminal Syndicalism Act was passed April 30, 1919. The whole theory of the prosecution was that the defendant committed the acts charged against him on November 9, 1919, over six months after the passage of the act. No evidence whatever was tendered by the prosecution regarding acts of the defendant committed prior to the passage of the act.

[12] The defendant's proposed instruction No. 10 was not a sound proposition of law; it was to the effect that a conspirator is not liable for the acts committed by his fellow conspirators during the life of the conspiracy in carrying out the conspiracy.

[13] Defendant's proposed instruction No. 11 was not addressed to any set of facts brought out in the evidence. It was a statement in various ways to the effect that the defendant was not on trial and could not be convicted for the opinions which he held. As to what offense was on trial the court had carefully covered the subject affirmatively, and it was not called upon to negative every other possible theory. Moreover, the trial court instructed the jury that the defendant could not be convicted because he held certain opinions.

[14] Defendant's proposed instruction No. 12 was a sociological dissertation but not the statement of a proposition of law. It was argumentative and dwelt at length on the rights of labor unions—a subject not in issue in this case. The ruling of the trial court in refusing to give this identical instruction was affirmed in People v. Taylor, supra.

[15] Instruction No. 17 was an attempt to define the word "willfully." It did not comply with the statute. Pen Code, § 7, subd. 1. In its charge the trial court had instructed fully on the subject. Under chapter 188 of the Statutes of 1919 the word is a part of the offense set forth in counts 3 and 4 only of the indictment. As to the other counts it is not a necessary element. State v. Hennessy, supra. In view of what we have written above concerning counts 3 and 4, it is unnecessary to discuss instructions not pertinent to the first count.

[16] Defendant's proposed instruction No. 18 was addressed to the right of the individual to sympathize with the Bolsheviks. There was no issue of that kind involved in the case; the prosecution had not made any claim to the contrary; and, as stated above, the trial court had fully and fairly instructed the jury on the issues that were before the court.

The judgment is affirmed as to the first count contained in the indictment, and it is reversed as to the second, third, and fourth counts.

We concur: LANGDON, P. J.; NOURSE, J.

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56 Cal. App. 46

PEET v. PEOPLE'S TRUST & SAVINGS BANK et al. (Civ. 3560.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1921.)

1. Chattel mortgages 🔑169—Mortgagee in possession, failing to sell property within reasonable time, liable for conversion.

A mortgagee of personal property, who takes possession thereof according to the terms of the mortgage, but who neglects to sell the property within a reasonable time, is liable for its conversion.

2. Chattel mortgages 🔑176(3)—Answer by mortgagee in possession, setting up necessity for feeding cattle seized before sale under mortgage held insufficient.

In an action for conversion of mortgaged cattle, based upon mortgagee's failure to sell the cattle within a reasonable time after having taken possession of them under the mortgage, an answer that defendant, after seizure of the cattle in April, had removed them to another state, where they could be fed, and that in the following October the mortgage was discharged by payment by a comaker of the note, and that after such payment defendant tendered the cattle to the comaker and to the former owner, and that, at the time of answering, a year and a half from the seizure, a certain number of cattle were left which was less than the number seized, *held* insufficiently to set up the defense that, in determining a reasonable time within which live stock seized under a mortgage must be sold, the mortgagee must be allowed such time as may be necessary to fatten the stock and render it marketable, if in bad condition; for it could not be assumed that the cattle could not have been put in condition for market in less than the period named.

3. Chattel mortgages 🔑176(3)—Allegation of tender of cattle by mortgagee in possession held insufficient.

Where mortgagee who had seized cattle mortgaged was sued by mortgagor for conversion on the ground that mortgagee had not sold the cattle within a reasonable time, an allegation by defendant that he had tendered "the cattle remaining" *held* insufficient.

4. Chattel mortgages 🔑176(4)—Evidence insufficient to sustain verdict for defendant charged with converting mortgaged cattle.

Where a mortgagee had seized cattle, but had failed to sell them within a reasonable time, and was sued by the mortgagor for conversion, evidence failing to show that the cattle could not have been sold to advantage before the debt was paid by plaintiff's cosigner on the note five months after seizure *held* insufficient to sustain a verdict for defendant.

5. Chattel mortgages 🔑176(6)—Instruction omitting necessity of proving sole defense held erroneous.

In a mortgagor's action against a mortgagee of cattle for conversion, in failing to sell them within a reasonable time after seizure under the mortgage, an instruction that, if defendant had the right of possession against the mortgagor, verdict should be for defendant, *held* erroneous, as eliminating proof by defendant of the necessity for fattening the cattle before sale, which was the sole defense interposed.

6. Chattel mortgages 🔑176(2)—Demand for mortgaged cattle unnecessary where it would have been unavailing.

In an action by a mortgagor of cattle against the mortgagee for conversion, based on the mortgagee's failure to sell them within a reasonable time after seizure, where the pleading and evidence showed that a demand by plaintiff for a return of the cattle would have been unavailing, such a demand was unnecessary.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action for conversion by Jay Peet against the People's Trust & Savings Bank and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

D. B. Chapin, of Los Angeles, for appellant.

Sarau & Thompson, of Riverside, for respondents.

WORKS, J. This is an action for the conversion of a band of cattle. Defendant had judgment after a trial by jury, and plaintiff appeals.

Appellant had executed to respondent bank a chattel mortgage on a large number of cattle, the instrument providing that, upon default in the payment of the obligation for the performance of which it was security, the bank might take possession of the stock, sell them, and apply the proceeds toward the payment of the mortgage debt. There was a default upon the part of appellant, and the record shows that the cattle covered by the mortgage, and which were still in existence, were taken by the bank under the terms of the mortgage giving it power to make the seizure.

[1] Appellant brought this action upon the theory that the bank did not proceed to sell the cattle after the taking, and that a conversion thereupon resulted. In his brief many authorities are cited to the effect that a mortgagee of personal property, who takes possession of the property according to the terms of the instrument, but who neglects to sell it within a reasonable time, is liable for its conversion. This rule seems to be well settled. Burton v. Randall, 4 Kan. App. 593, 46 Pac. 326; Howery v. Hoover, 97 Iowa, 581, 66 N. W. 772; Marseilles Mfg. Co. v. Perry, 62 Neb. 715, 87 N. W. 544; Marchand v. Ronaghan, 9 Idaho, 95, 72 Pac. 731.

The cattle were seized in Riverside county, near the Colorado river, on or about April 20, 1918, and the action was commenced February 4, 1919. In a special defense, which is set up in the amended answer, the bank admits the taking of the stock, alleges that they were at the time of the taking in a dying condition because of appellant's failure to care for and feed them, and that, "had a sale of said cattle taken place at the time or immediately after the said defendant aforesaid took up the same, the said defendant would have received nothing therefor, and the said plaintiff, mortgagor in said mortgage, would have received no credit whatsoever upon the note secured by said mortgage." It is then alleged that, in order that the cattle might not die, respondent bank took them across the river into Arizona, that being the only place where food and grazing could have been had at the time for them. It is also averred in the amended answer that on October 7, 1918, the mortgage on the cattle was discharged by the payment by a comaker with appellant of the note which it secured; that after the payment respondent tendered the cattle to the comaker on the note and to appellant, but that each of them refused the tender; that there are now left of the seized herd (the amended answer having been filed September 22, 1919)

45 head of cows and calves, a total of at least 9 less than the number seized; and that the cattle thus remaining are now in good condition, owing to the care and feed which respondent bank has given them.

[2] It is evident from these allegations that respondent's purpose was to set up a defense that, in determining what amounts to a reasonable time within which live stock seized under the provisions of a mortgage must be sold, the mortgagee is to be allowed such time as may be necessary to fatten the stock and render it marketable if it was in bad condition and unmarketable at the time of the seizure. If it be admitted that a period of time so consumed is, under the law, to be allowed to the mortgagee before making sale, within the rule that sale must be made within a reasonable time, the amended answer before us does not state such a defense. The pleading leaves it to conjecture to determine what was being done with the cattle between April 20, when the seizure occurred, and October 7, when the note was paid, and a sale was no longer necessary, and, also, what was their condition when the latter date arrived, and at all times between the two dates. This was a period of five months and a half. Why was not the sale made within that time? We cannot assume that the cattle could not have been put in condition for the market within less than the period named. To make such an assumption would be unwarrantably to stretch the doctrine of judicial notice. And yet the portion of the affirmative defense of the amended answer referred to is valueless without the assumption, for without it no defense is stated.

[3] If we look to the part of the amended answer alleging a tender, we are met with the same situation. The tender was not made until after payment of the obligation secured by the mortgage, which event occurred on October 7. We have already mentioned the fact that the answer alleges a tender, but we have not stated the form of the allegation. It is merely this: That, after the date mentioned, defendant bank tendered "the cattle remaining" in its hands at that time. If we construe this language as referring to cattle remaining of those seized under the power in the mortgage, although there is no allegation to that effect, and the averment is deficient in that respect, we are not told how many were remaining, nor what their condition was, nor what was the reason for a diminution of the herd seized to the number remaining. The allegation was far from sufficient as an allegation of tender.

Appellant does not raise these questions of pleading. The cause seems to have been tried upon the theory that the amended answer states a defense in so far as the questions to which we have adverted are concerned. We have dealt with the questions for the reason that a reversal of the judgment is necessary upon points which are presented by appellant, and because, in the event of a second trial, respondent bank should be accorded the opportunity of amending its pleading if it be so advised.

[4] Appellant contends that the evidence is insufficient to support the verdict, and the contention must be sustained. The evidence showed without dispute that the cattle were taken by respondent bank because of the nonpayment of the note which was secured by the mortgage. The only justification attempted to be advanced for the failure to sell them at once is the new matter set up in the answer, and to which we have referred above. Granting that this new matter constituted a defense, although we have shown that it does not, there is no evidence to support it, and the verdict is, of course, unjustified because of the same lack of evidence. The testimony in support of the affirmative defense, taking everything that was said by the witnesses on the subject, showed only that the cattle were thin and run down at the time of the seizure; that the bank took them into Arizona a month after the seizure; that there was better pasture for them at the place in that state to which they were taken than at the place where the seizure occurred, and that a parcel of the cattle, about a third of the herd which was seized, was inclosed in a corral in California while the herd was being gathered for the seizure; that respondent bank "sent down a load of hay to feed the cattle" in the parcel; and that, apparently, while in the corral, and before being taken to Arizona, they were well fed. This attenuated line of evidence utterly fails to meet the exigencies of the affirmative defense, granting again that the matter alleged constituted a defense. The evidence exhibits the vice which we have discovered in the answer: There is nothing in it to show what was the condition of the cattle at any time after the seizure, except that a third of the herd was well fed at one period before the removal to Arizona. There is nothing whatever to show that the cattle could not have been sold to advantage long before the date when the debt was paid by appellant's cosigner on the note, five months after the seizure. In short, there is nothing whatever in the evidence to justify a retention of the cattle for five months after seizure without sale. In this respect the evidence was totally insufficient to support the verdict.

[5] The trial court instructed the jury that, if they found from the evidence that the note was unpaid at the time of the seizure of the cattle, and that the mortgage gave respondent bank the right to take pos-

session in case of default, "then, and in that event, the defendant People's Trust & Savings Bank had the right of possession of said property mentioned in said mortgage and the whole thereof against the mortgagor in said mortgage, to wit, the plaintiff in the above-entitled action, and your verdict must be for the defendants." The jury could not have done otherwise than render verdict for respondent bank under this instruction. It completely obviated the necessity of proof by the bank of the only real defense it had made to the complaint, the defense of new matter to which we have alluded at length above. The instruction should not have been given.

[6] Respondent bank contends that, as it acquired possession of the cattle rightfully, it cannot be charged with a conversion of them unless a demand first shall have been made for their return. There was no proof of such a demand. It is, of course, the general rule that a demand is necessary in such a situation, but it is not always required. Where, for instance, a demand would be unavailing, it need not be made (Wood v. McDonald, 66 Cal. 546, 6 Pac. 452; Hand v. Scodeletti, 128 Cal. 674, 61 Pac. 373), for it would then be an idle ceremony. So it would have been here. The amended answer shows that respondent claimed the right to hold the cattle and fatten them for sale, and it is plain that the right would have been insisted on, even in the face of a demand, up to the time it is alleged that the note was paid by appellant's cosigner. Further, from that time forward, and even from an earlier period, a demand would have been unavailing for the same reason that the tender alleged in the amendment answer was a nullity. As already pointed out, the allegation is that tender was made of "the cattle remaining" in the hands of respondent bank at the time. The evidence introduced by respondent shows, as well, that some of the members of the herd died through "bogging down" in a marshy country soon after they were taken into Arizona, and while they were in custody of the bank. Any demand which appellant might have made for a return of the seized stock, therefore, could not have been complied with. Under all the circumstances stated, we conclude that no demand was necessary.

At the trial of the cause a motion for a nonsuit was granted as to respondent Odell, but appellant makes no point as against the order granting that motion. Respondent Odell is therefore eliminated from the case.

The judgment is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

We concur: FINLAYSON, P. J.; CRAIG, J.

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56 Cal. App. 7

HAMILTON et al. v. CONSOLIDATED WATER CO. OF POMONA.

(Civ. 3573.)

(District Court of Appeal, Second District, Division 2, California. Dec. 29, 1921.)

1. Appeal and error 🔑1011(1)—Finding on conflicting evidence not disturbed.

A finding of fact on conflicting evidence will not be disturbed.

2. Waters and water courses 🔑158(1) — Grantee's right to water was not affected by writing purporting to be contract between grantors and grantee, but to which grantee was not a party.

An absolute right to a certain amount of water conveyed to grantee was not affected by the execution on the same day by grantors of what purported to be a contract between the grantors and grantee qualifying grantee's interest, but to which grantee was not a party.

3. Waters and water courses 🔑158(1) — Grantee's successors held not bound by writing purporting to be contract between grantors and grantee, by reason of grantee's instructions to employee.

Where grantee, to whom grantors had conveyed the absolute right to a certain amount of water, did not join in contract, executed on the same day, purporting to be a contract between grantors and grantee qualifying grantee's interest, grantee's successors were not bound by the contract because of instructions given by grantee to his employee, in the absence of a showing that successors had actual knowledge of such instructions, or of the purported contract.

4. Waters and water courses 🔑156(5)—Recorded deed to grantee's wife, referring to writing which purported to be contract between grantors and grantee, but which grantee had not signed, not constructive notice to grantee's successors.

Where grantee to whom grantors had conveyed the absolute right to a certain amount of water did not join in the execution on the same day of what purported to be a contract between grantors and grantee qualifying grantee's interest, grantee's successors were not bound by such contract because of the deed to grantee's wife referring thereto, on theory that they had constructive knowledge of the contract because of recordation of such deed, since the deed was constructive notice only of its own contents and of the document referred to which was ineffectual to bind the grantee.

5. Evidence 🔑384—Rule that parol evidence cannot contradict legal effect of writing not affected by statute.

Code Civ. Proc. § 1849, providing that where one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former, has not affected the rule that parol evidence cannot contradict or modify the legal effect of a written instrument.

6. Waters and water courses 🔑158½(1) — Plaintiff suing to quiet title to water rights established case by proving conveyance to predecessors of water rights, requiring defendant to prove reconveyance.

In action to quiet title to water rights, plaintiffs established their case by proof of the execution of deed conveying such rights to their predecessor, throwing burden on defendant of proving a reconveyance.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by G. N. Hamilton and others against the Consolidated Water Company of Pomona. Judgment for plaintiffs, and defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

Nichols, Cooper & Hickson, of Pomona, for respondents.

CRAIG, J. This suit involves the ownership to 6½ inches of water measured under a 4-inch pressure, to quiet title to which the action is brought. The water in question is produced from tunnels in section 3, township 1 south, range 8 west, S. B. M., which are on the property of the defendant. The plaintiffs also seek to enjoin the defendant from diminishing or interfering with the delivery of the 6½ inches of water which the plaintiffs claim to own collectively. The defendant admits that the plaintiffs have an interest in said 6½ inches of water, but claim that it consists of merely the right to 6½ one hundred and seventeenths parts of the output of the said tunnels as they existed on the 28th day of January, 1895, and that the interest of the plaintiffs is subject to the right of the defendant to diminish the delivery of said 6½ inches proportionately whenever the output of said tunnels falls below 117 inches.

It appears, without contradiction, that on the 28th day of January, 1895, Peter Flemming and James Becket and J. T. Brady were the owners of the tunnel and the pipe line running between the E. ½ of the S. W. ¼ of section 3 and the W. ½ of the S. E. ¼ of that section and of the further right to develop water and rights of way for pipe lines. On that date they executed a deed to M. B. Campbell, conveying to him 6 inches of water. The following is an excerpt from the deed, which is important in the decision of this case as description of the property conveyed:

> "Six inches (6) of water to be taken from that body of water now developed on the east one-half (E. ½) of the southwest one-quarter (S. W. ¼) of section 3, township 1 south, range 8 west, S. B. M., and the west one-half (W. ½) of the southeast one-quarter (S. E. ¼) of said section, one-half (½) inch of said above six (6) inches to be of continuous flow for domestic purposes, to be used upon and to be appurtenant to certain lands in said deed described."

On the same date Flemming and Becket executed an instrument in writing with reference to which the court found as follows:

> "That on January 28, 1895, Peter Flemming and James Becket, being two of the grantors named in said deeds, signed and acknowledged a certain agreement dated January 28, 1895, providing that said Flemming and said Becket and M. B. Campbell were to build at their own joint expense a reservoir for water located upon the lands to which said 6 inches of water are declared to be appurtenant, and agreeing that there was then flowing in a tunnel from which said 6 inches of water was to be taken, 117 inches of water, and providing that, in case the said 117 inches of flow should decrease in volume, then the 6 inches conveyed to said M. B. Campbell while such decrease in the main body continued should be reduced in proportion that 6 inches bears to 117 inches, in such decrease, and that the actual flow of water from said tunnel should be accurately measured at 10 o'clock on the 16th day of July of each year, and providing that the increase or augmented water arising from the extension and continuation of said tunnels and other water development should also be measured on the 16th day of July, as aforesaid, and in case of such augmentation the entire water found after such increase shall be taken thereafter as the basis on which the said six inches should decrease, if at all, in case of the falling away from any cause of the water in the tunnel thereafter."

This writing was not signed by Campbell but was signed by Flemming and Becket as parties of the first part. However, it was recorded in the office of the county recorder of Los Angeles county in the book of deeds on the 14th day of February, 1895, and after the recording of the deed to the 6 inches of water first mentioned. It was introduced as a part of the evidence of the defendant. Both of these instruments were recorded before Campbell transferred the water rights in question.

It further appears that on the 1st day of June, 1896, Flemming and Becket and Brady executed a deed to Hannah E. Campbell, who was the wife of M. B. Campbell, conveying one-half inch of water from the body of water then developed on the said east one-half (E. ½) of the southeast one-fourth (S. E. ¼) of said section three (3), and the west one-half (W. ½) of the southeast ¼ of said section. This deed contains the following provision:

> "Said ½ inch of water is to be taken by party of the third part in a continuous flow, and is granted subject to all the benefits running with and subject to all the burdens, limitations, and restrictions attached or imposed upon that certain six inches of water set out and mentioned in that certain contract which is record-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ed in Book 989, page 242, of Deeds, Los Angeles county records, the same as if 6½ inches of water had been sold at that time by the parties of the second part and had been set out in said contract."

This deed was duly recorded. The contract to which reference is therein made is the one executed by Flemming and Becket only, and which we will designate as the "contract" to distinguish it from the other instrument involved. The plaintiffs deraign their title from M. B. Campbell and Hannah E. Campbell.

[1] In addition to claiming title by virtue of the deeds, the plaintiffs also assert a right by prescription. The court's finding was favorable to the plaintiffs in this regard. Appellant insists that this finding was not supported by the evidence. As to whether or not plaintiffs had actually received 6½ inches of water measured under a 4-inch pressure without diminution during all of the period of 15 years, there was some conflict in the testimony. In so far as that element is concerned, the finding of the trial court will therefore not be disturbed. But appellant points out that the evidence fails to show that there was any occasion upon which the defendant was called upon to deny the existence of the plaintiff's alleged right, or when the defendant was injured by allowing the plaintiff to use the entire 6½ inches of water.

[2] But the entire claim of title by prescription will be disregarded, for we think the decision must be upheld because the plaintiff's ownership of 6½ inches of water was clearly established by the proof of the execution, delivery, and recording of the deeds to M. B. Campbell and Hannah E. Campbell. The legal effect of the first of these deeds was to transfer to Campbell an absolute right to the 6 inches of water measured under a 4-inch pressure. This right was not impaired by the execution of the "contract" on the same date, to which Campbell was not a party, which purported to quality his interest in the property in question.

[3, 4] The appellant asserts that although M. B. Campbell did not sign the "contract," nevertheless he was bound thereby because of the following facts: First. He stated to the witness Lindsay, one of his employees, that when the water went below 117 inches, he was to stand his portion of the loss. Lindsay testified that "Campbell said this to him on several occasions after the deeds and instrument in writing were executed." Second. Campbell accepted title to the one-half inch of water previously conveyed under the deed to Hannah E. Campbell, which expressly referred to the writing of January 28, 1895. It is not claimed that the plaintiffs, or any of them, had actual knowledge of the conversation between Campbell and Lindsay or of the existence of the "contract." However, appellant contends that they were given constructive notice of it through the deed to Hannah E. Campbell. But the deed to Hannah E. Campbell was constructive notice only of its own contents and of the document referred to by it. Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; Pomeroy's Equity Jurisprudence, § 654. But if plaintiffs had examined the record they would have discovered only an instrument which was ineffectual to bind M. B. Campbell.

With reference to the one-half inch of water conveyed to Hannah E. Campbell, the court found, and in its judgment determined, that the plaintiffs own it subject to the right of diminution as asserted by the defendant. In this, its decision was also correct, for this deed especially refers to the "contract," and therefore incorporates it in the deed itself. The two instruments are to be construed as one.

[5] The cases cited by appellant are all distinguishable from the one at bar. Some of them hold that oral statements of the owner of real property may be introduced to prove a boundary line. Such statements do not vary the terms of the written instruments purporting to convey the real property involved. They are competent to identify the land transferred; to apply the description in the deed to the thing designated as alienated. The following are of this class: Austin v. Andrews, 71 Cal. 98, 16 Pac. 546; Sharp v. Blankenship, 79 Cal. 411, 21 Pac. 842; People v. Blake, 60 Cal. 497. Another group holds that statements which are a part of the res gestæ of the transaction are admissible. Draper v. Douglass, 23 Cal. 347. Others announce the law to be that where the instrument is uncertain, declarations of the parties to it made under certain circumstances should be received in evidence to explain the ambiguity, and thus aid in giving effect to the true intent of the parties. Among these cases are Draper v. Douglass, supra; Stanley v. Green, 12 Cal. 148; Williams v. Harter, 121 Cal. 52, 53 Pac. 405. Still other cases relied upon by appellant announce the principle in variously worded phrases as declared in section 1849, Code of Civil Procedure, which reads:

> "Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former."

But none of these cases apply here. The instant suit does not involve the identification of the property deeded to Campbell. In it we are not concerned with the explaining of ambiguities, for the deed is definite and certain in expressing the intent to convey an absolute ownership of 6 inches of water; nor can this case be reversed because of a failure upon the part of the trial court to observe the provision of section 1849, Code of Civil Procedure, for the witness Lindsay was permitted to testify to the oral statements of Campbell. That section does not attempt to say what weight shall be given to such declarations of the former owner, nor to set aside other rules of evidence. Frink v. Roe, 70 Cal. 296, 11 Pac. 820. The rule that parol evidence cannot contradict or modify the legal effect of a written instrument remains unchanged by section 1849, Code of Civil Procedure. Although admissible, Campbell's purported statements cannot be allowed to modify the deed to him, yet this is the result which appellant has endeavored to bring about through their introduction.

[6] As to the 6 inches of water in dispute, plaintiffs established their case by proof of the execution of the deed conveying it to Campbell. The defendant introduced no evidence which showed a reconveyance of this property, or any part of it. The burden was upon it to do so; having failed, the trial court properly gave judgment for the plaintiff.

Appellant does not object to the court's decision concerning the one-half inch of water litigated.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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55 Cal. App. 756

PEOPLE v. AMERICAN SURETY CO. OF NEW YORK. (Civ. 3748.)

(District Court of Appeal, Second District, Division 1, California. Dec. 24, 1921.)

Bail ⚷75—Defendant's failure to appear at preliminary examination held to render surety liable.

A bail bond in the form prescribed by Pen. Code, § 1278, conditioned that the principal "will appear and answer the charge above mentioned in whatever court it may be prosecuted," *held* to render surety liable on principal's failure to appear at preliminary examination, notwithstanding recital as to "order having been made * * * that H. [principal] be held to answer upon the charge," etc.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by the People of the State of California against the American Surety Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Lawler & Degnan, of Los Angeles, for appellant.

T. W. Duckworth, of San Bernardino, and M. O. Hert, of Colton, for respondent.

CONREY, P. J. Action on a bail bond. On the 29th day of April, 1919, a complaint was filed in the justice's court of San Bernardino township, in the county of San Bernardino, charging one Schumacher with a felony, and a warrant of arrest was duly issued. On the 1st day of May, the defendant being in custody under said warrant, the justice made an order fixing his bail at the sum of $2,000. Thereafter, on the 3d day of May, the defendant executed an undertaking of bail for Schumacher in the sum of $2,000. The undertaking was in the form prescribed by section 1278 of the Penal Code, and accordingly recited that "an order having been made * * * that Harry W. Schumacher be held to answer upon the charge of a felony upon which he has been admitted to bail in the sum of two thousand dollars," and the defendant undertook that the said Schumacher "will appear and answer the charge above mentioned in whatever court it may be prosecuted," etc.

At the time of execution of the undertaking there had not been any preliminary examination of Schumacher. The time for holding the preliminary examination was set for the 19th day of June, and the defendant in that case was duly notified thereof, but failed to appear. Thereafter his bond was declared forfeited on account of his failure to appear at the said preliminary examination. The appeal here presented is an appeal from the judgment rendered against the surety.

Section 1273 of the Penal Code, as amended in the year 1876 (Code Amends. 1875–76, p. 116), provides for the conditions of admission to bail before conviction:

> "First. For his appearance before the magistrate, on the examination of the charge, before being held to answer. Second. To appear at the court to which the magistrate is required to return the depositions and statement, upon the defendant being held to answer after examination. Third. After indictment, either before the bench warrant is issued for his arrest, or upon any order of the court committing him, or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment in the court in which it is found, or to which it may be transferred for trial."

Section 1278 of the Penal Code appears in article 2 of chapter 1 of title 10 of part 2 of that Code. Said article 2 is entitled, "Bail Upon Being Held to Answer Before Indictment," and has not been amended since its enactment in the year 1872. This section was a re-enactment of section 516 of the Criminal Practice Act (Stats. 1851, p. 269), without any changes in the clauses which we are required to consider in this case. At the time of that first enactment, and until 1880, all felonies were prosecuted by indictment. Pen. Code, § 888.

Appellant contends that the recital in the

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

bond as quoted above implied that the preliminary examination of Schumacher had been held, and that upon such examination he had been held to answer before the superior court. Therefore it is argued that the undertaking that he "will appear and answer the charge above mentioned in whatever court it may be prosecuted" cannot apply to his appearance in any court excepting the superior court, and, consequently, that his failure to appear at the preliminary examination was not a breach of the condition of liability imposed by the bond. In support of this argument, appellant relies upon cited decisions which held, in substance, that a surety cannot be held beyond the precise terms of his contract, and that a bail bond must comply with the statute and with the order of the magistrate, or else it is void. San Luis Obispo v. Ryal, 175 Cal. 34, 165 Pac. 1; County of Merced v. Shaffer, 40 Cal. App. 163, 180 Pac. 342; People v. Barrett, 6 Cal. App. 578, 92 Pac. 647.

The obligation of the bond given is in conformity with the order of the magistrate and with the statute. The only irregularity, if any there be, is one of fact, and is found in the words of recital, "An order having been made * * * that Harry A. Schumacher be held to answer upon the charge," etc. He had not, in fact, been held to answer after examination. He was being held in custody under a warrant, and was awaiting preliminary examination. In other words, the recital, if it applied solely to a holding to answer before the superior court, was untrue.

San Francisco v. Randall, 54 Cal. 408, was an action to recover upon five bail bonds given for the release of one John Tyler from custody on felony charges. The orders of admission to bail were made in November, 1877, by the police judge. After Tyler had been released on bail pursuant to those orders, the hearing upon the charges came before said police court. Tyler not appearing, the bonds were declared forfeited, and an action was commenced to recover thereon. In its opinion sustaining the judgment rendered against the defendants the Supreme Court made the following statement in response to the contention that the bonds were not in compliance with the statute, in that they did not state that Tyler was to appear before the police judge for examination:

> "Section twelve hundred and seventy-eight of the Penal Code gives a form for bail bonds, and says that the bond to be given shall be substantially in that form. That form applies to bonds to be given, as well where the party is to appear before the magistrate for examination as where he is held to answer after examination. The bonds in question follow the form given in the statute. They are that he will 'appear and answer the charge above mentioned, in whatever court it may be prosecuted.' If a party be arrested, and the examination postponed to a future day, before the same magistrate, that is the court in which the charge is to be prosecuted."

Notwithstanding the above decision, counsel for appellant insist that section 1278 does not provide the form of bond before being held to answer; that this is so because the headnote of the article, as published in the original authorized edition of the Penal Code (Bail Upon Being Held to Answer Before Indictment) excludes from the sections therein contained any bail given before being "held to answer" by a magistrate. We are referred to Bettencourt v. Sheehy, 157 Cal. 698, 702, 109 Pac. 89, 91, where it was said that the marginal notes to the sections of the original Codes cannot be distinguished in principle from the headnotes to the chapters, articles, and titles, and that—

> "As to these it has been held that they are parts of the statute limiting and defining the section to which they refer, and that to refuse to give effect to them according to their import would be to make the law, not to administer it"—citing cases.

The earliest of the cited cases is Barnes v. Jones, 51 Cal. 306. It was there pointed out that a headnote of a chapter is not, in any sense, a title to a statute. It is a part of the body of the act, inserted for the purpose of controlling and limiting the scope and application of the general words used in the chapter. This principle would likewise apply to the marginal inscriptions of particular sections. Thus, in the present instance, the marginal inscription to section 1278 in the original edition of the Code, which is now printed at the head of the section, reads: "Bail, how put in and form of the undertaking." The headnote to said chapter 1 is "Bail." Considering these headnotes to the chapter and article, together with the headnote or marginal inscription of section 1278, and considering also the fact that no other form of bail bond is provided which could be applied to the situation existing prior to the preliminary examination of a prisoner held on a charge of felony, we discover no sufficient reason for holding that this form of bond does not so apply in the instant case. To hold otherwise would be to attempt to overrule the decision in San Francisco v. Randall, supra.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(56 Cal. App. 52)

LEWIS v. TULARE RECLAMATION DIST. NO. 749 et al. (Civ. 2387.)

(District Court of Appeal, Third District, California. Jan. 5, 1922. Hearing Denied by Supreme Court March 2, 1922.)

1. Vendor and purchaser 🔑231(6)—Knowledge of contents of defective records in office of county treasurer held not sufficient notice of sale of land for taxes.

In certificate of sale of land for special assessment, where the recital of notice of sale correctly described it as being in section 27, and the certificate later describes the land sold as being in section 21, the fact that an abstract company, in searching the records to determine the title to the land for plaintiff before he purchased it, failed to examine in the county treasurer's office the stubs of the receipts for payment of the assessments, which showed that the land in section 27 had been bought by S. at a tax sale is no defense in an action to recover the land, since, if plaintiff had actual knowledge of the contents of the records in the treasurer's office, the uncertainty as to what lands were sold to S. would still exist.

2. Waters and water courses 🔑231—Certificate of sale of land for special assessment failing to properly describe it held fatally defective.

Where a certificate of sale of land worth $5,000 for a special assessment of $16.50 recited the notice of sale, which correctly described the land as being in section 27, and the certificate stated that the land, described as being in section 21, was sold, the mistake in the certificate prevented title from passing either by the certificate or the deed made in pursuance thereof.

3. Waters and water courses 🔑231—Recording of certificate of sale of land for taxes is to give notice of contents of certificate to the owner and subsequent purchasers.

In view of Civ. Code, § 1107, providing that every grant of estate and real property is conclusive against the grantor and every one subsequently claiming under him, except the purchaser or incumbrancer who in good faith or for valuable consideration acquires title or lien by an instrument that is first duly recorded, the requirement that a certificate of sale of land for special assessment shall be recorded is to give notice to the owner and subsequent purchaser of its contents.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by D. W. Lewis against the Tulare Reclamation District No. 749 and others. From a judgment for plaintiff, defendant J. J. Spitzer appeals. Affirmed.

Gregory & Goodell and D. Hadsell, all of San Francisco, for appellant.

J. L. C. Irwin, of Hanford, for respondent.

FINCH, P. J. [1] January 8, 1917, Geo. E. Mercer, whose residence was at Bowling Green, Ohio, was the owner of the southeast quarter of section 27, township 21 south, range 21 east, Mt. Diablo base and meridian, within the boundaries of defendant reclamation district, Kings county. On that day the trustees of the district ordered that an installment of 20 per cent. of an assessment theretofore made be paid on the 20th day of February, 1917. Notice of the order was duly published according to law and a copy of the notice was mailed to Mercer, but he did not receive it. February 21, 1917, the secretary of the board signed a notice of sale of said land, and other lands, to be made August 15, 1917, and the notice was thereafter published as required by law, commencing April 6, 1917. Mercer's land was sold at the time stated in the notice to defendant Spitzer for the sum of $16.50 and the trustees thereupon executed and delivered to Spitzer a certificate of such sale. The certificate sets out the notice of sale in full in which the description of the land in question is as follows:

> "Tract No. 40, Southeast quarter of Sec. 27, T. 21 S., R. 21 E., containing 160 acres, assessed to Geo. E. Mercer."

The number of the tract given in the description is its number on the assessment roll. The certificate recites that at the sale the trustees sold to Spitzer tract No. "40, being * * * the southeast quarter of section *21*, T. 21 S., R. 21 east, M. D. B. & M." The certificate was recorded September 24, 1917, in the record of certificates of sales in the office of the county recorder. November 7, 1918, the trustees executed and delivered to Spitzer a deed of the property.

October 17, 1918, Mercer deeded the land to plaintiff, and the deed was recorded November 1, 1918. Neither the plaintiff nor Mercer knew of the call for the 20 per cent. installment or of the sale of the property until about December 10, 1918. Immediately after learning of the sale the plaintiff offered to redeem, and tendered payment both to Spitzer and the county treasurer of the amount of said installment, with the accrued interest, costs, and penalty, and interest on said sums at the rate of 2 per cent. per month from the date of the sale, but his offer was refused. The plaintiff then brought this suit, and in his complaint offered to pay said sums. The court entered judgment, declaring the certificate and the trustees' deed null and void, and quieting plaintiff's title to the land upon payment by the plaintiff to Spitzer of the aforesaid sums.

The court found that the certificate of sale did not describe the Mercer land. As stated, the notice of sale, containing a correct description of the land, was embodied in the certificate by way of recital. This was followed by the statement that the southeast quarter of section *21* was sold. An examination of the certificate of sale alone or in conjunction with all the papers and proceedings leading up to the sale would not disclose what lands were actually sold. Only by evidence outside of the record of the proceedings could it be determined what land was sold. Before consummating the purchase, the plaintiff caused the records to be examined by the Kings County Abstract Company. The company, misled by the erroneous description of the land in the certificate of sale, certified that "said property is included within the boundary lines of Tulare Lake reclamation district No. 749, and is subject to any taxes or assessments for the purpose thereof; from an examination of the records of said district in the office of the county treasurer of Kings county, it appears that all such taxes or assessments heretofore levied have been fully paid." Appellant argues that the abstract company was the agent of the plaintiff in the examination of the records; that at the time of such examination there was on file in the office of the county treasurer a book containing the stubs of receipts given on payment of assessments; that the abstract company knew that such book was on file; that among such stubs was one showing that the southeast quarter of section 27 had by Spitzer been "bought for 20 per cent., with costs, interest, and penalty"; that the knowledge of the abstract company was the knowledge of the plaintiff; and that the foregoing facts were "sufficient to put him on actual notice." Even if the plaintiff had actual knowledge of the contents of all records in the treasurer's office, the uncertainty as to what lands were actually sold to Spitzer would still exist.

[2] Appellant contends that the description of the land in the certificate of sale is not fatally defective, citing Leonard v. Osburn, 169 Cal. 160, 146 Pac. 531, where it is said:

> "A deed is not void for uncertainty because of errors or inconsistency in some of the particulars of the description. * * * If the description is general, the particular subject-matter to which the description applies may be ascertained by parol evidence. Nor will the deed be void for uncertainty from the fact that the description in part is false or incorrect, if there are sufficient particulars given to enable the premises intended to be conveyed to be identified."

The case cited is not in point. The deed there under discussion was between individuals and no question of a tax title was involved. In case of a tax title:

> "It is not sufficient that a similar description, in a contract or conveyance between individuals, might be shown by parol evidence to have been intended for particular premises. The description must be certain of itself, and not such as to require evidence aliunde to render it certain." Keane v. Cannovan, 21 Cal. 302, 82 Am. Dec. 738. "It is hardly necessary to say that tax proceedings are in invitum, and to be valid, must be in strict accordance with the statute." People v. Mahoney, 55 Cal. 288. "A description which would suffice in an agreement to convey, or in a deed, may be bad in an assessment. In the first case, the court might inquire as to the intention of the parties, but in the other the owner has no part in the proceeding, which is hostile, and to every step in which he is objecting." Miller v. Williams, 135 Cal. 185, 67 Pac. 789. "A tax sale certificate containing an insufficient description is invalid, and the deed based thereon must likewise be invalid." Little v. Burlingham, 33 Idaho, 757, 198 Pac. 464; Wilson v. Jarron, 23 Idaho, 563, 131 Pac. 12; Cahoon v. Seger, 31 Idaho, 101, 168 Pac. 441.

In Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761, there was an inconsistency between two recitals in a tax deed as to the year of the assessment and the uncertainty was held fatal. The following cases, in which errors in tax proceedings have been held fatal, illustrate the strict compliance with the law required to sustain a tax title: Simmons v. McCarthy, supra (difference in recitals of deed of three cents as to amount paid); Miller v. Williams, supra (sale for 8 cents more than was due); Fox v. Townsend, 152 Cal. 51, 91 Pac. 1004, 1007 (omission of dollar-mark in assessment roll); Treadwell v. Patterson, 51 Cal. 638 (sale for 36 cents more than due); Harper v. Rowe, 53 Cal. 233, (sale for 70 cents more than due); Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34 (sale for $1 more than due); Warden v. Broome, 9 Cal. App. 172, 98 Pac. 252 (statement in published delinquent list of 82 cents in excess of amount due, though sale was for correct amount); Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816 (sale was noticed to be held at "the easterly door of the courthouse," instead of "the front of the courthouse," as the law required).

[3] The requirement that the certificate of sale shall be recorded is not for an idle purpose, but to give notice to the owner and subsequent purchasers of its contents. Page v. Rogers, 31 Cal. 294; Foorman v. Wallace, 75 Cal. 557, 17 Pac. 680; Bennett v. Wilson, 122 Cal. 513, 55 Pac. 390, 68 Am. St. Rep. 61; Civ. Code, § 1107). At the time the trustees directed payment of the installment in question here section 3466 of the Political Code provided:

> "Upon making such order the secretary shall cause to be published a notice in the following form: (Name of reclamation district, location of principal place of business.) Notice is hereby given that at a meeting of the directors, held on the (date), an installment of (amount) was ordered paid within thirty days from date thereof to the treasurer of the county of (name of county). Any installment which shall remain unpaid on the (day fixed) will be delinquent together with the accrued interest thereon and costs and penalties."

Instead of following the form so prescribed, the secretary caused to be published the following notice:

"Tulare Lake Reclamation District No. 749.

"Principal Place of Business, Kings County, California, Office of Trustees, Hanford, California.

"Notice is hereby given that at a meeting of the directors or trustees of the district held on January 8th, 1917, an installment of twenty per cent. of the total assessment was ordered paid on the 20th day of February, 1917, to the treasurer of the county of Kings, state of California. Any installment which shall remain unpaid on the said 20th day of February, 1917, will be delinquent, together with the accrued interest thereon and costs and penalties.

"By order of the board of trustees or directors. Leon J. Israel,
"Sec. Tulare Lake Reclamation Dist. No. 749."

Respondent contends that this notice is fatally defective in not giving the street and number of the principal place of business of the district and in stating that the installment was ordered paid "on the 20th day of February, 1917," instead of "within thirty days from date" of the order made by the trustees. This contention finds support in the case of Simmons v. McCarthy, 118 Cal. 624, 50 Pac. 762, where it is said that—

> "When a form has been made necessary, it is not for the courts to inquire whether the required recitals are of material facts or otherwise. A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and it should so appear on the face of the proceedings."

It may be further noted that section 3466 provides:

> "Immediately after the said installment has become delinquent, the trustees of the district must publish * * * a notice that the property assessed will be sold on the date therein stated," etc.

In this case the notice of sale was signed by the secretary of the board of trustees as such and there was nothing in the notice to indicate that it was given or published by the direction or under the authority of the trustees. Having arrived at the conclusion, however, that the certificate of sale is insufficient, it is not necessary to decide the other questions raised.

In this case the plaintiff paid Mercer $6,000 for the land in dispute. The court found that the land was worth $5,000. The defendant purchased the property at the trustee's sale for $16.50. Neither Mercer nor the plaintiff knew of the call for the installment or of the sale of the land until after the period for redemption had expired. If the judgment is upheld, the defendant will receive all that he paid out with interest thereon at the rate of two per cent. a month. If the sale to the defendant be held valid, he will receive the property for one-third of 1 per cent. of its true value. A court should not uphold a title so acquired unless compelled by the strict letter of the law.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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54 Cal. App. 109

SAN FRANCISCO LUMBER CO. v. YATES et al. (Civ. 3929.)

(District Court of Appeal, First District, Division 1, California. Aug. 30, 1921. Rehearing Denied Sept. 29, 1921. Hearing Denied by Supreme Court Oct. 24, 1921.)

Mortgages 🔑163(3)—Deed of trust securing note to vendor held prior to mechanics' lien thereafter acquired.

Where vendor, to obtain money to erect a building on the lot sold, as required by contract, sold vendee's note and the deed of trust securing same, the assignee, on purchasing the property at foreclosure sale, became the owner thereof free from liens for work done and materials furnished in the construction of the building after the recordation of the deed of trust, in view of Code Civ. Proc. § 1186, as to mechanics' liens.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the San Francisco Lumber Company against W. F. Yates and others. Judgment for plaintiff, and defendants appeal. Reversed in part and remanded, with directions.

T. W. Hubbard and Hubbard & Johnson, all of San Francisco, for appellants.

Aitken & Aitken and Aitken, Glensor, Clewe & Van Dine, all of San Francisco, for respondent.

WASTE, P. J. The plaintiff brought this action to foreclose two mechanics' liens. The court awarded a personal judgment against the contractor and decreed a lien on the building and land, subject only to a mortgage executed by defendants W. F. and Jeannette Yates, held by the German Savings & Loan Society, concerning which there is no dispute. It ordered a sale of the premises to satisfy the claims. Certain of the defendants appeal, claiming that their interests under a prior recorded deed of trust are superior to the rights of the lienholders, and that the court erred in its findings of fact and conclusions to the contrary.

The defendant Jeannette Yates was the owner of the lot in question. She made a contract with the defendants Berry, by the terms of which it was agreed that Mrs. Yates should erect a building upon the lot, the Berrys to buy the premises from her for an agreed price of $2,150 and interest, payable in monthly installments after completion of the building. Pursuant to this agreement Mrs. Yates and her husband executed and delivered a deed conveying the land to the Berrys, which deed was duly recorded. As part of the transaction, Amelia Frances Berry and Curtis Berry, her husband, then executed and delivered to Mrs. Yates their promissory note for the sum of $2,150, and interest, payable in installments as agreed. In order to secure the payment of the note, Mr. and Mrs. Berry executed a deed of trust of the lot to defendants Henry S. Bridge and Harry B. Allen, as trustees, which was properly recorded. Coincident with the execution of the note and deed of trust, Mrs. Yates sold and indorsed the note to the defendant Carrie E. Bridge, and she and her husband transferred and conveyed to Mrs. Bridge all of their right, title, and interest in and to the deed of trust, and Mrs. Bridge has ever since been the owner and holder of the note and said interests. Neither the assignment of the note, nor the transfer of the interests under the deed of trust, has ever been recorded.

After all the foregoing transactions had been completed, Mrs. Yates entered into an agreement with W. F. Yates, her husband, who was her agent and builder, to construct a dwelling on the lot. The court found, and it appears to be a fact, that the purpose of the execution of the note and deed of trust by the Berrys to Mrs. Yates, and by her transferred to Mrs. Bridge, was to obtain money to be used by defendant W. F. Yates in connection with his business of building and selling houses, one of which was the house in question.

The plaintiff supplied the lumber used in the construction of the building, and his assignor, Powers, furnished the material and labor for doing the plastering and cement work. It is admitted that they duly filed their claims of lien, and there is no question in the case as to the value of the labor and material. It is also admitted that prior to the time any of the material was furnished, or any of the work was done, the deed of trust from the Berrys to Bridge and Allen was recorded. In point of time, therefore, the lien created by this deed of trust is prior to the lien of the plaintiff. Notwithstanding this fact, the court below decreed that the lien of the plaintiff was superior to the rights of the appellants who are claiming under the deed of trust, which ruling raises the point to be determined on this appeal.

Section 1186 of the Code of Civil Procedure provides that mechanics' liens are only preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was not recorded at the time the building was commenced. The lower court took the view, and the respondent is here arguing, that the facts of this case remove it from the application of that section. Their position is, in brief, that Mrs. Yates was the real owner of the property; that the trust deed was in effect of her own execution; that through her husband, acting as her agent and contractor, she herself created the mechanic's and materialman's liens, which should take precedence over any interest she may have in the property; that the interest of Mrs. Yates, as owner, whatever it may be, was subject to the liens, regardless of the claims of Bridge as assignee.

We are not impressed with the argument advanced in support of the respondent's position. In the first place, Mrs. Yates was not the owner of the lot after the execution, delivery, and recordation of the deed to the Berrys. In the next place, even if she had been, she had the right to create, by the deed of trust, a preferred lien on the property to raise money for the purpose of erecting the building, which takes precedence to subsequent mechanics' lien claims (Harper & Reynolds Co. v. Hammond Lumber Co. [Cal. App.] 196 Pac. 97), in which a hearing in the Supreme Court was denied. No more was done in this case than in that. The facts there considered, while not the exact counterpart of those here, are so nearly alike that we deem the decision to be conclusively determinative of this case. In this case, as in that, there is no allegation of fraud in any of the pleadings, and nothing in the contract or assignment to suggest fraudulent intent. No facts are set forth in the findings from which corrupt motives on the part of any of the contracting parties could reasonably be inferred. Nowhere does it appear that subsequent to the recordation of the trust deed the proceeds were diverted from the purpose for which they were intended, with the intent to deprive the lien claimants of their priority.

The judgment and decree of the lower court, giving priority to the claims of liens of the respondent over the prior recorded deed of trust, is not supported by the facts, and is contrary to the express provision of the section of the Code referred to.

It is not disputed that the deed of trust was properly recorded. The validity of the indorsement of the note which it secured, and the sufficiency of the assignment of all the interest of Mrs. Yates under the deed of trust, to Mrs. Bridge, are not questioned. The court found that after the completion of the dwelling, the Berrys defaulted in their payments. Thereupon defendants Bridge and Allen, the trustees, at the instance of Mrs. Bridge, caused the property to be sold under the terms of the deed of trust. At the sale Mrs. Bridge became, and is now, the owner of the property. On these facts it conclusively appears that the property is free and clear of the claims of lien attempted to be asserted by the respondent in this action.

The judgment is reversed, except in so far as it accords a personal judgment in favor of the plaintiff and against the defendant W. F. Yates. The cause is remanded to the lower court, with directions to enter judgment in accordance with the views herein expressed; the appellants to recover their costs of this appeal.

We concur: RICHARDS, J.; KERRIGAN, J.

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56 Cal. App. 68

SECCOMBE v. CASE et al. (Civ. 4141.)

(District Court of Appeal, First District, Division 1, California. Jan. 6, 1922.)

1. Judgment 🔑784—Public Lands 🔑140—Existing judgments at time patent received equal liens on land, unless under Homestead Act.

Docketed judgments at the time landowner received federal patent became liens on the property simultaneously, and neither had priority, under Code Civ. Proc. § 671, provided the patent was not secured under the homestead law (Rev. St. U. S. § 2296 [U. S. Comp. St. § 4551]), in which case the land would not be liable for debts contracted prior to the issue of the patent, but would be liable for judgments based on torts.

2. Appeal and error 🔑176—Fact assumed to be true in trial court may not be contested on appeal.

When a fact is assumed to be true in the trial court it cannot afterwards be contested on appeal.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by A. H. Seccombe against George D. Case, James R. Shaw, and others. From a judgment, plaintiff and the named defendants appeal. Affirmed.

Walter T. Casey, of Los Angeles, for appellants Case and Shaw.

Kimpton Ellis, of Los Angeles, for appellant Seccombe.

Kemp, Mitchell & Silberberg, Michael Rudolph, and Isaac Pacht, all of Los Angeles, for respondents.

TYLER, P. J. This action was one brought to quiet title to certain lands situate in Los Angeles county. Defendants Case and Shaw answered, and by cross-complaint asked to have the property quieted in them. Defendants Sacks and Arnold similarly answered and cross-complained and sought the same relief as the other defendants. Judgment went for defendants Sacks and Arnold, the title to the property being quieted in them against the plaintiff and all other defendants including Charles O. Haskell. Plaintiff Seccombe, and defendants Case and Shaw appeal. At the trial most of the facts were submitted upon a stipulation. The case depends upon the sufficiency of the proof of the character of the grant received by defendant Haskell from the United States; all parties to the action claim title through Haskell. Plaintiff to this action had secured, and on May 7, 1914, had docketed, a deficiency judgment against Haskell in Los Angeles county. On November 29, 1918, he caused execution to be levied and the property to be sold, he bidding it in. On October 9, 1920, he received a sheriff's deed to the same. Appellants Case and Shaw's claim of title is based on a mortgage covering said property executed by Haskell October 15, 1916, which mortgage was duly recorded. Shaw and Case were the mortgagees. Respondents' title arose as follows: Defendant H. J. Wilson obtained judgment against Haskell in Los Angeles county, and on October 11, 1917, he caused execution to be levied on the property. Sale was had under execution in November, 1917; the purchasers being the respondents Sacks and Arnold. On November 23, 1918, a sheriff's deed issued to said purchasers, who were thereupon let into possession of the property in question. The cause of action upon which the last-named judgment was rendered was based upon fraud perpetrated by Haskell. This action was brought to determine these conflicting claims. The judgment appealed from is attacked on one ground only. The court found that Haskell's title was derived through "a federal patent and homestead." Appellants challenged this finding, claiming that the evidence is insufficient to sustain the finding that the patent issued to Haskell was one secured under the homestead act of the United States. They admit that a federal patent was issued to Haskell, their sole contention being that the evidence failed to show that the patent was of a homestead character. The materiality of this finding arises as follows:

[1] At the date that Haskell received his patent, October 9, 1915, both the Seccombe and Wilson judgments against Haskell were docketed. If the patent were not a homestead patent both judgments became a lien on the property simultaneously, and under the law neither had priority; both being of equal rank. Section 671, Code Civ. Proc.; Hertweck v. Fearon, 179 Pac. 190.

If the grant was a homestead patent a different result followed. Lands acquired under the Homestead Act are not liable for debts contracted prior to the issue of a patent therefor. Section 2296, Rev. Stats. (U. S. Comp. St. § 4551) Public Land Law. This law is not applicable to debts arising from torts prior to issuance of patent. Brun v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R.

A. (N. S.) 154; Doran v. Kennedy, 237 U. S. 367, 35 Sup. Ct. 615, 59 L. Ed. 996; Mullen v. Simmons, 234 U. S. 198, 34 Sup. Ct. 857, 58 L. Ed. 1274. Seccombe's judgment was founded on contract; Wilson's judgment upon fraud. It follows that if Haskell's patent was in fact a homestead patent Seccombe acquired no rights in the property by virtue of his judgment, it being founded on contract, but Wilson did, his judgment arising from a fraud. Case and Shaw's mortgage was executed in 1916, the patent issued in 1915. If the patent were not a homestead, the lien of the Seccombe and Wilson judgments attached equally at the time of the patent for 1915, and both judgments have precedence over the mortgage; it being executed after the patent. If the patent were a homestead, then the lien of Wilson's judgment alone attached at the time patent issued, and it alone would have precedence over the mortgage. The result is that in any event Wilson's judgment, and through him, respondents' title, is superior to the mortgage. The controversy, therefore, narrows down between Seccombe and respondents as follows: (1) The respondents' title is superior to Seccombe's if Haskell's patent is a homestead; (2) respondents and Seccombe acquired an equal lien on the property if Haskell's patent is not a homestead.

The trial court found the patent to be a homestead. Appellant attacks this finding. Appellant makes no attack whatever upon the law as applied to the facts. His attack is directed solely against the one finding of "homestead." We are of the opinion that under the stipulation with reference to the facts there was implied without any question that the patent was of homestead character. Plaintiff was justified in relying that the stipulation was to this effect. It would seem from the discussion of counsel at the time of the introduction of the patent that evidence of the same was in court and was offered, but the court refused to receive it upon the ground that its existence was stipulated, and all parties had acquiesced in the conclusion that the patent was a homestead. At the time of the proposed offer it was stated by counsel for cross-complainants that the patent was of a federal homestead, and after briefly stating the consequences that would follow that character of patent, so far as it related to the rights of the parties herein, it was then stipulated that the patent had issued, whereupon the court remarked:

> "That the patent was issued on that day and not issued until then, and there was no patent until then."

And further:

> "It has already been stipulated that patent has been issued, and it was issued to Haskell, and the date of it."

[2] And again:

> "There is no occasion to put that in evidence. The patent was issued by the United States to Haskell."

It is by reason of these remarks by the court in referring to the stipulation that appellant claims there is no evidence in the record to support the homestead character of the patent. The objection is highly technical and has no merit. At the time of the offer as above indicated, it was clearly stated by counsel making the offer that the patent was of a homestead character. The reference thereafter by the court to it generally as a patent in no manner indicated that the stipulation excluded the idea that the patent was of a homestead character. All counsel were present, and the statement that it was a homestead patent was not denied or challenged by any of the parties interested. The case was tried and decided on the assumption that this was the fact, and was the very object and purpose of the stipulation. Counsel cannot now change their position before this court. When a fact is assumed to be true in a trial court it cannot afterwards be contested on appeal. It is suggested by counsel for respondent that, the patent being a public document, and on file in the United States land office at Los Angeles, for the purpose of saving time and expense of a new trial we cause the same to be examined and determine the fact of the character of the patent. Upon the conclusion we have reached this is unnecessary.

The appeal is without substantial merit and the judgment is hereby affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

56 Cal. App. 87

ANDERSON v. ANDERSON. (Civ. 4155.)

(District Court of Appeal, First District, Division 1, California. Jan. 7, 1922.)

1. Divorce 🔑161 — Default decree not set aside by reason of court's disregard of stipulation.

Where at time of overruling of demurrer in a divorce case a stipulation was entered into between the parties to the effect that defendant might have the custody of a certain child, and relied thereon when failing to answer, the fact that the court disregarded such stipulation and awarded custody of the children to the plaintiff did not warrant setting aside default decree.

2. Divorce 🔑297—Court and not parties' stipulations control custody of children.

While parents have a legal right to stipulate with each other as to the custody and control of their offspring in a divorce action, this right is subject to the control of the court, which will place the children where their welfare requires.

3. Divorce 🔑161, 184(5)—Setting aside default discretionary.

Application to set aside default decree of divorce was addressed to the sound discretion of court, and its action will not be disturbed in the absence of an abuse of such discretion.

4. Divorce 🔑184(12)—Defendant not prejudiced by refusal of court to set aside default divorce decree.

Defendant was not prejudiced by refusal of court to set aside default divorce decree, where her only purpose was to obtain custody of a certain child, since by a proper showing of fitness the decree could be modified at any time during minority of the child under Civ. Code, § 138.

5. Divorce 🔑184(6)—Sufficiency of evidence not before court on appeal from order refusing to set aside default.

Insufficiency of evidence to support a decree of divorce was not before the court on appeal from an order refusing to set aside a default.

Appeal from Superior Court, Riverside County, Hugh H. Craig, Judge.

Action by Albert C. Anderson against Pearl J. Anderson for divorce. From an order denying her motion to set aside a default judgment and order as to custody of children, defendant appeals. Affirmed.

Ford & Bodkin, of Los Angeles, for appellant.

George A. French, of Riverside, for respondent.

TYLER, P. J. Action for divorce. Plaintiff had judgment by default, and an order awarding the care and custody of two minor children, Milford, a son, 14 years of age, and Evelyn, a daughter, aged 9 years. This is an appeal from an order denying defendant's motion to set aside the default judgment entered herein and refusing to disturb the order made in the interlocutory decree awarding the custody of the minor children to plaintiff. It is admitted that, the question of amending the decree as requested by defendant being discretionary, and there being conflicting affidavits on file touching the qualifications of the parties to the action, an appeal from this portion of the order awarding the custody of the children to the plaintiff would be of no avail.

[1-5] The attack upon the order appealed from is therefore limited to that portion thereof refusing to set aside the default of defendant. It is apparent from a reading of the record that defendant never intended to contest the divorce action or make any defense therein. The suit as originally filed charged the defendant with cruelty and adultery. Defendant failed to plead within the time allowed by law, and her default was regularly entered. Thereafter by stipulation the default was set aside, and defendant filed a demurrer. This demurrer was subsequently, on October 6, 1919, overruled by consent, and defendant was given five days to answer. At the same time the count charging her with adultery was dismissed; the remaining charge being that of cruelty. From this date defendant had her time to plead extended from time to time by stipulation until January 3, 1920, but was in default from that date until the trial, July 12, 1920, on which date her default was again entered. At the time of the overruling of the demurrer a stipulation was entered into between the parties to the effect that defendant might have the custody of the minor daughter, Evelyn Anderson. The trial court, however, disregarded this stipulation, and awarded the custody of both minor children to plaintiff. Appellant here contends that in failing to answer she relied upon the stipulation had with plaintiff regarding the custody of the child, and was of the belief that a decree would be entered in conformity therewith, and that, as the decree is in violation of the stipulation, the judgment should be set aside and she should be permitted to answer. We do not consider that these reasons warrant the setting aside of the decree. While parents have a legal right to contract with each other as to the custody and control of their offspring (Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931), this right to so stipulate is subject to the control of the court in which a divorce action is pending (Black v. Black, 149 Cal. 224, 86 Pac. 505). Where the welfare of children is involved as it is in divorce cases, parents cannot by contract so bind themselves as to foreclose the court from an inquiry as to what that welfare requires. Bancroft v. Bancroft, 178 Cal. 352, 173 Pac. 582; Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702; 19 C. J. 344; Aldrich v. Aldrich, 166 Mich. 248, 131 N. W. 542. It is apparent from the facts that defendant had no intention of opposing the action for divorce, and the record presents no showing of excusable neglect entitling her to the relief here sought. On the contrary, the very ground upon which the motion to set aside the default is based indicates that she was only concerned in obtaining the custody of one of the minor children. The record discloses that the default was taken July 12, 1920, and the motion to set it aside was not filed until January 8, 1921, nearly six months thereafter, another fact that suggests that she was little concerned with any portion of the judgment. On hearing of the motion the testimony was conflicting, and the application was addressed to the sound discretion of the court. No abuse of such discretion is here shown. The action of the court, therefore, will not be disturbed. Morton v. Morton, 117 Cal. 443, 49 Pac. 557; Black v. Black, 149 Cal. 224, 86 Pac. 505; Simmons v.

Simmons, 22 Cal. App. 448, 134 Pac. 791. Aside from these considerations, defendant was not prejudiced by the action of the court in refusing to be bound by the stipulation. By a proper showing of fitness the decree may be modified at any time during minority of the children. Civ. Code, § 138. The claim was also made that the evidence introduced at the trial was insufficient to support the conclusion of the trial court. This point is not properly before us on this motion. From a reading of the record, however, it is apparent that it is amply sufficient to sustain the judgment.

The order appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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56 Cal. App. 34

Ex parte KELLEY. (Cr. 1014.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1921.)

Habeas corpus ⚷51, 99(1)—Parents cannot be deprived of custody unless parties to proceeding and shown to be unfit or unable to perform duties.

Parents are the natural guardians of their children, and cannot be deprived of their care and custody except by a proceeding to which they are parties, and in which it must be shown that they are unfit, unwilling, or unable to perform their parental duties.

Application by Franklin B. Kelley for writ of habeas corpus to secure the release of Franklin B. Kelley, Jr., a minor, from the custody of his maternal grandparents. Writ granted, minor discharged from custody, and committed to custody of petitioner.

Edward A. Cunha and John J. West, both of San Francisco, for petitioner.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, and Albert Nelson, of San Luis Obispo, for respondent.

KERRIGAN, J. The petitioner, a resident of Alameda county, is the surviving parent of Franklin B. Kelley, Jr., a minor. The following facts are disclosed by the record:

Petitioner, Franklin B. Kelley, and the mother of the said minor were lawfully married, and the said minor is the legitimate issue of said marriage. The mother died September 15, 1914, at which time the child whose custody is here sought was about 2½ years of age. At the date of the mother's death petitioner resided with his wife and child in San Francisco. Upon the request and solicitation of George and Cordelia McCabe, maternal grandparents of the minor, who reside at San Luis Obispo, petitioner permitted his child to abide with them from the date of the mother's death until about June 15, 1921. On September 1, 1916, the McCabes filed their joint application in the superior court of San Luis Obispo county praying for an order appointing George W. McCabe guardian of the person and estate of said minor. In this application it was alleged that the minor child was in the custody of George W. McCabe. An order of arrest was prayed for, and the transfer of the custody of the minor from George to Cordelia McCabe was asked during the pendency of the proceeding. Without any further showing such an order was made. In the application for guardianship it was not charged that the father had neglected or abandoned his child, nor that he was an unfit or incompetent person to have its care and custody. No notice of this application or the hearing thereof was ever served upon petitioner herein, nor did he ever consent to the order made or know of its existence until August 16, 1921. In July, 1921, and while said minor was residing with his father, the applicant herein, the superior court of Alameda county, upon proper application, made its judgment and order appointing said applicant guardian of the person and estate of said minor, and he thereupon duly qualified as such guardian on the same day. Thereafter, on August 15, 1921, without notice to this applicant, the superior court in and for San Luis Obispo county made an order for a writ of arrest to issue directing the sheriff of the county to arrest said minor from the custody of petitioner and deliver him into the custody of Cordelia McCabe, the maternal grandmother. On the following day such writ was executed by the sheriff, arresting said minor and removing him from the custody of petitioner to San Luis Obispo and there delivering him into the custody of Cordelia McCabe, who now detains said minor from petitioner under authority of this order. It further appears from the record that no proceedings of any character were had upon the original application for letters of guardianship filed in the superior court of San Luis Obispo county until the making of the order of arrest of August 15, 1921.

Subsequent to the issuance of this order it appears that application was made before the superior court in Alameda county on the 22d day of November, 1921, by George and Cordelia McCabe to vacate and set aside the order of July 7, 1921, appointing petitioner guardian of the person and estate of said minor, and upon the hearing of this application all of the evidence here presented was reviewed upon such motion. The motion having been submitted, it was found that all the proceedings appointing petitioner guardian of the person and estate of said minor were regularly had, and that said petitioner had at all times been ready, willing, and able to support said minor, and that he had never by act or conduct at any time abandoned or agreed to abandon said minor or to surrender his custody, or in any manner forfeited his parental rights, and that it was for the best interest of said minor that he remain in the custody of petitioner. It was further determined that the superior court in and for the county of San Luis Obispo had never acted on the petition filed by the McCabes in September, 1916, and that it had never appointed a guardian over the person and estate of said minor, and, further, that no notice of any kind was ever served upon petitioner herein of such proceedings, and that such proceedings had been abandoned by the McCabes.

It further found that no showing upon the merits was made why the order appointing petitioner guardian of the person and estate of his minor child should be set aside, and the motion was accordingly denied.

Under these circumstances we are of the opinion that the minor should be restored to the custody of petitioner. Parents are the natural guardians of their children and cannot be deprived of their care and custody except by a proceeding to which they are parties, and in which it must be shown that they are unfit or unwilling or unable to perform their parental duties. Ex parte Jonie Becknell, 119 Cal. 496, 51 Pac. 692; Matter of Hart, 21 Cal. App. 30, 130 Pac. 704. Here no such showing was made. The orders issued out of the proceedings initiated in the county of San Luis Obispo, and the orders of arrest had therein could have no such effect for petitioner had no notice thereof and was not a party thereto, and, furthermore, they were abandoned, as correctly found by the judge of the superior court of Alameda county, who heard petitioner's application for letters. This being so, petitioner is entitled to the relief here sought.

It is therefore ordered that the minor be discharged from the illegal detention and custody in which he is held and committed to the custody of petitioner herein.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

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56 Cal. App. 21

BEGGS v. SPALDING. (Civ. 4030.)

(District Court of Appeal, First District, Division 2, California. Dec. 30, 1921. Hearing Denied by Supreme Court Feb. 27, 1922.)

1. Vendor and purchaser 🔑37(1) — Vendee cannot sue for misrepresentation in original contract afterwards modified to avoid the same.

Vendee of an orange orchard has no rights growing out of representations made by vendor, at the time of entering into the contract, concerning oak root disease, where subsequently such vendee made investigation and discovered that such disease was located in certain places and the contract was modified and the purchase price reduced and time of payment extended by reason of the existence of such disease.

2. Vendor and purchaser 🔑37(4)—Statement of vendor of orange grove that oak root disease would not spread held mere expression of opinion.

A statement of vendor of orange orchard that he "was sure said oak root disease would not spread any further" was a mere expression of opinion and one upon which vendee was not entitled to rely, especially where vendee made personal investigations and secured literature on the subject.

3. Vendor and purchaser 🔑37(4) — Vendee held not entitled to damages for misrepresentation as to quality of soil.

A vendee of an orange orchard was not entitled to damages for misrepresentation as to the quality of the soil, where she had her own relatives make examinations of the property independently of the vendor, and such relatives were as competent to judge of the matter as the vendor.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by C. H. Beggs, as administrator of the estate of George G. Mathews, deceased, against Mary D. Spalding. From a judgment, both parties appeal. Modified and affirmed.

Carnahan & Clark, of Los Angeles, for plaintiff, appellant and respondent.

Howard Robertson, of Los Angeles, T. R. Spalding, and C. D. Houghton, for defendant, appellant and respondent.

LANGDON, P. J. This action was brought by George C. Mathews to foreclose a mortgage in the sum of $24,000, covering an orange orchard of about 22 acres, sold by him to the defendant for the sum of $40,000. Before the trial the plaintiff died and C. H. Beggs, special administrator of his estate, was substituted as plaintiff. The defendant in her amended answer, after certain admissions and denials, pleaded as a further and separate defense and by way of counterclaim that said Mathews had made to her certain false and fraudulent representations in regard to the extent to which a certain disease called "oak root disease" would spread among the trees in the orchard, and in regard to the composition of the soil on the property; that she relied upon these representations to her damage in the sum of $14,000, which amount she asked to have set off against said $24,000 due on the mortgage. The trial court allowed to defendant a deduction of $2,500 from the amount of the mortgage because of damage due to the spread of the "oak root disease" and gave judgment for plaintiff for the sum of $22,500 upon the mortgage, together with $1,000 for attorney's fees, $35 for expenses in searching the title, and costs of suit. Both parties have appealed upon the judgment roll; the plaintiff from that portion of the judgment wherein the sum of $2,500 is deducted from the principal sum due on the promissory note secured by the mortgage, and the defendant from the whole judgment except that portion thereof which is in her favor.

These are the facts, as found by the court: About the year 1906 George C. Mathews and his wife, jointly, acquired the property involved here and duing the year 1907 and 1908 set out the same to orange trees. At all times mentioned the said Mathews was generally known to be and was skillful, careful, and experienced in the planting, care, and cultivation of citrus fruit trees and the production of fruit therefrom and was known to have had experience with and knowledge and judgment of the soil and locality best adapted to the growing and production of citrus fruits. Said property was traversed by a water course that divided the same so that about 2½ acres lay on the southeasterly side thereof and about 17½ acres lay on the northwesterly side thereof. The banks of said water course were not perpendicular, but were flattened, sloping and shelving, and covered with a layer of soil of substantially the character and appearance of that upon the surface of the land adjoining said banks, and there was upon said sloping banks a growth of weeds, grass, and shrubs, which in a large measure covered and concealed the surface of the soil thereof. At the time when Mathews acquired the land there were five large growing oak trees and one old oak tree stump thereon, the locations of which are set out in the findings. Said Mathews did not have, at any time, any knowledge of the existence of any other oak trees or oak stumps or oak roots upon said premises. Mathews caused the land to be leveled and graded and planted to orange trees and at all times knew the kind, character, and composition of said land and the soil thereon. In preparing the land for setting out said orange trees Mathews cut down said oak trees which were upon the land and removed the stumps and large roots thereof and also removed said old oak stump and the large roots thereof.

On or about April 12, 1912, Mathews and defendant entered into an executory contract whereby Mathews agreed to sell and defendant agreed to buy said real property for the price of $40,000. At the time of the execution of said contract the title to said property was involved in the administration of the estate of the deceased wife of said Mathews and for that reason he was unable to convey title thereto, and it was provided, therefore, in said contract that the defendant should pay on account of said purchase price $16,000 in cash at the time of the execution of said contract, and should immediately enter into possession of said property and cultivate the same and harvest and market the crops thereon for a period of one year thereafter and that on or before the expiration of said year Mathews should convey to the defendant a good title to said premises and said defendant should, contemporaneously therewith, pay to Mathews interest on $24,000 at 6 per cent. per annum from the date of said contract to the date of said conveyance and also execute her certain promissory note in favor of said Mathews for the principal sum of $24,000, payable in three years after date, and to bear interest at the rate of 6 per cent. per annum, and as security for the payment thereof, should execute a first mortgage upon said real property. Said contract further provided that in the event said Mathews should be unable to convey title to said premises within said period of one year, said defendant should be released from any obligation to purchase said property, and thereupon the sum of $16,000 should be returned to said defendant.

Prior to the execution of said contract and during the negotiations therefor, said defendant personally inspected said premises and also caused said premises to be inspected for her by W. A. Spalding and W. R. Powell, her husband and brother-in-law respectively, and each of said men was a competent and well-informed business man and W. R. Powell was experienced in the culture of citrus trees in that vicinity and for more than 25 years immediately preceding the execution of said contract said Spalding and said Powell had owned, jointly, about 30 acres of land improved with bearing citrus trees and situated in the same vicinity as the Mathews property, which said land so owned by Spalding and Powell was cultivated and managed by said Powell. Said defendant sought, received, and acted upon their advice and judgment in purchasing said land from plaintiff.

During the negotiations and prior to the execution of the contract the defendant was informed by one Arthur Powell that certain portions of said property from which said oak trees and said old oak stump were removed were infected with oak root disease and that several trees in said area had died from that disease. Said Arthur Powell was the nephew of defendant and a person competent, skilled, and experienced in the diseases of citrus trees and was personally familiar with the grove situated upon said land sold to defendant by plaintiff, and defendant sought and received his advice and judgment in relation thereto.

Upon receiving said information and prior to the executon of said contract said Arthur

Powell with said W. A. Spalding, for and on behalf of said defendant, and independently of said Mathews, entered upon and inspected said property for the existence and evidence of said oak root disease, and said defendant sought and received expert and other advice concerning said disease. Prior to obtaining said information, as aforesaid, said defendant did not personally possess any knowledge or information concerning oak root disease and did not know of the existence thereof in said land.

Prior to the execution of said contract and for the purpose of inducing the defendant to execute the same, said Mathews stated and represented to said defendant that he had caused the trees to be planted in said land and was familiar with the soil thereof, and with the exception of an area of about three-fourths of an acre adjoining the said water course on its northerly side, said land was good, deep, strong soil, and suitable for the culture of citrus trees thereon; that he did not know of any oak trees, other than those hereinbefore mentioned, having ever existed upon said land; that he was familiar with oak root disease and knew the extent to which the same would spread; that no trees upon said land other than those then affected by said disease could or would be effected by said disease; and that said disease would not and could not extend beyond the areas from which said oak trees and said old oak stump had been removed. Said defendant relied upon said statements and representations so made by said Mathews and did not further examine or investigate or test said land for the purpose of ascertaining its character and suitability for growing such trees, except that said defendant did further investigate the matter of oak root disease and did secure literature thereon, and except for such statements of said Mathews and defendant's reliance thereon, she would not have purchased said property and entered into said contract.

At the time of the execution of the contract said defendant paid to said Mathews $16,000 on account of said purchase price and entered into possession of said property and at all times since has been and now is in possession and engaged in the cultivation thereof. At all times since defendant took possession of said property one Volney Spalding, the son of defendant, has been actually residing upon said premises and personally superintending the care, cultivation, and management of said property at the request of said defendant and for her benefit and said premises have at all times been cultivated carefully and in a husbandlike manner.

Mathews was unable to and did not convey to defendant title to said land within the time limited by said contract, and said defendant, upon the expiration of said time, notified said Mathews that she had discovered that five or seven additional orange trees situated in the areas from which said group of three oak trees and said old oak stump had been removed, were seriously affected with oak root disease, and that she would not complete the purchase of said land unless said Mathews would make a reduction in said purchase price to indemnify her for the existence of said disease.

Thereupon, said Mathews, for the purpose of inducing said defendant to purchase said land, offered to release her from the payment of the interest for the preceding year on the unpaid portion of said purchase price, which said interest amounted to $1,440, and to let the said note and mortgage run for five years instead of three years, and further represented and stated to said defendant that he was sure that said oak root disease would not spread any further and that said disease would not and could not extend beyond the areas from which said oak trees and said old oak stump had been removed. Said defendant believed said representations and was thereby induced to and did accept said offer of said Mathews to waive the payment of interest and to extend the time for the payment of said note and mortgage, and thereupon, on or about May 1, 1913, said Mathews waived the payment of said interest and conveyed said premises to defendant and said defendant accepted said waiver and conveyance and executed her promissory note in favor of said Mathews for the principal sum of $24,000 and also executed said mortgage securing the same.

Within a few months after the execution of said note and mortgage other orange trees situated in the areas from which said Mathews had removed said three oak trees and said old oak stump became infected with said oak root disease and subsequently died therefrom.

[1, 2] From these findings it seems clear that in the first instance defendant did not depend or rely upon Mathews' representations regarding the spread of oak root disease, but made independent investigations and was assisted in said independent investigations by her husband, brother-in-law, and nephew, men experienced in business and in this particular business of raising citrus fruit and, so far as the findings show, no less skillful and able to form a reliable judgment upon this matter than was Mathews; and it was found by the trial court that in purchasing said property, the defendant "received and acted upon their advice and judgment." But be that as it may, when it became apparent that orange trees within the area from which the oak trees had been removed were affected by this disease, Mathews made a very substantial allowance to defendant on this account, thus wiping out any claim she could possibly have had on this

matter. She was allowed $1,400 and an additional extension of two years in the time for payment of her note, which was drawing interest at only 6 per cent. It is beyond dispute that defendant has no rights now growing out of any representations made by Mathews at the time she entered into the original contract. The parties did not go on with that contract, but modified and changed the same. Now when the new contract or compromise was made and the conveyance, mortgage, and notes were executed, Mathews stated to defendant:

> "That he was sure said oak root disease would not spread any further and that said disease could not and would not extend beyond the areas from which said oak trees and said old oak stump had been removed."

According to the findings, the latter portion of this statement was correct and it was found that the trees affected by the disease were situated within the area from which said Mathews had removed said oak trees. As to the other portion of the statement that Mathews "was sure said oak root disease would not spread any further," we think it was a mere expression of opinion and one upon which the defendant was not entitled to rely. In the first place, defendant had had independent advice on that subject from several persons as competent to judge as Mathews; she had made personal investigations and had secured literature on the subject, and Mathews' statement was merely his opinion about an uncertain future condition and could not have been intended for nor accepted as a guarantee. Furthermore, Mathews had previously stated the same thing when the contract was originally entered into, and defendant had found that his opinion was erroneous and that the disease had spread within the affected area, and Mathews had acknowledged the fallacy of his previous opinion by allowing the defendant $1,400 in cash and other valuable rights to compensate her for any damage she might have suffered by reliance upon this statement. Clearly, under all these facts, defendant could not blindly rely upon this statement and ignore all information received by her independently from her relatives and her own investigations and her reading on the subject, as well as her experience of the previous year, and then predicate a cause of action upon such reliance.

We are of the opinion that the allowance of $2,500 made by the trial court because of the further spread of the oak root disease within the area from which the oak tree had been removed was erroneous under the facts found.

[3] But a further claim for damages is made by defendant predicated upon the following facts found by the trial court: During the month of February, 1914, an unusually large volume of flood water was concentrated in the water course upon said property and by reason thereof both of the banks of said water course upon said property, for practically their entire length across said property, were eroded and cut away to a depth varying from six to ten feet and said banks were extended back into said property many feet and clearly disclosed the true composition of said land, and that substantial areas of said property situated in that portion of said property which said Mathews had represented as containing good, deep, strong soil, consisted of a top layer of loose, sandy soil, varying in depth from three to ten inches, and immediately underneath said soil layer there existed a stratum of coarse gravel and sand, varying in depth from ten inches to two feet. By reason of the composition of portions of said land, as aforesaid, there were only about 15 acres of said land reasonably suitable for the growth and maturity of citrus trees. This condition was made apparent, as stated, in 1914, at a time when the property was being cultivated by defendant's son for and on her behalf.

Defendant claims the right to an allowance because of the actual soil condition, by reason of the fact that the trial court found that Mathews had represented to defendant that he was familiar with the soil and that with the exception of an area of about three-quarters of an acre adjoining the water course on its northerly side, said land was good, deep, strong soil and suitable for the culture of citrus trees thereon, and that defendant did not further examine or test said land for the purpose of ascertaining its character and suitability for growing said trees, and except for such statements of said Mathews and her reliance thereon, would not have purchased said property and entered into said contract.

The court also found that defendant paid the interest upon her note as the same matured to November 12, 1917, but has not paid any interest thereon since said date and has refused to pay the principal sum thereof; that she had actual and constructive knowledge of the true composition of said land more than three years prior to the commencement of this action.

No finding was made as to the amount of defendant's damage due to the misrepresentations as to the composition of the soil, and the trial court denied defendant relief as to this matter, evidently upon the theory that her right was barred by the statute of limitations. It is contended by the defendant and appellant that in the application of the statute of limitations to defendant's right to avail herself of these misrepresentations as to the soil in defense to an action upon the note, the trial court erred. It is argued that while a party seeking relief upon the ground of fraud or mistake must commence his action within three years after discovery of the facts constituting the fraud or mistake, a different case is presented where the guilty party is seeking enforcement of the contract and the fraud is set up as a defense. We may concede this to be true, but nevertheless, we are of the opinion that the defendant was entitled to no set-off against the mortgage debt because of the statement of Mathews regarding the soil. The court has found that prior to the execution of the contract between the parties and during the negotiations therefor, the defendant personally inspected the premises and caused them to be inspected for her by her husband and brother-in-law, and each of said men was a competent and well-informed business man and defendant's said brother-in-law was experienced in the culture of citrus trees in that vicinity, and for more than 25 years immediately preceding the execution of said contract, defendant's said husband and brother-in-law had owned, jointly, about 30 acres of land improved with bearing citrus trees and situated in the same vicinity as the Mathews property, which land was cultivated and managed by defendant's said brother-in-law, and defendant sought, received, and acted upon their advice and judgment in purchasing said land.

It is true there appears to be a conflict in the findings due to the fact that the court found that except for the statements of Mathews and defendant's reliance thereon, she would not have purchased the property. But that conflict becomes immaterial here, because we think defendant had no right to rely upon Mathews' statements regarding the soil, under all the facts shown here. Her own relatives were as competent to judge of the matter as was Mathews, and three of them made examinations of the property independently of Mathews at the request of defendant, and defendant's husband acted for her in negotiations for the contract. The soil was actually sustaining the trees at the time of the purchase and defendant saw them growing thereon, and she and her husband and brother-in-law and nephew had every opportunity to investigate and judge for themselves of the adaptability of the soil for the purpose for which it was being used. The court had found that she acted upon the advice and judgment of these persons who were, presumably, interested in her financial welfare and whose advice she sought. She is not in a position now to shift the responsibility to Mathews and was not entitled to rely upon his statements as to a matter of this kind under all the facts and circumstances shown here, and such statements do not furnish a cause of action. 12 R. C. L. § 135; Gordon v. Parmelee, 2 Allen (Mass.) 212, 214. Therefore, quite apart from the statute of limitations, the defendant is entitled to no offset against the money due upon the mortgage.

The judgment is modified so that the first paragraph thereof will read as follows:

> "That plaintiff do have and recover of said defendant Mary D. Spalding the principal sum of $24,000, together with interest thereon at the rate of 6 per cent. per annum from the 12th day of November, 1917, and that said interest be compounded semiannually."

The balance of the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

56 Cal. App. 72

PASSOW & SONS v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 3910.)

(District Court of Appeal, First District, Division 1, California. Jan. 6, 1922. Rehearing Denied Feb. 3, 1922. Hearing Denied by Supreme Court March 7, 1922.)

1. Attachment 🔑349—Pleading as to return of execution unsatisfied in advance of statutory time held sufficient in action against surety on bond releasing attachment.

In an action against a surety on a bond in release of attachment, an averment that defendant in the main action did not have any property subject to levy or means wherewith to satisfy the execution or judgment on the date on which the execution issued or at any time thereafter between the date of the issuance of the execution and the earliest date a return of the execution was permitted by law to be made or at any other time thereafter, when supported by proof, *held* sufficient.

2. Execution 🔑37 — Officer must pay mortgage lien on property levied upon to make the levy good.

Execution cannot be levied upon personal property on which there is a lien without compliance by the officer with Civ. Code, § 2969, providing that, before the property may be taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest or must deposit the amount thereof with the county treasurer payable to the mortgagee's order, and a levy without compliance with such provision is unlawful and creates no lien.

3. Attachment 🔑344—Creditor need not require levying officer to pay liens as condition precedent to suing surety on bond to release attachment.

An execution creditor is not bound to require an officer to pay liens upon goods sought to be levied upon nor to equip him so to do in order to fulfill the requirement of execution return unsatisfied, a condition precedent to suing a surety on a bond to release attachment.

4. Attachment 🔑337—Evidence 🔑66—Surety held not entitled to complain that obligee waived lien and sued on debt; surety presumed to know facts.

Where a bond to release attachment is an unconditional agreement to pay the amount of judgment, the surety is not in a position to complain that plaintiff brought suit upon a debt previously secured by a lien which he might have enforced instead of waiving it, since the surety must be presumed to have been aware of the facts and to have made its contracts accordingly.

5. Sales 🔑313—Acts of seller held relinquishment of possession and seller's lien.

Where a seller of property consigned it to the purchaser and had it delivered to the railroad company upon such consignment and transmitted by mail the original shipping receipt to the purchaser, retaining only a copy thereof, the seller parted with any lien dependent on retention of possession.

6. Costs 🔑69—Judgment for costs decreed to defendant on previous appeal held final.

Where a judgment against defendant was reversed, and defendant recovered costs under Supreme Court rule 23 (176 Pac. xi), and a judgment to such effect was inserted in the remittitur, so that defendant was entitled to include such costs in its cost bill filed in the superior court on the going down of the remittitur, the judgment for such costs was final, in view of Code Civ. Proc. § 1034, and plaintiff, recovering judgment on a subsequent trial, could not be allowed such costs by the trial court.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Passow & Sons against the United States Fidelity & Guaranty Company. From a judgment for plaintiff, defendant appeals, and from an order after final judgment striking out certain items from the cost bill, plaintiff appeals. Affirmed on both appeals.

W. H. Morrissey, of San Francisco (Frederick M. Shipper, of San Francisco, of counsel), for plaintiff.

Leon E. Morris, of San Francisco, for defendant.

RICHARDS, J. There are two appeals herein, one by the defendant from the judgment and one by the plaintiff from an order after final judgment striking out certain items from its cost bill. We shall dispose of these in their order. This is the second time this cause has been before the appellate tribunals upon the defendant's appeal. The facts of the case leading up to the institution of the action were thus summarized by the Supreme Court upon the former appeal:

"The action was for the recovery of the price of certain goods sold by the plaintiff to Bowman. The price agreed on was $1,000, of which $200 was to be paid before delivery, and $40 per month during each month thereafter. The agreement was in writing, signed by the parties, and it acknowledged the receipt of the goods by Bowman. It further provided that until the price was fully paid the property should belong to the plaintiffs, without right in Bowman to sell or incumber the same. There was a further provision, however, that if Bowman failed to pay any installment when due, or should refuse to accept delivery or return the goods, then the entire balance of the price should at once become due and payable, and that thereupon the plaintiff at its option could either sue for the whole price or cancel the contract and take possession of the goods. Bowman failed to pay the price, and the plaintiff thereupon began the main action. In suing out the attachment the affidavit on behalf of the plaintiff stated, as the law required, that the debt was not secured by any lien. On the trial of that action Bowman appeared and consented to a judgment for the whole price unpaid, on condition that the title to the property should pass to him. Thereupon judgment was rendered accordingly, and full delivery was made to him in accordance with his proposal." Passow & Sons v. U. S. F. & G. Co., 177 Cal. 31, 37, 170 Pac. 1124, 1126.

The ground upon which a reversal was had upon the former appeal was that the execution in the original action in which the undertaking sued upon in this action was given appeared to have been prematurely returned, and that for that reason this action, in the then state of its pleadings, could not then be maintained, the Supreme Court saying upon that subject:

> "There is a qualification of this rule, in other states, to the effect that where the issuance and return of an execution are necessary as a foundation for further proceedings against the judgment debtor, as, for example, proceedings supplementary to execution, or a creditors' bill, a premature return unsatisfied may be cured by proof that the execution debtor in fact had no leviable property. In our opinion the reasons in favor of this rule justify its application to a premature return, where the return is necessary as a foundation for an action upon an undertaking to release an attachment. It is obvious that, if in fact the judgment debtor had no property subject to levy, or means wherewith to satisfy the execution, at any time during the period between its issuance and the earliest lawful return day thereof, and premature return could not cause any loss or prejudice to the surety upon the undertaking, it would appear to be just and reasonable that if these facts be clearly established, the return unsatisfied, though premature in point of time, may still be available to support a subsequent suit or proceeding. The effect of this, however, is that the party instituting the suit on the undertaking must allege and prove that the execution could not have been satisfied during the minimum lawful period for its return." Passow & Sons v. U. S. F. & G. Co., supra.

Upon the remission of the cause for retrial plaintiff amended its complaint by inserting the following averment:

> "That Charles Bowman, the defendant in that action, did not have any property subject to levy or means wherewith to satisfy said execution or judgment, or any part thereof, on the 14th day of February, 1913, the date on which said execution issued, or at any time thereafter between the date of the issuance of said execution and the earliest date a return of said execution was permitted by law to be made or at any other time thereafter."

Thereafter the cause came on for retrial, whereupon the plaintiff, in addition to the reintroduction of its former proof, presented evidence to the effect that immediately after the conclusion of the original action, at the close of which the defendant Bowman therein had received the actual possession of the billiard tables, to recover the price of which that action had been brought, placed a chattel mortgage upon the same for the sum of $500, which was in existence at the time the execution in that action was issued and returned unsatisfied. There was also evidence that the said Bowman had no property subject to execution with the exception of his possible equity in said billiard tables over and above the lien of said mortgage. There was also evidence that said billiard tables had been subsequently sold to pay said mortgage, but that a sufficient sum had not been realized from said sale to satisfy the same. Upon these facts the trial court found as follows:

> "At the time said execution was issued the said Charles Bowman owned no property, and prior to the issuance of said execution said Charles Bowman had sold and transferred all of said pool tables and equipment and all property that he owned. That said Charles Bowman had no property at the time said execution was issued nor at any time thereafter and did not have up to the time of the trial of this action."

[1, 2] The appellant upon the present appeal contends that it is again entitled to a reversal of the case upon the ground that the required conditions upon which an execution may be returned unsatisfied in advance of the minimum statutory period fixed for its return as stated by the Supreme Court in its former opinion as above set forth have not been met by the plaintiff's amendment to its complaint and by the above evidence educed in support of said amendment. We are unable to agree with this contention. The expression of the Supreme Court above quoted, in defining the conditions under which an execution might be returned in advance of the statutory period and might still furnish the basis for an action against the surety upon the attachment bond, was not, as the appellant insists, "dicta," but, on the contrary, was an express direction as to the pleadings and proofs required upon a retrial of the cause. This direction the plaintiff sufficiently complied with by its amendment to its former complaint, and we think also sufficiently conformed to in its proofs in support of said amendment. The defendant Bowman in said former action had no property upon which said execution could have been levied except his interest in the billiard tables covered by the lien of the chattel mortgage. This lien was admittedly a valid one. The execution, therefore, could not have been levied upon said property without a compliance on the part of the officer levying the same with the provisions of section 2969 of the Civil Code, which reads as follows:

> "Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee."

[3] It has been held that any levy attempted to be made without complying with this section of the Civil Code is unlawful and creates no lien. Sousa v. Lucas, 156 Cal. 460, 105 Pac. 413, and cases cited. It follows that, aside from the fact that the evidence shows that there was no appreciable equity in the mortgagor at the time of the issuance and return of the execution, there was no interest therein upon which a levy could have been made, without either a violation of the terms of the Civil Code above quoted, or the doing of acts on the part of the officer levying the writ which we do not think the execution creditor was bound to require or equip him to do.

[4] The appellant upon this appeal returns to its insistence upon the former appeal that the judgment lien for the release of which the undertaking upon which this action was brought was given was void, for the reason that the plaintiff had a lien upon the property for its purchase price for which it was suing at the time it procured said attachment and at the time said undertaking was given for the release of the same. We think this matter has been concluded by the decision of the Supreme Court upon the former appeal; for although the court, in its said decision, was dealing more particularly with the seller's right to retake the property under the terms of the conditional sale thereof to defendant Bowman, still the language of the decision covers whatever lien the seller may have had at the time that suit was brought, since the court says:

> "In view of these authorities we are of the opinion that the defendant here is not in a position to complain of the conduct of the plaintiff in bringing the action upon a debt which was previously secured by some sort of lien upon property, which he might have enforced instead of waiving it and bringing suit for the debt. The surety must be presumed to have been aware of the facts and to have made its contract accordingly. It was an unconditional agreement to pay the amount of the judgment when rendered." Passow & Sons v. U. S. F. & G. Co., supra.

[5] The appellant, however, still contends that the evidence educed upon the second trial of this action affirmatively shows that the seller still had its seller's lien upon the billiard tables at the time of this attachment and up to the time of the judgment in the original action. We do not regard this as material in view of the above citation from the former decision, but, even if it were so, we are of the opinion that the evidence, far from showing that the seller's lien, dependent upon possession, existed at the time of the attachment in said action, does sufficiently show that the seller had parted with its possession of said property and had no longer a seller's lien thereon. It had consigned the property to Bowman and had delivered the same to the railroad company upon such consignment. It had transmitted to the purchaser by mail the original shipping receipt, retaining only a copy thereof. Conceding that there is some conflict in the evidence as to said shipping receipt, the findings of the trial court that the plaintiff had no seller's lien upon the billiard tables at the time it procured its attachment and at the time said bond was given is conclusive as to that matter, as is also the finding of the trial court that there was no fraud or collusion upon the part of the plaintiff in agreeing that said Bowman should be given possession of said property immediately upon the entry of plaintiff's judgment for the purchase price thereof, since, if the seller had no lien thereon, there could be no fraud in agreeing that the purchaser might take possession to which he was already entitled by virtue of the consignment of said property to him.

This, we think, disposes of the appellant's contentions upon this field. We do not deal with the question as to whether the plaintiff would have been entitled to a judgment upon its second cause of action for the reason that the second cause of action concerns the same matter as the first cause of action, but contains certain additional averments relating to an alleged offer of the defendant to pay the plaintiff's claim as soon as the original judgment against its principal, Bowman, became final. The trial court, however, seems to have overlooked this second cause of action, making no specific finding thereon. There is a general finding that all the allegations of the plaintiff's complaint are true, but this, taken with its context, apparently has reference only to the first cause of action.

The only remaining matter for discussion is that presented upon the plaintiff's appeal from the order striking certain items from its cost bill. The facts in relation to this matter are these:

Upon the reversal of the first judgment herein by the Supreme Court the defendant filed in the trial court a cost bill amounting to $219.85 and embracing its costs in the superior court, the appellate court, and the Supreme Court. Thereafter the defendant moved the trial court for an order staying further proceedings in the action until the plaintiff should pay the defendant said sum, which motion was granted by the trial court by the following order:

> "It is therefore ordered that further proceedings be stayed in this court until the plaintiff pays to the defendant the sum of $219.85, the full amount of its cost bill, and 7 per cent. per annum from the 29th day of January, 1918, subject to plaintiff's right to recover the same in the event of judgment being rendered in favor of plaintiff and against defendant."

[6] Thereafter, and upon the recovery by the plaintiff of the judgment herein appealed from, it filed its cost bill and included in it the amount it had been required to pay and had paid pursuant to said order; but upon motion of the defendant this item was, by order of the trial court, stricken from the plaintiff's cost bill. The plaintiff's appeal herein is from said last-named order. We perceive no error in said order. The defendant, upon the reversal of the former judgment, was entitled, under rule 23 of the Supreme Court (176 Pac. xi), to recover its costs upon appeal and to have a judgment to that effect inserted in the remittitur. This having been done, the defendant was further entitled to include such costs in its cost bill filed in the superior court on the going down of such remittitur. This it did. No motion to retax said cost bill having been made by plaintiff it became, as to the items in said cost bill, a final judgment in the defendant's favor. Code Civ. Proc. § 1034. The order of the trial court staying further proceedings in the case until such costs had been paid was not assailed by the plaintiff, but, on the contrary, was complied with by it. The plaintiff, however, contends that by the concluding clause in said order it was given the right to recover such costs in the event of a judgment being finally rendered in its favor; but clearly the trial court could grant no such right to the plaintiff as to those costs to which the defendant was absolutely entitled and for which it had a final judgment in its favor by virtue of said remittitur and of defendant's uncontested cost bill. This being so, the action of the trial court was proper in striking said item of costs from the plaintiff's cost bill filed upon the rendition of the second judgment in its favor. There is no merit, therefore, in the plaintiff's appeal.

The judgment upon the defendant's appeal therefrom is affirmed.

The order from which the plaintiff appeals is also affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

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56 Cal. App. 80

PEOPLE v. BOWERS. (Cr. 804.)

(District Court of Appeal, Second District, Division 1, California. Jan. 7, 1922. Rehearing Denied Feb. 3, 1922. Hearing Denied by Supreme Court March 6, 1922.)

1. Criminal law 🔑1159(2)—Judgment upheld on appeal where substantial evidence supports it.

Where it appears that substantial evidence was introduced supporting the charge, the judgment must be upheld on appeal.

2. Homicide 🔑253(1) — Evidence justified conviction for murder.

Evidence *held* sufficient to justify conviction of murder in the first degree.

3. Homicide 🔑174(6)—Evidence of finding cartridges in defendant's auto shortly after murder properly admitted.

In a prosecution for murder, where the weapon was never found, but officers found defendant seated in an automobile shortly after the shooting, and on searching the car discovered cartridges, the admission of testimony relating thereto was not error; it appearing from the testimony that defendant had placed them there.

4. Homicide 🔑169(6)—Where brass knuckles were found on defendant, evidence that he a number of years before had owned brass knuckles not error.

In a prosecution for murder where defendant was searched shortly afterwards and brass knuckles found on him which he claimed he took from deceased, admission of testimony that a number of years before defendant had owned brass knuckles was not error.

5. Homicide 🔑234(5)—Where defendant was coparticipant in crime, that evidence of conspiracy was wanting immaterial.

Where the evidence in a prosecution for murder was that defendant was a coparticipant and accomplice, that the evidence was not sufficient to establish a conspiracy was unimportant.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Oscar A. Bowers was convicted of murder, and he appeals. Affirmed.

Davis, Rush & MacDonald, W. W. Hyams, and Clyde Burr, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and R. L. Chamberlain, of San Francisco, for the People.

JAMES, J. The defendant was convicted of the crime of murder in the first degree. The verdict of the jury fixed punishment at "imprisonment for life." The judgment of the court followed in the terms prescribed by the law. The defendant thereafter appealed from the judgment and from an order made denying his motion for a new trial.

The indictment of the grand jury charged the defendant, together with Maybelle Roe, Edward F. Doane, and Julia Doane, with having on the first day of September, 1920, with malice aforethought, killed and murdered one McCullough Graydon.

[1, 2] The appellant here was separately tried. He complains of the insufficiency of the evidence and of certain alleged errors of law occurring in the course of the trial. In considering the claims of the defendant, we will make a general statement of the evidence as the record discloses it, giving prom-

inence to that offered by the prosecution for the reason that we have here nothing to do with the matter of reconciling a conflict, but must uphold the judgment if it appears that substantial evidence was introduced supporting the charge. The affray in which the defendant was engaged occurred at the seaside resort of Venice and was precipitated by a controversy which existed between the deceased and Julia Doane respecting the right to the possession of a dwelling house. Julia Doane owned this house, and a number of months prior to the date charged in the information had leased the same to the deceased, Graydon, who thereafter occupied it with his wife. After they had used the premises for several months, Mrs. Doane, who also lived at Venice, served two notices upon the Graydons; the first being to raise the monthly rental, and the second requiring possession to be given to her after the Graydons had failed to pay the increased rental. The Graydons contended that they were occupying under an oral lease for one year, while Mrs. Doane contended that the tenancy was from month to month. Mrs. Doane proceeded to bring an action against the Graydons for unlawful detainer, and the issue being tried in that suit as to the duration of the lease, judgment was rendered in favor of the lessees, the Graydons. Before this action had terminated, Mrs. Doane had taken possession of her house and had installed a tenant therein. The Graydons having succeeded in the action referred to, in turn brought suit against Mrs. Doane to secure possession of the house. This action progressed to judgment and again the judgment was in favor of the Graydons. A few days after the entry of the latter judgment, Graydon applied for a writ of restitution, which was issued to him, and in company with a deputy sheriff, he, together with Mrs. Graydon and the latter's sister, Miss Marshall, proceeded to Venice for the purpose of resuming possession of the Doane house. The deputy sheriff charged with the duty of executing the writ caused the possession of the house to be delivered over by the tenants of Mrs. Doane to the Graydons and, having fully performed his functions in that regard, left the premises. It appears that prior to the issuance of the writ of restitution, the attorney for Mr. Doane had prepared and filed a bond on appeal, staying execution of the judgment. The clerk, in issuing the writ of restitution, did not examine the record to ascertain whether such a bond was on file, although he testified that he inquired of whoever it was who received the writ as to whether such a bond had been filed and received a response in the negative. Very shortly after the Graydons had been placed in possession of the house under the writ of restitution, the attorney for Mr. Doane was notified of the fact and telephoned to appellant Bowers, requesting him to go to Venice and give notice that the bond had been filed. Bowers had been a client of this attorney, and it was through him that the Doane business had been brought to that attorney's office. Bowers went to Venice in an automobile, taking Maybelle Roe with him. Both Bowers and Maybelle Roe, and especially the latter, seem from the evidence to have adopted the Doane-Graydon controversy as personal to themselves. So far as can be learned from any of the evidence, neither Bowers nor Maybelle Roe had any interest whatsoever in the Doane house or any lease made by Mrs. Doane. Bowers and Roe lived in the city of Los Angeles, both being boarders at the home of the latter's mother.

On the early occasion, before the first suit brought by Julia Doane against the Graydons, Maybelle Roe accompanied Mrs. Doane to the house where Mrs. Graydon was, where a wordy controversy was had, in which Maybelle Roe took a more prominent part than Mrs. Doane, the owner. It was appellant's statement given at the trial that on the day of the affray he took Maybelle Roe with him because she was not feeling well and needed the fresh air. Subsequent developments showed that for a person in enfeebled health Maybelle Roe was capable of great physical activity, for on the occasion of this second controversy which resulted fatally to Graydon, her participation therein was of the more deadly consequence. That she and appellant Bowers acted with mutual intent and like purposes no reasoning mind can doubt upon examination of the record here exhibited, and by that record it is shown plainly enough that had it not been for the presence and acts of Bowers and Maybelle Roe the controversy between the Doanes and Graydons as to the possession of the house would have been settled in a peaceful way, unaccompanied by the tragedy which occurred. After Bowers and Maybelle Roe arrived at the house, with the Graydons on the inside, they first knocked at the windows and called to Graydon, using profane language. Mrs. Graydon left the place and went to the police station at Venice, which was some distance away, in an endeavor to secure police protection. She was unable to obtain help from that quarter, and, being tired, she secured a taxicab to take her back to the house. Before doing this she went to a hardware store and endeavored to procure a revolver, but failed, as such weapons were not found there for sale. Upon her return to the house she persuaded the taxicab driver, who appears not to have known any of the parties, to enter the place with her. This driver was a witness of the events which followed. Before the final affray occurred, however, the Graydons having been orally informed by either the Doanes or Bowers that a bond had been given to stay execution, the sister, Miss

Marshall, went in the taxicab to a telephone and telephoned to Los Angeles and ascertained that such a bond had been given. She returned to the house and re-entered the same, together with the taxi driver, and informed the Graydons of the facts. About this time Mrs. Doane arrived at the door and demanded admittance. Mrs. Doane was a woman of about 60 years, of nervous and excitable temperament. She asked to be admitted and was told by Mrs. Graydon that she could come in if she would not let Bowers nor Maybelle Roe in, to which Mrs. Doane finally agreed. After Mrs. Doane had been admitted and, as at least two of the witnesses then in the room stated, as soon as Mr. Graydon was able to interrupt her, he informed her that he had found that a mistake had been made, and that they, the Graydons, were then leaving the place. Mr. Doane had entered meanwhile and Graydon proceeded toward the door. Mrs. Doane called out, "Come on! come on!" evidently addressing Bowers and Maybelle Roe, for the two latter appeared at the front door facing Graydon as he was about to make his exit. The testimony of both the taxicab driver and Mrs. Graydon is to the effect that immediately Maybelle Roe struck Graydon over the head, Mrs. Graydon said with something similar to the article which was afterwards found in the possession of Maybelle Roe and being that which is commonly called a "blackjack." The testimony was that Bowers proceeded also to attack Graydon, and in a moment the three men were outside the door struggling, Bowers and Doane against Graydon, with the latter striving to defend himself. Mrs. Graydon endeavored to go to the assistance of her husband. She was struck over the head by Maybelle Roe. Recovering herself, she went into the house and procured what she said was a "bill file," returned, and, using the file as a weapon, struck Maybelle Roe on the head. The fight progressed to a point where Graydon was on his knees. Mrs. Graydon's sister described his position as follows:

> "Mrs. Doane and Mr. Bowers were in back of him, and Mr. Graydon's hands were pinioned behind his back, and his face was black and his eyes were closed, and his head was bent back and his knees were sagging forward. I thought he was dead from the appearance; and just then I was conscious of a movement from the sidewalk, and I saw Maybelle Roe lurch out from the side, and she had a gun in her hand. It was so quick—she took the gun in both hands like this and she fired."

The three witnesses, to wit, Joan Marshall, Mrs. Graydon, and the taxicab driver Atkins, all agreed that Mrs. Roe went behind Graydon while he was being held by Bowers and Doane, and holding a blue-colored weapon in both hands, very close to Graydon's back, fired the shot from the effect of which Graydon died the next day. There was ample testimony to show that prior to being shot Graydon's head and face had been struck with hard instruments which created abrasions, bruises, and blackened spots. A nearby resident who, from her home which was very close to the Doane house, heard the shot, observed the participants in the affray, and heard Bowers say, immediately after the shot was fired, "You ——— ———, if that don't finish you, I have something that will." When these words were uttered, Bowers was standing at the back of Graydon. This witness then saw Bowers stoop down, and, as she said, he "seemed to pick up something off the lawn, when he and the woman who has been designated as Mrs. Roe went around to the back of the house."

[3, 4] The weapon with which the shooting was done was never found. The police officers who arrived on the scene discovered appellant and Maybelle Roe seated in the automobile, the engine of which had been started. Maybelle Roe had in her possession the "blackjack" and in one of Bowers' pockets was found a pair of metal "knuckles." These two persons each stated to the officers that they had taken the "blackjack" and "knuckles" from the Graydons. A lady who lived in the neighborhood was asked by the police officers to search the automobile, and she testified that she made a thorough examination of it but failed to find any weapon or ammunition of any kind. A short while later the officers made a second search and discovered under the floor mat in the rear of the machine several cartridges. According to one witness at least, between the time that the lady referred to had searched the machine and the time when the cartridges were found, Doane was seen to go to the automobile, get up on the running board, and do something at that place. The admission of the testimony as to the presence of the cartridges does not constitute error, because the circumstances were fully explained and it appeared from the testimony that Doane, if any one, placed them there. A young son of Bowers, of the age of 14, testified that on an occasion shortly before the day of the fatal affray, his father and Maybelle Roe were at dinner at a country place, at which he was present, and that, referring to Graydon, Maybelle Roe said that he (meaning Graydon) would "get his," and that Bowers added, "His days are numbered." This witness also testified that his father owned a blue revolver and that he had it in his pocket on August 29, 1920. Another son of Bowers, called by the prosecution, testified that a number of years prior to the trial he knew that his father kept a pair of "brass knuckles." We think that it was not error to admit the testimony as to the prior possession of the "knuckles," even though the time of that possession was quite remote from the date important here. It was a circumstance to be given such weight as the jury might deem it entitled to in considering the denial of the appellant that the "knuckles" found in his possession immediately after the tragedy belonged to him. The marks and bruises on the face of Graydon were such as might well have been produced by the metal "knuckles," as appears by the testimony of a surgeon who was examined as a witness.

[5] Instructions were offered by both prosecution and the defendant and given by the court upon the subject of the responsibility of a conspirator. The correctness of the instructions is not challenged, but it is claimed that the evidence was insufficient to establish the fact of conspiracy. Assuming that premise, appellant argues that Bowers could not be convicted where it was shown that he did not fire the shot that killed Graydon. But we think that it is not necessary to consider the question as to whether a conspiracy existed, for plainly on the evidence produced by the prosecution Bowers was a coparticipant and an accomplice of Maybelle Roe in the commission of the crime. We have already indicated that state of the evidence which shows that Maybelle Roe and Bowers acted with mutual purpose and intent, and that intent plainly was to commit great bodily injury upon Graydon, even to the extent of killing him. That Bowers himself used a weapon capable of producing a serious injury is fairly shown by the evidence; that he countenanced and approved of the acts of Maybelle Roe is shown by his own words uttered at the moment of the tragedy. In addition to the statements already attributed to him, as shown in the record, there was testimony of a further statement of Bowers made before the Graydons started to leave the house, when, addressing a vile name to Graydon, he said to him that he had better come out, and that when Mrs. Doane came he (Graydon) "would come out differently from the way he went in."

The fact that it was through an error of the county clerk that the writ of restitution was issued is not, to our minds, important in the case. The Graydons were installed in the possession of the house peaceably, and, if that possession was wrongful, the Doanes had redress by application to the court. Neither the Doanes nor this appellant were armed with any process authorizing them to eject the Graydons from the house, and, moreover, as we have shown, the testimony for the prosecution was clear to the point that the Graydons, when they learned of the error and before being attacked by this appellant and Maybelle Roe, announced their intention to leave, and were then endeavoring to do so and surrender possession in a peaceable manner. We find no error in this record justifying the claim that the appellant has been deprived of, or interfered with in his right to, a fair trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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56 Cal. App. 41

IRWIN v. COLBURN et al. (Civ. 3405.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1921. Hearing Denied by Supreme Court Feb. 27, 1922.)

1. Bills and notes ⚷226—Indorsement held supported by consideration.

Where a lease of farm land was made and notes were given in payment of rent and were indorsed by a canning company, and on the same day and as a part of the same transaction the canning company and the lessee executed an agreement referring to the lease and notes in which it was stipulated that the lessee should plant and raise tomatoes and sell them to the canning company, and that the canning company should indorse and guarantee payment of the notes, the canning company was not an accommodation indorser, the consideration for the indorsement being the promise of the lessee to sell his crop to the canning company, especially where lessor would not have leased the premises except for the indorsement.

2. Corporations ⚷416—Officers had authority to indorse and guarantee notes given for rent by person agreeing to sell crop to corporation.

Act of officers of canning corporation in indorsing and guaranteeing payment of notes given in payment of rent by a lessee who simultaneously agreed with the corporation to raise tomatoes and sell them to it, was not ultra vires, since a corporation has authority in making financial transactions which inure to its own benefit in its regular course of business to aid customers by guaranteeing payment of their obligations under Civ. Code, § 354, subd. 8.

3. Corporations ⚷432(7)—Authority of officers may be proved by permitted conduct.

Authority of officers to bind a corporation may be proved by evidence that such officers have been allowed to conduct its business, and that third persons have acted on the authority which the corporation has thus permitted them to assume.

4. Corporations ⚷426(10)—Cannot deny authority of officer after receiving benefits.

A canning corporation having received benefits from the leasing of land to a third party by plaintiff, and a contract with the third party, made possible only by execution of guaranties on notes given for rent by the third party, it will not be permitted to say that its officers lacked authority to guarantee payment of the notes.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by I. Isaac Irwin against Phillip Colburn and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Wylie, of San Diego, for appellants.
Wm. G. Mirow, of San Diego, for respondent.

CRAIG, J. This action is one upon five promissory notes made and executed by the defendant Phillip Colburn to the plaintiff and alleged to be duly indorsed by the appellant, the Standard Canning Company of San Diego. Upon a trial judgment was rendered for the plaintiff.

Appellant does not dispute that the indorsement was placed upon each of the notes in question over the seal of the corporation, together with its guaranty of payment and a waiver of presentation to maker, demand of payment, protest, and notice of nonpayment. It is undisputed that these indorsements, guaranties, and waivers were signed by the defendant through Hendee, who was then president, and Williams, then secretary, of the defendant corporation. These notes were executed and delivered with the indorsements and waivers thereon to Irwin in connection with the following transaction: Colburn was to rent certain farm land belonging to Irwin for the purpose of raising tomatoes. He was to sell the tomatoes to the defendant company. He gave the promissory notes to pay for the rent of the premises. Colburn was unknown to Irwin, who had had former transactions of a similar character concerning the same land with the Standard Canning Company and another tenant. After certain negotiations, carried on principally by Williams, purporting to represent the Standard Canning Company, with Irwin, and to which Colburn was a party, it was agreed that the lease and notes should be executed by the respective parties. This was done. On the same day and as a part of the same transaction between Colburn and the Canning Company, these parties signed and executed a written agreement referring to the lease and the notes and in which it was stipulated that Colburn should plant and raise the tomatoes and sell them to the Canning Company and the Canning Company agreed to indorse and guarantee the payment of the notes. Thereafter Colburn entered upon the premises and raised a crop of tomatoes which he sold and delivered to the Canning Company. Neither the principal nor the interest upon the notes were paid.

It was part of the duty of Williams as secretary of the Canning Company to arrange contracts on its behalf for the purchase of fruits and vegetables to be used by it in canning. The company made a practice as part of its business of contracting with farmers to raise tomatoes to be purchased by it and canned and later sold in the market. This was its regular business. A letter was introduced in evidence written by E. A. Edmonds, manager of the Canning Company, asking an extension of 30 days in which to pay the notes. This letter was sent to the plaintiff after he had made several efforts to collect.

The sole defense interposed and upon which appellant relies is that the corporation received no consideration, and that the indorsements were purely for accommodation; that the officers who executed the indorsements, waivers, and guaranties had no power to make or indorse negotiable promissory notes for the company and to bind it as an accommodation maker or indorser and in attempting to do so acted ultra vires.

Under the circumstances of this case as above delineated appellant can hardly have the hardihood to expect or suggest that its defense should appeal to a court of justice. The decision of the trial court should not be disturbed unless it was clearly erroneous.

[1] The claim that the defendant received no consideration is absurd. Its contract with Colburn was executed simultaneously with the notes. They were all a part of the same transaction, and the consideration for the company guaranteeing payment of the notes was the promise of Colburn to raise a crop of tomatoes upon the premises leased from Irwin and to sell it to the defendant. Besides this, Irwin would not have leased the premises to Colburn except for the fact that the company guaranteed payment of the notes given for the rental. There is no merit to the assertion that the notes were accommodation paper. This being true, a considerable part of appellant's argument and authorities are inapplicable.

[2] The fact that the company received legal consideration also materially affects the defense that the act of the officers in indorsing the notes was ultra vires. A corporation has authority in making financial transactions, which inure to its own benefit, in its regular course of business, to aid customers by guaranteeing payment of their obligations. Civ. Code, § 354, subd. 8; Armour & Co. v. Rosenberg, 36 Cal. App. 773, 173 Pac. 404; Bates v. Coronado Beach Co., 109 Cal. 163, 41 Pac. 855; Woods Lumber Co. v. W. H. Moore, 183 Cal. 497, 191 Pac. 905, 11 A. L. R. 549; James Eva Estate, 40 Cal. App. 515, 181 Pac. 415.

[3] The defendant offered in evidence its by-laws and minutes, from which it appeared that there was no express authority given the president and secretary to indorse negotiable paper. However, it nowhere appears that such action by these officers was prohibited. Authority to bind the corporation may be proved by evidence that such officers have been allowed to conduct its business, and that third persons have acted

upon the authority which the corporation has thus permitted them to assume.

There were but three directors, Hendee, who was president, Williams, who was secretary, and Edmonds, the manager, during the period when this transaction was being carried out. It was the regular duty of Williams to arrange contracts with growers to raise tomatoes and sell them to the Standard Canning Company. Edmonds knew all about these guaranties having been placed upon the notes, and asked Irwin for further time to pay them. The ordinary course of business dealing warranted Irwin in believing that Hendee and Williams had authority to execute the guaranties. The corporation is bound by the ostensible authority which it permitted its officers to possess and use. 10 Cyc. 937.

[4] A further ground for affirming the judgment is the fact that, having received the benefits from the lease and contract with Colburn, made possible only by the execution of the guaranties, the defendant will not be permitted to say that its officers lacked authority. This is clearly a case for the invoking of the rule of estoppel. In Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252, cited by appellant, no question of ostensible authority was involved. The mortgage in question was executed without authority, and the Supreme Court held the evidence insufficient to justify a finding of ratification and the findings of the trial court were limited to ratification. It appears to have found no facts from which an estoppel in pais could be held to exist. In the case here on appeal the defendant is bound upon its guaranties without regard to ratification of the acts of its officers in executing them. It is bound because it allowed them an ostensible authority and also as the result of an estoppel in pais, the facts constituting which were found in this case.

Without reviewing each of appellant's other authorities, it may be said that in none of those cited to support its ultra vires defense did the corporation knowingly receive the benefit of the attempted contract.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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56 Cal. App. 37

KOENIG v. AMERICAN SURETY CO. OF NEW YORK et al. (Civ. 3408.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1921. Hearing Denied by Supreme Court Feb. 27, 1922.)

1. Mechanics' liens 🔑313—Bond given by building contractor pursuant to Code also good common-law bond between parties.

Where a building contract provided that contractor release the building and premises from all claims accruing against it, a bond delivered to owner conditioned that, should the contractor pay all just claims against him for labor and materials, then the obligation to be null and void, though a statutory undertaking given pursuant to the requirements of Code Civ. Proc. § 1183, was also a good common-law bond as between the owner and the surety.

2. Mechanics' liens 🔑315—Where full contract price was paid, owner cannot recover on contractor's bond on voluntary payment of a lien.

Where building contract and bond were duly filed before commencement of any work, and the work was done and the full contract price was paid the contractor, no lien claimant was entitled to any foreclosure upon any building, and any payment by the owner of a lien filed was voluntary, and no recovery could be had by the owner from the surety, though the bond was a good common-law bond and extended to "claims that may have accrued against the building by reason of the aforesaid erection," and all "just claims against the contractor for labor or materials," under Code Civ. Proc. § 1183.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Daniel Backer Koenig against the American Surety Company of New York and another. From an adverse judgment, plaintiff appeals. Affirmed.

John F. Poole, of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action by the owner of a building upon a building contractor's bond. The action is against the contractor and his surety. The surety company answered, and, after a trial, obtained a judgment from which plaintiff, the owner, appeals.

[1] The building contract whereby the defendant Myers contracted to construct a building for plaintiff contains a provision to the effect that the contractor, on or before 35 days after the acceptance of the building, shall "cancel and release the said building and premises from all claims that may have accrued against the said building by reason of the aforesaid erection." Contemporaneously with the execution of the contract, the contractor, as principal, and the surety company, as surety, executed and delivered to plaintiff a bond in the penal sum of $6,600, conditioned that—

> "Should said M. A. Myers (said contractor) faithfully keep and strictly perform all the covenants of said agreement [the building contract], and well and truly pay, or cause to be paid, all just claims against him for such aforementioned labor or materials, or both, so performed or furnished, as the case may be, then this obligation to be null and void, and other-

wise to be and remain in full force and effect."

Though the bond is a statutory undertaking, given pursuant to the requirements of section 1183 of the Code of Civil Procedure, it also is a valid express contract between the owner and the surety, and, as between those two, is a good common-law bond. Both contract and bond were duly filed in the office of the county recorder before the commencement of any work, and therefore, according to the express declaration of the Code, the owner's liability to lien claimants was limited to the measure of the contract price, and any recovery by such lien claimants under their liens would be restricted "to an aggregate amount equal to the amount found to be due from the owner to the contractor." Section 1183, Code Civ. Proc. But there was no amount due from the owner to the contractor; for, at various times between the execution of the contract and the recording of the notice of completion, the owner had paid to the contractor, under the terms of their contract, sums of money that aggregated the full amount of the contract price. The result is that no lien claimant was entitled to a foreclosure of any lien upon the building, though he might be entitled to a personal judgment against the contractor and his surety. This condition of affairs notwithstanding, the Hammond Lumber Company, within 30 days after the filing of the notice of completion, filed in the office of the county recorder its verified claim of lien for $781,02 for materials furnished, and, within 90 days thereafter, claiming that, as a materialman, it had a lien on the premises, commenced an action to foreclose its alleged lien. The owner, the plaintiff in this action, filed an answer in that case and requested that the surety company be brought in as a party defendant. An order therefor was made by the court in that action, and thereupon the owner served upon the surety company a notice of the pendency of that action and a request that it "conduct the defense of said action upon behalf of himself." The surety company appeared and filed its answer in the action and prepared for the defense thereof, not, however, upon behalf of the owner or in his defense, but solely upon its own behalf and in its own defense. About a year after the filing of the lumber company's claim of lien, the owner negotiated a sale of the property, and, the foreclosure suit still being pending, he paid to the lumber company the full amount of its claim and thus procured the dismissal of its suit. This was done without the consent or knowledge of the surety company, and though the latter received prompt notice of the dismissal of the action, it had no actual knowledge of the fact that plaintiff had paid the lien claim, or that he intended to look to it for reimbursement, until about two years thereafter and shortly prior to the bringing of this action against it upon its bond to recover the amount so paid by plaintiff.

[2] There are two conditions in the bond on the due performance of which that undertaking provides that it shall be void. The first is that if the contractor shall faithfully keep and strictly perform all the covenants contained in his building contract, then his obligation as principal and the obligation of the surety company as surety shall be null and void. Plaintiff cannot recover as for a breach of this condition. The contract, as we have pointed out, provides that the contractor, within 35 days after the acceptance of the building, shall cancel and release the premises from all claims "that may have accrued against said building." The claim of the lumber company against the contractor was not an enforceable claim against the building for the reason that there was no amount due from the owner to the contractor and the former had done all that the law requires in order to restrict the recovery under liens to such an amount, if any, as might be due from the owner to the contractor—in this case nothing whatever. The obligation of the bond did not extend to the releasing of the building from invalid or unenforceable liens. In the language of the building contract, the obligation of the bond extended to "claims that may have accrued against said building by reason of the aforesaid erection." Claims which cannot legally be enforced against the building cannot be said to have "accrued" against it.

The other condition of the bond is that if the contractor shall well and truly pay, or cause to be paid, all just claims against him for labor or materials, then his obligation as principal and that of the surety company as surety shall be null and void. Assuming, for the purpose of this decision, that this condition that all just claims against the contractor for labor or material shall be paid is a provision that inures to the benefit of the owner as well as to the benefit of laborers and materialmen, plaintiff, nevertheless, has no cause of action for its breach. To the contract between the contractor and the Hammond Lumber Company, the plaintiff here was not privy; no obligation rested upon him in respect thereto. Appellant. was under no legal obligation to pay the claim of Hammond Lumber Company; his property could not be made liable therefor; and it does not appear that the contractor, whose debt it was, requested him to pay it. In order to entitle appellant to recover against the surety company, it must be made to appear that the lumber company had an enforceable lien, or that for some other cause the payment that appellant made to the lumber company was compulsorily made. In the absence of an enforceable lien making plaintiff's payment compulsory, it must be held that the payment of the lumber company's claim was voluntary on his part; and he cannot acquire a right of action against the surety which he would not have had in the absence of such payment. In principle, the case is not distinguished from Brill v. De Turk, 130 Cal. 241, 62 Pac. 462, and for the reasons there stated the judgment must be affirmed. See, also, Growall v. Pacific Surety Co., 21 Cal. App. 185, 131 Pac. 73, and Price v. Doyle, 34 Minn. 400, 26 N. W. 14.

Judgment affirmed.

We concur: CRAIG, J.; MYERS, Justice pro tem.

56 Cal. App. 13

PEOPLE v. HICKOK. (Cr. 963.)

(District Court of Appeal, First District, Division 1, California. Dec. 30, 1921. Hearing Denied by Supreme Court Feb. 27, 1922.)

1. Criminal law 🔑486—Medical expert may base opinion partly upon statements of patient.

A medical expert may base his opinion in part upon the statements of his patient describing his bodily condition and the symptoms.

2. Criminal law 🔑1036(6)—Admission of opinion based on hearsay not reversible error in absence of objection.

Complaint cannot be made, on appeal, of admission of opinion of medical expert based partly on hearsay statements, where no objection on that ground was made at the time.

3. Criminal law 🔑371(1)—Evidence of other operations held admissible to show intent.

In prosecution for abortion, admission of evidence of similar operations performed by the defendant upon others is admissible, where the defendant claims that the operation in question was innocently performed and for a lawful purpose.

4. Abortion 🔑11—Evidence held sufficient to sustain conviction.

In a prosecution for abortion, evidence *held* sufficient to sustain a conviction.

5. Criminal law 🔑371(1)—Evidence of other operations held admissible.

In prosecution for abortion where the only witness called by the defendant was a physician who testified in effect that, from the examination of the prosecutrix made by medical expert testifying for the state, it would be impossible to say that she was pregnant, and that the operation described by her might have been for a certain female ailment, evidence of other similar operations performed upon others at about the same time were admissible to rebut the evidence that the act charged as criminal might have been innocently performed.

6. Criminal law 🔑561(1)—State must prove case beyond a reasonable doubt.

It is the duty of the state to prove its case beyond a reasonable doubt.

7. Criminal law 🔑682—Admission of rebuttal evidence in chief not matter of serious moment.

An objection that evidence offered in chief was proper only in rebuttal only goes to the order of proof and is a matter of no serious moment.

8. Criminal law 🔑1169(8)—Admission of statement denying operation in abortion case held not prejudicial.

In a prosecution for abortion defendant could not be prejudiced by introduction in evidence of his declaration that he performed no operation on the prosecuting witness and did not know her.

Appeal from Superior Court, San Mateo County; Benjamin K. Knight, Judge.

Galen R. Hickok was convicted of operating for the purpose of procuring an abortion, and appeals. Affirmed.

Eric J. Rosenstirn, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. Defendant was charged by information with violating section 274 of the Penal Code by operating upon the person of Bertha Casteel for the purpose of procuring an abortion. He was tried and convicted, and this appeal is from the judgment and from an order denying his motion for a new trial.

The complaining witness, Bertha Casteel, testified that she was a married woman and the mother of two young children; that during the month of August, 1920, she visited the office of the defendant in San Francisco, desiring to be relieved of a condition of pregnancy. There she met the defendant and Dr. Rheinhart Allen, who placed her upon an operating table, and, after an examination, confirmed the fact of pregnancy dating from about three months, and informed her she would have to go to a hospital; that an operation would cost $50, with hospital charges at the rate of $5 per day. She left the office to arrange to procure the necessary funds, returning the next day, when the defendant and his associate again placed her upon an operating table and inserted some gauze in her womb. She was thereafter taken, in the defendant's automobile, driven by the defendant's chauffeur, accompanied by the defendant's associate and a cook, to a place called Salada Beach, in San Mateo county, where the defendant conducted a hospital. There she met two young women, Mary Cozzo and Irene Carpenter, patients of the defendant. Two days later the defendant removed the gauze, above mentioned, and operated upon her, using surgical instruments, which operation was one to terminate pregnancy. It was performed without an anæsthetic and lasted about five or ten minutes.

Dr. Wood C. Baker, the county physician of San Mateo county made an examination of the complaining witness on September 3, 1920, from which and a history of the case obtained from the patient he declared that she had been pregnant, subjected to an operation for the procurement of an abortion within a week, and that instruments had been used for the purpose; that she was in good health, and there was nothing in her physical condition or health which indicated that an abortion was necessary to preserve her health or life.

Police Officer Henry C. Hoar, of the Berkeley police department, acting upon a request from the San Francisco police department, called at the home of the defendant for the purpose of placing him under arrest. The defendant answered the door bell; he denied his identity; informed the officer that Dr. Hickok was in San Francisco and that he himself was a servant in the house. Later this officer returned, the door this time being opened by the defendant's wife. After some conversation with her the officer took into custody the defendant, who still insisted that he was not Dr. Hickok.

Police Officer James S. Rooney, of the police department of Berkeley and also a medical student, testified that in the presence of other police officers, the defendant stated that he was a nurse in the employ of Dr. Hickok, but finally receded from this position and admitted his identity. When Officer Rooney inquired of him if he knew of what crime he was charged, he replied that he did not, "but that he thought somebody had talked too much," and that he realized that sooner or later he would come in contact with the law, but he had to make money to support his wife and family. Asked his opinion on the practice of abortion, he replied that professional abortions should be permitted by law; that they were absolutely essential to society; that "he had a case shortly before this time of a 14 year old girl * * * who was pregnant, * * * and that there was only one thing to do in that case or in a case of that kind, and that was to take the child from that girl; that it would have been a disgrace both to herself and the family if that child had not been removed." "I asked him," said this witness, "concerning his method of operating, and he stated that he enlarged the vagina and curetted the tissues in there, and shortly afterwards the miscarriage took place." In answer to a further question defendant said that he did not use an anæsthetic; that it took him about five minutes to operate; that he charged for such operations not less than $50. The witness, continuing, said:

> "As we approached San Francisco the defendant, learning that I knew Detective Miles Jackson, remarked, 'Well, I wish you would put in a good word for me. * * * I have got lots of money. * * * I might be able to help you out of a hole some time.'"

Miles M. Jackson, a detective sergeant of the San Francisco police department, testified:

> "As the defendant stepped off the boat in custody of Officer Rooney, he stepped up to me and shook hands with me, and I said, 'Well, Doctor, you are back at your old tricks again,' and he said, 'Well, Mr. Jackson, what could I do?' and he said, 'I had to do something,' and he said: 'I lost all the money in the business that I was in, * * * and I had to get back at the game again.' I said, 'If you keep that up, Doctor, you will find yourself over across the bay with Dr. Card and Dr. Northcott,' and he said: 'Well, Mr. Jackson, you be easy with me. I have a wife and family and I had to do something to support them.' When we arrived at the hall of justice defendant put his hand over on my shoulder, and he said, 'Mr. Jackson, can't we fix things up among ourselves? You know it costs a lot of money to hire lawyers, and we might just as well keep the money between ourselves,' and I said, 'Doctor, forget about that kind of talk; nothing doing.' And he said, 'You will be easy with me, won't you?' and I said, 'I will treat you fair, Doctor—absolutely fair.'"

Joseph Kindergren testified that he was defendant's chauffeur and that he drove the complaining witness to defendant's hospital, in San Mateo county.

The witnesses Mary Cozzo and Irene Carpenter testified that they had seen the defendant and the prosecutrix together in the hospital at Salada Beach; and Irene Carpenter also testified that the defendant told her that the operation on the prosecutrix was slight, and if she had come sooner her stay in the hospital would have been shorter.

The defendant, when confronted with the prosecutrix, asserted that he had never seen her before.

These two last-named witnesses also testified that the defendant had operated upon them for the same purpose as in the case of Bertha Casteel at about the same time, and Dr. Baker gave corroborating testimony. The evidence further shows that the defendant in performing these several operations used the same method, namely, first dilating the womb by packing with gauze, and later producing the abortion by the use of instruments and without administering an anæsthetic; the operation consuming from five to ten minutes.

The defendant did not take the witness stand, and the only testimony offered by him was that of Dr. Tilton E. Tillman, who, in effect, said that it was impossible for any one to say, from an examination of the kind made by Dr. Baker, that the prosecutrix had been pregnant, and that the operation charged to have been performed upon her by the defendant might have been for a certain female disease or ailment; that the operation for such purpose was similar in character, and was accompanied by the same pains and sensations as an operation to terminate pregnancy.

[1, 2] Basing his opinion partly upon a physical examination of the prosecuting witness and partly upon a history of the case given him by her, Dr. Baker testified, in behalf of the state, that the prosecuting witness had recently been operated upon for the purpose of being relieved of pregnancy. The history of the case was given to this witness out of the presence of the defendant; it was remote from the res gestæ, and the defendant claims it was hearsay and inadmissible. A medical expert may base his opinion in part upon the statements of his patient, describing his bodily condition and symptoms. People v. Shattuck, 109 Cal. 673, 42 Pac. 315; 5 Ency. of Ev. 608. But assuming for the purpose of this case that the statement made by the prosecuting witness and used by the expert in part as the basis of his opinion was not within this rule and was hearsay, still it appearing, as it does, that there was no objection made at the time on this ground, the defendant cannot now urge it as a basis for reversal.

[3] Defendant also questions the correctness of the admission of the evidence of two similar operations performed by the defendant upon Mary Cozzo and Irene Carpenter, which testimony was admitted for the limited purpose of showing the intent with which the operation in question was performed.

[4-6] As a rule, upon the trial for a particular crime evidence which tends to show the commission of another and distinct offense by the defendant is inadmissible. To this rule there are, however, several exceptions. According to one line of authorities the state would have the right to introduce such testimony as a part of its case in chief in order to negative the possibility that the operation was necessitated by the condition of health of the patient. People v. Hagenow, 236 Ill. 514, 86 N. E. 370; People v. Northcott (Cal. App.) 189 Pac. 704; People v. Sindici (Cal. App.) 201 Pac. 975. In two California cases the Supreme Court, in denying petitions for their transfer to that court, withheld its approval of this doctrine; the exigencies of those cases not requiring its application. However, it is settled that such evidence is admissible whenever it appears that the defendant claims that the operation was innocently performed and for a lawful purpose. People v. King, 23 Cal. App. 259, 137 Pac. 1076. Here, as before stated, the defendant did not take the witness stand; and with the exception of the expert testimony of Dr. Baker the evidence introduced by the state is uncontradicted and unimpeached. From such evidence it appears that the prosecutrix believed she was pregnant, and the defendant confirmed her in such belief, telling her that she had been in that condition for three months; that he removed that condition by a surgical operation. This evidence receives corroboration from several circumstances, also disclosed by the testimony, namely, that the prosecuting witness was conveyed to the defendant's hospital at Salada Beach in the defendant's automobile driven by the defendant's chauffeur; that she was there seen with the defendant by the witnesses Mary Cozzo and Irene Carpenter, to one of whom he admitted the performance of an operation upon this woman; and the defendant's denial that he had ever seen her, proven to be false, indicates guilt. Strong corroboration is also furnished by the testimony of Dr. Baker as well as by the defendant's conduct and conversations with the police officers at the time of his arrest, which plainly show a consciousness of guilt, if not tantamount to an admission that he had performed this particular abortion. It is clear that without the testimony of the witnesses Mary Cozzo and Irene Carpenter to the effect that the defendant had operated upon them for abortion the jury would have been fully justified in returning a verdict against the defendant. But independent of this view we think the evidence clearly falls within the last-stated exception to the general rule that evidence of similar and collateral offenses is sometimes admissible to rebut the claim that the act charged as criminal was innocently performed. As before stated, the only witness called by the defendant was a physician, who testified, in effect, that from the examination of the prosecutrix made by Dr. Baker it would be impossible to say that she was pregnant. He also testified that the operation described by her as having taken place in the hospital at Salada Beach might have been for a certain female ailment, in which event the instruments used and the sensations of pain described by the patient would have been the same as in the case of an operation to arrest pregnancy. In other words, the defendant's sole defense was the inference deducible from this evidence that the operation could have been for an innocent and lawful purpose. This was sufficient to create in the minds of the jury a reasonable doubt of the defendant's guilt; and it was the duty of the state to prove its case beyond such doubt. It follows, therefore, we think, that the evidence was admissible to negative the defense that the operation was for a lawful purpose.

In the case of People v. Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326, it is said:

> "Upon principle and authority, it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidently done, or by mistake, or when the result is claimed to have followed an act lawfully

done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain."

[7] Assuming, too, as is sometimes claimed in cases like this, that the evidence would have been proper only in rebuttal, that objection only goes to the order of proof, and its admission in the people's case in chief would be a matter of no serious moment to the defendant.

[8] Regarding another complaint of the defendant as to alleged improper admission of evidence, it appears that Officer Miles Jackson, without stating their contents, testified that he had read to the defendant the statements of Mary Cozzo and Irene Carpenter and the prosecutrix, and that the defendant denied operating upon any of them. This testimony, so far as it concerned Mary Cozzo and Irene Carpenter, was subsequently stricken out by the court of its own motion, on the ground doubtless that the defendant having, as he did, denied that he had performed operations upon those two young women, the accusatory statements standing alone were not competent evidence of defendant's guilt. People v. Ayhens, 16 Cal. App. 618, 117 Pac. 789. The court not only struck out this testimony, but instructed the jury that they should disregard all testimony stricken from the record. The only part objected to on this score and which was not stricken out reads as follows:

> "When the statement given us by Mrs. Casteel was read he denied it. * * * He denied ever having seen Mrs. Casteel before, and denied ever having operated upon her, and denied knowing anything about her."

There was evidence in the case which, if believed by the jury, proved these statements of the defendant that he had never seen Mrs. Casteel or had anything to do with her to be false; in which event the jury could draw a legitimate inference that they were made under a consciousness of guilt, for it is apparent that if the defendant's dealings with this woman were of a lawful character he could have no reason for denying that he had ever seen her. As to that part of the statement thus admitted denying the operation, its admission could not prejudice the defendant, inasmuch as such denial was included in his plea of not guilty upon which he was standing before the jury.

Other points urged are technical and without substantial merit. The jury was correctly instructed as to the law applicable to the case, and the defendant was fairly tried.

Judgment and order affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

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55 Cal. App. 752

FABRY v. SAN JOAQUIN LIGHT & POWER CORPORATION et al.

VANDERBURGH et al. v. SAME.

(Civ. 3993, 3994.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1921. Hearing Denied by Supreme Court Feb. 20, 1922.)

1. Negligence ⚷134(4)—Evidence held to show negligence in failing to extinguish fire.

In an action for the destruction of grain by fire, evidence *held* sufficient to sustain the court's findings that defendants' employees, engaged in repairing a power line, were negligent in failing to extinguish or prevent the spread of a small grass fire caused by sparks from their fire pot.

2. Evidence ⚷244(7)—Employees' declaration that they would "attend to fire" held competent in action against master for destruction of grain.

In an action against an electric power company for the destruction of grain by fire, testimony of a witness, who observed defendants' employees standing by a small grass fire, near the base of pole with sacks in their hands, but doing nothing to extinguish it or prevent it from spreading, that, in reply to a remark concerning the fire, they said "Never mind, partner, we will attend to the fire," was competent, as tending to establish defendants' responsibility for the origin of the fire.

Appeals from Superior Court, Fresno County; D. A. Cashin, Judge.

Actions by G. C. Fabry and B. D. Vanderburgh and others against the San Joaquin Light & Power Corporation and another. The cases were consolidated. Judgments for plaintiffs, and defendants appeal. Affirmed.

Short & Sutherland, Murray Bourne and Short, Lindsay & Woolley, all of Fresno, for appellants.

Geo. K. Ford, of San Francisco, Chas. Watkinson, of Hanford, and Goodfellow, Eels, Moore & Orrick, of San Francisco, for respondents.

KERRIGAN, J. These two actions were consolidated for trial in the court below, and have been likewise consolidated on appeal. They are companion cases to Dibble v. San Joaquin Light & Power Corporation (Cal. App.) 190 Pac. 198, recently decided by this court. That case, like these, was for damages for the destruction by fire of certain grain belonging to the plaintiff, and in each of them the plaintiff prevailed. From the judgment in the present case the defendant has appealed.

Plaintiffs and their assignors were the lessees of certain lands near Huron, in Fresno county, upon which they had grown crops of wheat and barley. On the afternoon of June 8, 1915, and while the crops were still on said premises, they were destroyed by fire, whereby respondent Fabry and his assignors sustained damage in the sum of $41,467.50, and respondent Vanderburgh sustained damage in the sum of $6,032.54. The defendants owned and operated a power line near the property in question, and before and at the time of the breaking out of the fire were engaged in repairing it, the work being done by two employees named Schultz and Moore. When these men were first observed by Mr. McCabe, a witness on behalf of the plaintiffs, one of them was in the act of descending from a pole supporting the power line, which was located about 50 feet easterly from the center, and 200 feet south, of the county road which bounded on the west the Dibble land, which adjoined the lands here involved. The other man was then on the ground near the foot of the pole, where a small grass fire was burning. Around the fire was tall, thick, dry grass, which extended to the Dibble land. The grain in question, except a small portion which had already been harvested, was standing and ready for harvesting. Numerous other fields of standing grain were in the immediate vicinity. The danger from fire was further increased by the fact that a wind was blowing in the direction of the Dibble land from the fire. About 20 feet from the place where the fire was burning Mr. McCabe observed a fire pot with fire in it, the fire pot being so situated that the wind would carry sparks from it toward the place of the fire. There was also a torch, such as is used by plumbers, lying just where the fire was burning. A team and wagon of the defendant San Joaquin Light & Power Corporation was standing in the immediate vicinity of the pole. The name or initials of said company were painted on the side of the wagon, and its initials were also on the harness of the team. When Mr. McCabe first saw the men referred to—which was early in the afternoon—he was approaching the pole from the vicinity of Huron, driving a team and buggy along the county road. By the time he had gotten close to the men the one who was descending from the pole, as above stated, had reached the ground. The fire at this time was quite small, having burned a space in the grass of not more than 3 or 4 feet in diameter. It could then have been readily extinguished by the men, who were standing near the fire with sacks in their hands. When McCabe approached he made a remark to these employees concerning the then burning fire, to which one of them replied, "Never mind partner, we will attend to the fire." Neither of the men made any attempt to extinguish or stay the spread of the fire. Shortly afterwards the wind increased slightly, and the fire spread rapidly, until it reached and consumed the grain involved in these actions. The grain was insured against fire in various insurance companies, which paid the amount due under their policies. Prior to the commencement of the action the said insurance companies assigned to plaintiffs their rights and causes of action against defendants arising out of the matter stated. It was stipulated by defendants that if plaintiffs were entitled to judgment against either of them, the judgment would go against both.

[1] The evidence in these cases is identical with the evidence in the case of Dibble v. San Joaquin Light & Power Corporation, supra, with the exception that in the cases at bar there was the additional evidence that the team, wagon, and appliances at the scene of the fire were the property of the defendants, and the two men, Moore and Schultz, also there, were employees of the defendants. It thus appears that the evidence in these cases was stronger than that presented in their forerunner, and since the evidence was held to be sufficient to sustain the allegations of negligence set forth in the complaint in that action, it follows that there is little merit in the defendants' contention in these cases that the evidence is insufficient to sustain the findings of the court.

[2] The defendants also contend that the court erred prejudicially in permitting McCabe, against their objection, to answer a certain question. By this witness it had been shown that he had arrived upon the scene just as the fire was starting; that he observed Schultz and Moore standing by the fire with sacks in their hands, but doing nothing to extinguish the fire or to prevent it from spreading, whereupon this witness testified:

> "I made a remark to the two men concerning the fire. They said: 'Never mind, partner, we will attend to the fire.'"

Defendants complain that this remark was not part of the res gestæ, and hence inadmissible. This declaration was competent and relevant. Its import was plainly this: It was a mild rebuke, administered by the employee of the defendants uttering it, to the person who, evidently apprehending danger, ventured to call their attention to the burning grass, together with a hint that it was none of his business. If not his business, whose was it? Evidently theirs. "Never mind, partner, we will attend to the fire"—in other words, "It is our fire." And the jury was justified in inferring from this attitude of these employees of the defendants and the other circumstances of the case that they were responsible for its origin.

Judgment affirmed in each case.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

56 Cal. App. 203

STEWART et al. v. TILSON. (Civ. 4152.)

(District Court of Appeal, First District, Division 1, California. Jan. 14, 1922.)

Appeal and error ⚿1011(1)—Findings of trial court based on conflicting evidence not disturbed.

In an action of ejectment for failure to pay rent due, where the evidence was conflicting, the finding of the court that plaintiff had not agreed to extend the time for the payment of the rent, founded on sufficient evidence, and a conclusion of law that plaintiffs were entitled to a judgment of restitution with damages for withholding, cannot be disturbed on appeal.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Minnie L. Stewart and others against V. W. Tilson. From judgment for plaintiffs, defendant appeals. Affirmed.

A. S. Maloney, of San Bernardino, for appellant.

Frank T. Bates, of San Bernardino, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiffs in an action for possession of real estate. The complaint is in the usual form of an action for ejectment, the plaintiffs alleging that on July 1, 1920, and at all times thereafter, they were the owners and entitled to the premises described therein; that on July 3, 1920, the defendant unlawfully, and without right or title so to do, entered into and upon said premises and ousted said plaintiff therefrom, and thereafter, and without right, has withheld and still withholds the possession of said premises from said plaintiffs to their damage, etc. The prayer is for the restitution of said premises, with damages for the withholding thereof, and for the rents, issues, and profits thereof. The answer of the defendant admits that on the 1st day of July, 1920, the plaintiffs were the owners of the premises in question, but denies that they were then, or thereafter, entitled to the possession thereof, and further denies any unlawful ouster of the said plaintiffs from the said premises, or any damages as the result thereof. And for a further answer the defendant alleges that he is in possession of the premises by virtue of a certain written lease thereof, the terms of which he has fully complied with by offering to pay the plaintiffs the money due as rent according to the terms thereof which the plaintiffs have refused to accept. He attaches said lease to his answer, and makes it a part thereof. The lease is dated January 31, 1919. It describes the premises in question, and purports to be for a term of five years, at the yearly rent of $1,380, payable quarterly in advance. It further provides that, in case any rent shall remain due for a period of more than 30 days, the party of the first part may enter upon the premises and expel the party of the second part therefrom, and terminate the lease. When the cause came on for trial upon the issues as thus made up the defendant offered, and was permitted to file, an amended answer, wherein he alleged as an additional defense that the plaintiffs had waived the provisions of said lease relative to the payment of rent at the time specified therein, and had, on or about May 3, 1920, by the acceptance of a portion of certain rent then due, extended and agreed to extend the time for the defendant to make the payment of the balance of said rent so as to waive the conditions as to the forfeiture of said lease. Upon the trial of the cause the only contest was that arising from the averments of the defendant's amended answer, as to whether there had been a forfeiture of said lease. Upon this question the evidence of the respective parties was sharply in conflict. The defendant and his witnesses testified in support of the averments of his said amended answer, and the plaintiffs denied the existence of any agreement to extend the time for the payment of any portion of said rental or any waiver of the forfeiture clause in said lease. Upon this state of the evidence the trial court made the following finding:

> "That it is not true, as stated in paragraph 4 of defendant's amended answer herein, that said plaintiffs, at the time mentioned therein, or at any other time, agreed with said defendant to extend the time of payment of said rent, or any rent, until such time as said defendant could find a market for his hay; and it is not true that said plaintiffs ever agreed to an extension of time for the payment of rent which would or did alter or vary the provision of said lease as to termination thereof."

Following the foregoing finding, the court found upon sufficient evidence that the plaintiffs had by proper notices terminated said lease, notwithstanding which the defendant had refused to deliver up the possession of the premises. As a conclusion of law the court found the plaintiffs to be entitled to a judgment for the restitution of the said premises, with damages for the withholding thereof. Judgment was entered accordingly.

It is clear that, in view of the aforesaid conflict in the evidence, and of the said findings of the court thereon, we cannot distrub said findings or interfere with said judgment under the well-settled rules of law.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 173

THOMPSON v. WHITE et al. (Civ. 3566.)

(District Court of Appeal, Second District, Division 2, California. Jan. 13, 1922.)

1. Municipal corporations 🔑705(10)—Contributory negligence of pedestrian struck by automobile barred recovery.

In action for the death of a pedestrian struck by an automobile while crossing street, the pedestrian's contributory negligence *held* to preclude recovery.

2. Appeal and error 🔑1010(1)—Finding of fact supported by a reasonable view of evidence conclusive.

Where the defendant did not present any evidence and the case was submitted for a judgment on the merits on the evidence introduced by plaintiff, the court's finding of fact will be upheld on appeal if supported by any reasonable view of the evidence, even though the appellate court might be inclined to think the findings should have been the other way.

3. Municipal corporations 🔑706(5)—Evidence held to justify finding pedestrian's contributory negligence the efficient and proximate cause of his death.

In action for the death of a pedestrian struck by defendant's automobile while diagonally crossing street intersection, evidence *held* to justify finding that contributory negligence in failing to look in such direction before attempting to cross the street was the efficient and proximate cause of death, notwithstanding defendant's negligence.

4. Municipal corporations 🔑706(5) — Evidence that pedestrian attempted to cross street without looking for approach of automobiles held to support finding of contributory negligence.

In action for the death of a pedestrian struck by defendant's automobile, evidence that the deceased attempted to cross street intersection diagonally at a time when it was misting, without looking in the direction from which the automobile by which he was struck was approaching, *held* to justify court's finding that he was contributorily negligent.

5. Municipal corporations 🔑705(10)—Pedestrian required to look both ways before starting to cross city street on which there is considerable vehicular travel.

It is the duty of a pedestrian to look both ways before starting to cross a city street on which there is considerable vehicular travel.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Alma Thompson against Louis White and others. Judgment for defendants, and plaintiff appeals. Affirmed.

George W. Perkins, of Los Angeles, for appellant.

Lucius K. Chase, of Los Angeles, for respondents.

FINLAYSON, P. J. On December 5, 1919, at half past 6 in the evening, at or near the intersection of Alessandro and Duane streets, in the city of Los Angeles, Frank Thompson was struck by an automobile owned by the defendant Louis White and driven by the defendant Jules White. From the injuries thus received, Thompson died the next day. His widow brought this action to recover damages for the loss occasioned by her husband's death, alleging that it was caused by the negligence of the defendants. The case was tried by the court without a jury, judgment was given in favor of defendants, and from that judgment plaintiff appeals.

[1] The court found against plaintiff's allegation of negligence and likewise found that the decedent was guilty of contributory negligence. Appellant attacks both findings as unsupported by the evidence. If the finding that the decedent was guilty of contributory negligence be supported by the evidence, the finding that defendants were not negligent need not be considered. Such finding of contributory negligence on the part of the decedent, if supported by the evidence, would alone be sufficient to uphold the judgment.

[2] No evidence was adduced by defendants, the case having been submitted for a judgment on the merits on the evidence introduced by plaintiff. Since the court rendered a decision on the merits, we are bound to uphold the finding of contributory negligence if it can be supported by any reasonable view of the evidence, even though we might be inclined to think the finding should have been the other way.

The evidence, as disclosed by the record, tends to establish the following facts, among others: It was quite dark at the time of the accident; it was misting, and the driver of the automobile had difficulty in seeing through the wind shield so as to observe objects in front of him; the automobile, traveling in a northerly direction along Alessandro street—a street which runs in a northerly and southerly direction—was proceeding at a speed of from 12 to 15 miles an hour just before it struck Thompson. The lights of the machine, which is a Ford, were connected with the motor, and because of the low rate of speed at which the car was traveling, the lights were dim. By reason of the mist on his wind shield and the dimness of his lights, the driver of the car was not aware of Thompson's presence until the latter was about four feet in front of the machine.

The decedent and his wife lived in an apartment house on the southeast corner of Alessandro and Duane streets. The house faces Alessandro street. After turning to his wife, who stood on the steps of the apartment house, and motioning her to follow him, the decedent stepped into Alessandro street and started to walk diagonally from a point on the east side of that street, about

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

10 or 15 feet south of Duane street, to the northwest corner of the crossing formed by the intersection of Alessandro and Duane streets, where he intended waiting for a street car that runs southerly on Alessandro street. Not once, after starting across the street, did Thompson look to the south to see if any vehicle was coming from that direction. Had he done so, he could readily have seen the headlights of defendants' machine, 60 feet to the south, at the time when he stepped into the street. As he thus walked diagonally over the crossing, keeping his gaze fixed toward the north, and while he still was on the easterly half of Alessandro street, the decedent stepped in front of defendants' machine as it was traveling northerly on Alessandro street. He turned just as the machine was upon him, and, apparently realizing the imminence of his danger, jumped for and caught the radiator, and then, releasing his hold, fell back upon the pavement, receiving the injuries from which he died.

[3-5] Appellant claims that respondents' machine was not equipped with such lights as the Motor Vehicle Act (St. 1917, p. 396, § 11) requires, that it was traveling at too high a rate of speed under the circumstances, and that defendants were negligent in undertaking to drive their car at all while the driver's view was obscured by mist on the wind shield. But even so, such acts of negligence on defendants' part would not preclude the court from finding that the negligence of the decedent was the efficient and proximate cause of his death. That there was sufficient evidence to justify the court's finding that the decedent was guilty of contributory negligence, barring plaintiff's right of recovery, is, we think, quite clear. There was ample justification for the view that Thompson walked heedlessly into danger, without taking the most ordinary precautions for his safety. It is the duty of a foot passenger to look both ways before starting to cross a city street on which there is considerable vehicular travel. Davis v. Breuner Co., 167 Cal. 683, 140 Pac. 586.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

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56 Cal. App. 90

NEWHALL LAND & FARMING CO. v. HOGUE-KELLOGG CO. (Civ. 4162.)

(District Court of Appeal, First District, Division 1, California. Jan. 10, 1922.)

1. Sales 🔑442(11)—Measure of damages for breach of warranty of variety of seeds stated.

Under Civ. Code, § 3313, fixing damages for breach of warranty as the excess of the value of the property as warranted at the time to which the warranty referred over its actual value at that time, the measure of damages for breach of warranty of the type or variety of seeds is the difference in the value of the crop actually produced and that which would have been produced had the warranty been complied with, though the defect as to variety was discovered before the crop matured.

2. Sales 🔑442(11)—Statute fixing damages for breach of warranty of quality held inapplicable to sale of seed of particular variety.

The measure of damages for breach of warranty of the type or variety of seeds is fixed by Civ. Code, § 3300, and is the difference in the value of the crop actually produced and that which would have been produced had the warranty been complied with; section 3313, fixing the detriment caused by breach of warranty of the "quality" of personal property, not applying.

3. Sales 🔑264—Where seller purports to furnish article of particular variety, warranty of identity arises.

Where an article of a particular variety or type is ordered by name, and the seller purports to furnish the same with or without any express statement that the article furnished is of the kind ordered, a warranty of the identity of the variety or kind ordered arises.

4. Principal and agent 🔑179(2)—Notice to agent prior to creation of agency is not notice to principal.

A printed disclaimer of guaranty on the seller's stationery used in correspondence with the buyers' agent, before it became such was not notice to the buyers.

5. Contracts 🔑241—Cannot be changed except with concurrence of all parties.

The terms of a contract cannot be changed except with the concurrence of all the parties.

6. Sales 🔑89—Printed disclaimer of guaranty in small type on letter held insufficient to modify contract.

The receipt, by the buyers' agent, after the consummation of the sale, of a letter on which was printed in small type a disclaimer of guaranty *held* insufficient to modify the contract, and impose on the buyer the duty of returning the goods.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by the Newhall Land & Farming Company against the Hogue-Kellogg Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Louis C. Drapeau, of Ventura, and George E. Farrand, of Los Angeles, for appellant.

I. W. Stewart, of Oxnard, and Alvin B. Shaw, Jr., of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiff for the sum of $9,171.18, awarded to it as assignee of Steve Costamagna and B.

Aragno for damages for the breach of a warranty as to type or variety of two lots of lima bean seed, aggregating 5,600 pounds, purchased by said Aragno and Costamagna from the defendant and planted upon their lands.

The facts of the case pertinent to the questions to be considered are summed up in the respondent's brief, and are substantially as follows: Early in April, 1919, Arthur S. Chesebrough, plaintiff's ranch manager at the Newhall ranch which is situated in Ventura and Los Angeles counties, between Saugus and Camulos, called upon Mr. Kellogg, vice president of the defendant company, at defendant's warehouse in Ventura, and on behalf of two tenants of the plaintiff company—the above-mentioned Aragno and Costamagna—discussed with Mr. Kellogg the price of seed beans, particularly of two varieties, Henderson bush limas and Wilson's improved bush limas. Prices were given to Mr. Chesebrough, and he saw some of the seed. He asked Mr. Kellogg to visit the ranch, and shortly thereafter Mr. Kellogg did so bringing with him samples of each of the two varieties of beans, and exhibited them to one of said tenants. At that time Mr. Chesebrough, on behalf of both tenants, ordered specific quantities of Wilson's improved seed and Henderson bush seed. The seed was thereafter delivered by freight to the nearest station, Piru, and was planted. A perfect "stand" of plants resulted. About the 1st of July it was observed by the tenants that the vines were beginning to throw out runners, and, as the Wilson improved beans are of the bush habit as distinguished from ordinary lima beans, which are vining beans, the matter was at once brought to the attention of Mr. Chesebrough and of the defendant company. Mr. Hogue, president of the defendant, visited the fields and inspected them and came to the conclusion that the plants were ordinary lima bean plants. By agreement of both parties the future cultivation and harvesting of the crop were given over to the management of Mr. Wallace Cummings, an experienced bean grower, and the cultivation and harvesting were carried on thereafter properly and to his satisfaction. The resulting crop of lima beans was very scanty except in a few spots where, the ground being comparatively flat, irrigation water had stood and the vines produced a considerable number of beans, whereas elsewhere there were few pods on the vines. Such beans as were produced were moldy, split, and broken, and, according to uncontradicted testimony, were on that account defective, off-grade beans.

The trial court found, in accordance with the allegations of the amended complaint, that ordinary lima beans cannot be successfully grown in the territory of which the lands farmed by said tenants form a part, but that Wilson's improved bush lima, requiring less summer atmospheric moisture than ordinary lima beans, can be profitably grown in said territory, which facts were known to the defendant, as also the purpose for which the seed in question was purchased, and that the defendant warranted the seed to be of the variety designated "Wilson's improved bush lima bean." It also by its findings negatived defendant's contention that the lands were not properly farmed, or that after the discovery of the error in the description of seed furnished the plaintiff's assignors could have reduced their damages by removing the then growing plants and planting and bringing to maturity a more suitable and successful crop.

In support of its appeal the defendant makes three contentions, the first of which is that the court erred in fixing the measure of damages. Much of the argument of the appellant under this head is devoted to an analysis of the evidence as to the amount and value of the crop that would have been had if the seed supplied had been as ordered, in an effort to demonstrate that the court's findings, both as to quantity of such crop and its market value, were too high. We find, however, that there is ample testimony in the record to sustain the court's conclusion in this regard.

[1] It is also argued by the appellant in this connection that the measure of damages applicable to the case is furnished by section 3313 of the Civil Code; and that under the terms of this section the market value of Wilson's improved bean on the 1st of July, 1919—the date of the discovery of the breach of warranty—should have been used in order to determine the value of the crop which would have been produced had the warranty been complied with, instead of the market value of this variety of bean at or shortly after the time of harvest. This section reads as follows:

> "The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time."

It will be observed that this section refers to the warranty of the quality of personal property; so that if a warranty of type or variety is not a warranty of quality it would not be governed by said section.

The difficulty of applying the terms of this section to a warranty of type or variety was recognized in Burge v. Albany Nurseries, Inc., 176 Cal. 313, 168 Pac. 343, and in Germain Fruit Co. v. Armsby Co., 153 Cal. 590, 96 Pac. 319, which were cases of warranty of variety of nursery stock, either as to the fruit to be produced or the root upon which the trees were grafted. Obviously, the time to which a warranty refers—nothing appearing to the contrary—is the time of the sale; but since the purchaser in the cases cited had no means of knowing whether the warranty had in fact been complied with until two years had elapsed, during which time expense had been incurred in planting and cultivating the orchard, to have held that the warranty referred to the time of sale, and that the measure of damages was the difference in value at that time between nursery stock of the variety agreed to be furnished and that actually delivered would have led to an unreasonable, if not absurd, result, for the nursery stock delivered might at that time, considered as a commodity, have been of equal, if not superior, value to that ordered. The appellate court, therefore, construed this section so as to hold that the time to which a warranty of variety of nursery stock refers is the time when the breach of warranty is or should be discovered. Applying the warranty as of that time, it was found that the orchard produced from the nursery stock, i. e., the land together with the trees planted and growing therein, would, if the warranty had been complied with, have been of a certain value; that with the variety furnished the orchard was of a certain lesser value; and the difference was held to measure the damage suffered as the result of the breach.

But if we attempt to apply this construction to a warranty of the type or variety of seeds the difficulty of fixing the time to which the warranty refers is not escaped unless the discovery of the breach is made before the seed is sown, or, if not then made, remains undiscovered until the harvest. In the case at bar the discovery was admittedly made about the 1st of July following the sowing, at which time, of course, the seed was no longer in existence, and the growing plants produced from the seed were valuable only as a prospective crop of beans. The trial court, in view of this difficulty, adopted as the measure of damages the difference in value of the crop actually produced and that which would, according to the evidence, in all probability have been produced had the warranty been complied with. We think the court adopted a correct construction. It is true that the appellant does not go so far as to contend that the value of the growing plants on July 1st was the criterion to be adopted, but somewhat illogically contends that the market price of Wilson improved bush lima beans at that date should have been applied to the crop which would not come into existence until a later time. We say "illogically" because it is apparent that if the purchaser of the seed was entitled to a crop to be produced from that seed he could not be limited to a market price prevailing at a time when he could not possibly have been in possession of his crop.

[2] We also think the measure of damages adopted by the trial court can be reached and justified by another course of reasoning. Section 3313 of the Civil Code, in common with several other sections dealing with the measure of damages for breach of warranty and breach of contract, are statutory enactments in affirmance of the common-law rules. Such enactments are to be interpreted in accordance with those rules. Baker v. Baker, 13 Cal. 87; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356. Section 3313 is the common-law rule for breach of warranty of quality only. Hoe v. Sanborn, 36 N. Y. 98. It was not applied in the case of warranty of variety of seed, but the measure of damages in such a case was the difference between the value of the crop produced and that which ordinarily would have been produced had the warranty been complied with. Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753. This is the result which would be reached by applying the general measure of damages furnished by section 3300 of the Civil Code, viz.:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

But we think it clear that if such a case is to be brought within section 3313, that section must be given such a construction as to lead to a reasonable result. Whether the trial court in awarding damages purported to follow the provisions of either of these sections, we have no doubt that it arrived at a correct conclusion.

The appellant next contends that the court erred in finding that ordinary lima beans would not grow to success at the Newhall ranch by reason of climatic conditions. We think this issue had no great materiality, except perhaps as emphasizing the importance of furnishing the variety of seed ordered; but assuming that it had, there was abundant evidence to show, not only that the general climatic conditions of the place where this seed was to be sown were unsuited to the growth of ordinary lima beans, but that this particular crop was well farmed, and produced very poor results.

[3, 4] Appellant's final contention is that the trial court erred in finding that the defendant guaranteed the seed sold to run true to type. Where an article of a particular variety or type is ordered by name and the seller purports to furnish the same, with or without any express statement that the article furnished is of the kind ordered, a warranty of the identity of the variety or kind arises. Flint v. Lyon, 4 Cal. 17, 21; Burge v. Albany Nurseries, Inc., 176 Cal. 313, 168 Pac. 343; Firth v. Richter, 193 Pac. 277;

Rauth v. Southwest Warehouse Co., 158 Cal. 54, 60, 109 Pac. 839. It is urged by the appellant, however, that at the time of the oral negotiations for this seed between the defendant and Mr. Chesebrough, as the agent of the plaintiff's assignors, it was expressly stated that the defendant could not guarantee the seed; and, in addition to this, that there was printed upon stationery of the defendant—and thereby through its correspondence with the plaintiff or its assignors brought to the attention of the latter—a notice to the effect that the defendant "gives no warranty, express or implied, as to description, quality, productiveness or any other matter of any seeds they send out. * * * If the purchaser does not accept the seeds on these terms they are at once to be returned."

As to the oral disclaimer of warranty, the trial court was justified in concluding that anything said by the defendant's representative at the time of the sale in the nature of declining to guarantee the seed referred to its quality (which was admittedly inferior) and not to its variety.

[5, 6] Coming now to the printed disclaimer of warranty upon the stationery of the defendant, and which it is claimed was brought to the notice of the plaintiff's assignors through their agent Chesebrough, the evidence shows that some correspondence took place between the plaintiff corporation and the defendant during the year 1918; and it is defendant's contention that the printed disclaimer of guaranty above set forth appeared upon the stationery used in such correspondence. As to this it is sufficient to say that if we regard the evidence as establishing that it was the plaintiff who acted as the agent of Costamagna and Aragno in the purchase of this seed, and not Mr. Chesebrough, the ranch manager of the plaintiff, individually, still this correspondence took place before the creation of such agency, so that notice to the Newhall Land & Farming Company at that time, according to the established rule in California, was not notice to the persons who subsequently employed it. Pomeroy's Eq. Jur. § 670; Connelly v. Peck, 6 Cal. 348; Stanley v. Green, 12 Cal. 148; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Bierce v. Red Bluff Co., 31 Cal. 161; Donald v. Beals, 57 Cal. 399; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64. There is one letter, however, written by the defendant to Mr. Chesebrough, dated April 17, 1919. It related to this transaction; it contained the printed disclaimer, and was received and read by Mr. Chesebrough, including said disclaimer. But this was after the making of the contract of sale of the seeds; and it is held, in accordance with elementary principles, that the terms of a contract duly entered into cannot be changed except with the concurrence of all the parties thereto. 9 Cyc. 264; 13 Corp. Jur. 279; 6 R. C. L. 605; Dale v. See, 51 N. J. Law, 378, 18 Atl. 306, 5 L. R. A. 583, 14 Am. St. Rep. 688; Brittain Dry Goods Co. v. Birkenfeld, 20 Mont. 347, 51 Pac. 263; Amzi Godden Seed Co. v. Smith, 185 Ala. 296, 64 South. 100. See, also, Los Angeles Investment Co. v. Home Sav. Bank, 180 Cal. 601, 182 Pac. 293, 5 A. L. R. 1193. We think, therefore, that the receipt after the consummation of the sale by the agent of the plaintiff's assignors of a letter upon which was printed in small type a disclaimer of guaranty cannot be held sufficient to modify the terms of the contract, and that the vendor could not thereby impose upon the vendee the duty of returning the goods unless he consented to the modification.

In the four cases cited by the appellant in which the disclaimer of warranty was held binding upon the purchaser, the record showed facts not present here, such as notice of the disclaimer prior to the sale, or a custom of the seed trade not to warrant, pleaded and proven in the case. They are not therefore to be considered as authority applicable to the case at bar.

Judgment affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

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56 Cal. App. 197

PATTERSON v. REDDISH et al. (Civ. 4157.)

(District Court of Appeal, First District, Division 1, California. Jan. 13, 1922.)

Specific performance ⚷30—Contract for purchase of realty and payment at "maturity" of installment contract held too uncertain to be specifically enforced.

A written contract for the purchase of land, expiring by its terms November 25, 1919, by which the buyer assumed a parol installment contract of the seller covering the same land, and extending until December 1, 1924, payment of the balance to be "one-third at maturity of this agreement and one-third six months from maturity of this contract & bal. one year," *held* not capable of specific performance at the suit of the purchaser, the terms of the agreement not being sufficiently certain to make the precise act to be done clearly ascertainable, as required by Civ. Code, § 3390, in that the time for payment of the balance was left uncertain; "maturity" generally referring to the time when the conditions and obligations of contracts are to be completely fulfilled.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maturity.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by William A. Patterson against A. R. Reddish, with cross-action by defendant against plaintiff and Nettie Patterson, his wife. Judgment for plaintiff, and defendant appeals. Affirmed.

Pierce, Critchlow & Barrett, of Los Angeles, for appellant.

Robert M. Clarke, of Los Angeles, for respondent.

RICHARDS, J. This is an action to quiet title to the premises described in the plaintiff's complaint, which is in the usual form made use of in such actions. The defendant in his answer, after admitting that he did claim an estate and interest in the property in question adverse to the said plaintiff and denying that his said claim was without right or merit, proceeded to set up a contract in writing between himself and the plaintiff, William A. Patterson, and his wife, Nettie Patterson, for the sale by the plaintiff and his said wife of said premises to the defendant upon the terms set forth in said agreement. The defendant also filed a cross-complaint against said plaintiff and his wife setting forth the same matters averred in his answer and praying for the specific performance of said contract. The plaintiff demurred to the defendant's answer and cross-complaint upon the general ground that the affirmative matter pleaded therein did not constitute a sufficient defense or cause of cross-complaint, and also moved to strike out said affirmative matter in both the answer and cross-complaint. The trial court granted said motion and sustained the said demurrer as to both the answer and cross-complaint, and thereafter, and upon the trial of the issues made by the mere denials of the defendant's answer, filed its findings of fact and conclusions of law in plaintiff's favor and ordered and entered its judgment for the plaintiff in accordance therewith. From such judgment the defendant has taken this appeal. The written contract upon which the defendant counted and relied in both his affirmative answer and cross-complaint reads as follows:

> "This agreement, made and entered into this 24th day of September, A. D. 1919, by and between W. A. Patterson, of Zelzah, Cal., hereinafter designated as the seller, and A. R. Reddish, hereinafter designated as the buyer, of Los Angeles, Cal., witnesseth: That the seller for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase, the following described real property situate in the county of Los Angeles, state of California, to wit: Lots 55, 56, 57, 58 in section 13 and lots 7, 8, 9, 10, 23, 24, 25, 26, section 24, Tp. 2 north, range 16 west, containing 91 acres approximately. Said buyer hereby agrees to pay for said described premises the sum of $500.00 per acre, payable at Los Angeles, Cal., within the following times, to wit: $50.00 cash, the receipt of which is hereby acknowledged, and assume the contract of purchase given to J. S. Torrance, bal. to be paid one-third at maturity of this agreement and one-third six months from maturity of this contract & bal. one year.
>
> "In witness whereof, the parties hereto have signed their names and affixed their seals the day and year first above written.
>
> "This agreement and option to run to November 25, 1919."

The defendant also set forth in both his answer and cross-complaint the substance of the contract between J. S. Torrance and wife and the plaintiff referred to in the above agreement, and which the defendant alleges had been prior to his own contract above set forth, orally made between said J. S. Torrance and wife and the plaintiff, for the purchase by the latter of the property in question from Torrance, which said oral agreement was reduced to writing after the date of the defendant's said contract, in which it was provided that the purchase price which the plaintiff was to pay said Torrance for said premises was $35,893.35, payable as follows: $6,465.68 on or before November 4, 1919; $6,885.67 on or before December 1, 1920; $6,885.50 on or before December 1, 1921; $6,885.50 on or before December 1, 1922; $6,885.50 on or before December 1, 1923; and the balance, $1,885.50 on or before December 1, 1924, with interest on all deferred payments at 6 per cent., payable semiannually from said 4th day of November, 1919. The defendant further alleged in both his said pleadings that on the 24th day of September, 1919, the date of his contract with the plaintiff, he had made the initial payment of $50 required therein, but that on the 11th day of October, 1919, the said plaintiff and his wife had given to said defendant written notice of their rescission of his said contract, and had therewith sent said defendant in a sealed envelope the sum of $50, which latter sum he had refused to receive, but had returned in a registered letter to plaintiff, which letter the plaintiff had in turn refused to accept or receipt for, and the same had been returned unopened to the defendant. In addition to these averments the defendant's answer and cross-complaint embraced the usual allegations of the defendant's readiness and willingness to comply with and perform on his part all of the terms and conditions of his said written contract and of his offer so to do and of the plaintiff's refusal to accept said offers; and his contention based upon these averments is that he had sufficiently made out in his said pleadings a case for relief in equity in the way of the specific performance of his said written contract for the purchase of the premises in question, and that the trial court was in error in striking out said portions of his said pleadings and in sustaining the demurrer thereto.

The only question presented upon this appeal is as to whether the said defendant had presented in his said answer and cross-complaint a contract in writing for the purchase of the premises in question which a court of equity would lay hold of and specifically enforce. We are of the opinion that the defendant failed to present such a contract.

The real estate which by the terms of his said contract the defendant was to purchase consisted of 91 acres of land, for which he was to pay at the rate of $500 per acre, the total sum of $45,500. In part payment of this sum he was to assume the so-called Torrance contract, which, according to the averments of his answer and cross-complaint, called for the further installment payments above specifically set forth, aggregating the sum of $35,893.35, extended over a period of five years, or until December 1, 1924, with interest on deferred payments at the rate of 6 per cent. per annum from November 4, 1919. These payments, if made according to the terms of the Torrance contract, would leave the sum of $9.506.65, exclusive of the defendant's initial payment of $50, still to be paid to the plaintiff. But when was this to be paid? The defendant claims that the concluding clauses of his said agreement fix the times when these three installments of this balance were to be paid, namely:

> "Bal. to be paid one-third at maturity of this agreement and one-third six months from maturity of this contract & bal. one year. * * *
>
> "This agreement and option to run to November 25, 1919."

What is meant by the phrase "at maturity of this agreement"? The defendant claims that it means November 25, 1919, but, if we are to read the Torrance contract into this agreement as a part thereof, can it be said that the agreement as a whole will come to maturity until the payments required by the Torrance contract have been fully made? The term "maturity," when used in connection with contracts generally, is interpreted to refer to the time when its conditions and obligations are to be completely fulfilled, as, for example, in promissory notes, when the time fixed for payment arrives. Gilbert v. Sprague, 88 Ill. App. 508. In insurance policies it means the time fixed for the payment of the policy during the lifetime of or at the death of the insured. Union Cent. Life Ins. Co. v. Wood, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205. If applied to bonds and other similar instruments, maturity refers to the termination of the period they have to run. Bouvier's Law Dictionary, Maturity. Applying this interpretation to the Torrance contract, it is clear that it did not reach maturity until the date for the payment of all of its installments had been reached. Can it then be said that the defendant's agreement would reach its maturity at an earlier date than that of the maturity of the Torrance contract which he assumed, and thereby made a part of his own contract? Clearly here is an uncertainty upon the face of the defendant's agreement, since it is plainly susceptible of another construction than that which he himself has placed upon it. It was not necessary for the trial court, and it is not necessary for us, to resolve this uncertainty. It is sufficient to find its existence in order to defeat the defendant's asserted right to specific performance of said agreement. The Civil Code provides:

> "The following obligations cannot be specifically enforced: * * * 6. An agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." Civ. Code, § 3390.

In Pomeroy on Contracts, § 159, the rule with reference to the degree of certainty required in order to the specific performance of agreements is thus laid down:

> "A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages. An action at law is founded upon a mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite and precise understanding of all the terms; they must be exactly ascertained before the performance can be enforced."

In the case of Durst v. Jolly, 35 Cal. App. 184, 169 Pac. 449, the court correctly states that:

> "It is not necessary to cite authorities to support the proposition that the court, when called upon specifically to enforce an agreement, must ascertain the terms of the instrument sought to be enforced from the instrument itself and not from the construction put upon it in the pleading demanding its enforcement. A complaint in specific performance cannot supply the deficiencies which may render the contract nonenforceable in equity."

The cases of Klein v. Markarian, 175 Cal. 37, 165 Pac. 3, Magee v. McManus, 70 Cal. 553, 12 Pac. 451, and Reymond v. Laboudigue, 148 Cal. 691, 84 Pac. 189, may also be cited as illustrating the degree of exactitude required of contracts sought to be made the subject of specific performance. Tested by the foregoing principles, the contract under consideration in the instant case in the particular above specified falls far short of that certainty which is essential to a specific performance of its terms. This being so, it could furnish neither a defense to the plaintiff's action to quiet title nor a sufficient basis for the defendant's cross-complaint. The trial court did not err, therefore, in sustaining the plaintiff's demurrer to the affirmative matter pleaded by the defendant in his answer and cross-complaint and in thereafter giving judgment in the plaintiff's favor quieting the title against the defendant's asserted claim.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 151

Ex parte SCOTT. (Cr. 600.)

(District Court of Appeal, Third District, California. Jan. 11, 1922.)

1. Insane persons 🔑12—Affidavit of insanity held sufficient to warrant investigation.

An affidavit that a person "is insane and is so far disordered in mind as to endanger the health, person, or property of himself or others," and that he at divers times threatened "to get affiant and others," was legally sufficient to warrant an investigation of the question of his sanity, under Pol. Code, § 2168; the technical precision or necessity required of a pleading being unnecessary.

2. Insane persons 🔑26—Adjudication of insanity held conclusive as to facts stated.

An adjudication that two medical examiners were called as witnesses and testified and made certificate in an investigation as to sanity, as required by Pol. Code, §§ 2169, 2170, was conclusive as to such facts.

3. Insane persons 🔑19—Statutory requirement that alleged insane person be tried by jury within 10 days of demand directory.

The requirement in Pol. Code, § 2174, requiring trial by jury within 10 days on demand by one committed by the court as insane is merely directory, and no complaint can be made that trial took place more than 10 days after demand, where no objection was made upon that ground at the commencement of the trial.

4. Insane persons 🔑24—Court may require another trial within a reasonable time, where less than three-fourths of jury find insanity.

Where three-fourths of the members of a jury have not found a verdict that a patient is insane in an investigation under Pol. Code, § 2174, it is entirely within the discretion of the trial court either to order a retrial of the issue before another jury or discharge the patient, and the patient is not entitled to a discharge as a matter of right, and the court need not fix the date of retrial within 10 days.

In the matter of the application of Tom Scott for writ of habeas corpus prayed to be directed to the sheriff of Yolo county. Writ discharged, and applicant remanded.

See, also, 204 Pac. 571.

John R. Connelly, in pro. per., of Sacramento, for petitioner.

C. C. McDonald, Dist. Atty., of Woodland, for respondent.

HART, J. One Tom Scott is held in custody by the sheriff of Yolo county under an adjudication by the judge of the superior court of said county that he is insane. For a variety of alleged reasons, he claims that the restraint of his person under the adjudication so made is illegal, and his attorney has petitioned this court for an order releasing him from custody through the agency of a writ of habeas corpus.

It appears that on the 1st day of September, 1921, one Neal Chalmers filed an affidavit with the clerk of said superior court, charging said Scott with being dangerously insane. The affidavit, after first alleging that the said Scott is insane, and so far disordered in mind "as to endanger the health, person, or the property of himself and others," proceeds:

> "That he, at Woodland, in said county, *on the 30th day of September, 1921* (italics ours), threatened to kill John Ansell because the said Ansell was cutting the hedge of affiant; that he has threatened 'to get' affiant at divers times if affiant should employ any one else to do his yard work; that he has also threatened others with violence without cause."

Upon the foregoing affidavit, an inquisition was, on the 7th day of September, 1921, conducted before the judge of the superior court, resulting in an adjudication that said Scott was insane, or, to employ in part the language of the adjudication itself, "so far disordered in mind as to endanger health, person, and property, and that it is dangerous for life, health, person, and property for such person to be at large, and that his condition is such as to require care and treatment in a hospital for the care and treatment of the insane." By the adjudication it was ordered that Scott be committed to and confined in the Napa State Hospital, at Napa, Cal.

It is further recited in the adjudication that—

> Scott was represented by an attorney at the inquisition; that "at said hearing and examination, there were in attendance M. W. Ward and T. W. Prose, two regularly appointed and qualified medical examiners of said Yolo county, who then and there heard the testimony of all the witnesses, and each of whom made a personal examination of said alleged insane person, and testified before the court as to the results of such examination, and other pertinent facts within their knowledge; that said medical examiners, after making examination and hearing testimony of the witnesses, and testifying as aforesaid, did make a certificate showing all

the facts required by section 2170 of the Political Code, which certificate is hereto attached and made a part hereof."

It is further shown that on the 13th day of September, 1921, the attorney for the said insane person (the same attorney who appears in this proceeding in propria persona in support of the petition for the writ herein sought), filed in the office of the county clerk and clerk of the superior court of said Yolo county a demand for a jury trial for the purpose of trying and thus testing the question of the sanity of said Scott. On the 20th day of October, 1921, it was ordered by the judge of said court that the question of the sanity of said Scott be tried by a jury on the 15th day of November, and the alleged insane person having been under an order of the said judge returned to the county of Yolo from the state hospital for that purpose, the trial of said question was had before a jury on said 15th day of November and the 16th day of November, 1921. After the question was submitted to the jury and the latter had deliberated upon the evidence adduced before them upon the issue involved, said jury returned into court and through the foreman thereof announced that they had failed to agree. The judge discharged the jury, and thereafter, and on the 28th day of November, 1921, reset the matter for trial by a jury for the 1st day of December, 1921. On the last-named date, the matter was called for trial, whereupon, by the consent of all the parties, including the petitioner as attorney for said Scott, the matter was continued until the 19th day of December, 1921, to be set for trial. It is stated in the petition that the petitioner was present "throughout all the proceedings above alleged" acting therein as the attorney for said Scott.

The petitioner makes these points: (1) That the original proceeding culminating in the commitment of Scott by the judge was void for these reasons: That the affidavit by which said proceeding was initiated and upon which the adjudication was based, although made and filed on the 1st day of September, 1921, alleges that the asserted acts of insanity committed by Scott occurred on the 30th day of September, 1921, or approximately a month after said affidavit was prepared and filed; that two physicians were not called to testify as to the alleged insanity of Scott before the judge, as required by the statute. But upon the assumption that the original proceeding and the commitment of Scott following therefrom were valid, the petitioner makes the following contentions: (2) That the alleged insane patient became entitled to his discharge for the reason that the question of his sanity was not brought to trial before a jury within 10 days from the date of the demand for a jury trial, as provided by section 2174 of the Political Code. (3) That if the going to trial without objection was a waiver of the 10-day period within which the trial by jury should be had in such a case, the patient was entitled to a discharge because of the failure of three-fourths of the jury impaneled to try the question of his sanity to find that he was insane. (4) It is further contended that, conceding that the patient was not, under the statute, entitled to his discharge for failure of three-fourths of the jury to find that he was insane, he is, nevertheless, entitled to be discharged for the reason that he was not given a trial by jury within 10 days from the date of the disagreement of the jury to whom in the first instance was submitted for determination the question whether he was sane or insane.

[1] 1. The affidavit upon which the adjudication of the insanity of the patient, was founded was legally sufficient to warrant the investigation of the question of his sanity and a determination and adjudication that he was insane, if there was evidence to sustain the statement contained in said affidavit that he was insane. It is more than probable that the averment in the affidavit that the patient threatened the life of John Ansell on the 30th of September, 1921, is a clerical misprision. This would seem to be true from the fact that the affidavit was made and filed on the 1st day of September, 1921. Probably the 30th day of August, instead of the 30th day of September, 1921, was the date of said alleged threats, and that the affiant so intended to state. But, in any event, that portion of the affidavit may be eliminated and still the affidavit was sufficient to warrant the inquisition. It further states, it will be noted, that said Scott "is insane and is so far disordered in mind as to endanger the health, person, or property of himself or others." This statement, together with the further statement that he had at divers times threatened "to get" affiant and others, etc., is sufficient to meet the requirements of the statute, which provides, in part:

> "Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that any person therein [named?] is so far disordered in mind as to endanger health, person or property, he must issue * * * a warrant directing that such person be arrested and taken before a judge of the superior court of the county, for a hearing and examination on such charge." Pol. Code, § 2168.

The form for the affidavit, as prescribed by the above section, contains a blank space in which the specific acts of insanty charged against the patient may be set forth, as threats or attempts by the patient to commit acts of violence. But there are undoubtedly cases of mental disorder in which the insanity of the person is not manifested by acts of violence or threats to commit such acts. A person, as is well known, may be insane and yet harmless, so far as the person and the property of himself or others are concerned, the insanity being characterized by mere mental morbidity, and no threat or attempt to do any violent acts made. In such case clearly the general statement in the affidavit that the alleged insane person was disordered in mind or insane, together with as accurate a description of the manifestations of his mental disorder as may be given, would be sufficient. Besides, the proceeding, aside from that involved in the trial of the question of the patient's sanity, was intended to be summary in character, the real purpose thereof being to ascertain and determine whether he is suffering from mental disorder and should be confined in a hospital for the insane, not only for the purpose of protecting the public from violence at his hands, but also for the treatment of his malady by those having special experience in the treatment of mental diseases. It is clear, therefore, that the statement of the charge in the affidavit by which the matter of his sanity may be inquired into by a judge of the superior court is not required to be with the technical precision or nicety required of a pleading.

2. There is no support for the contention that the adjudication of the insanity of the patient and his commitment to the state hospital following therefrom are invalid for the alleged reason that two physicians did not testify before the judge upon the question of the patient's sanity. Section 2169 of the Political Code, among other things, provides:

> "The superior judge may, for any hearing * * * compel the attendance of witnesses and must compel the attendance of at least two medical examiners, who must hear the testimony of all witnesses make a personal examination of the alleged insane person, and testify before the judge as to the result of such examination, and to any other pertinent facts within their knowledge."

Section 2170 of said Code provides that the medical examiners so summoned to appear and testify before the judge as to the sanity of the alleged patient must make a certificate in effect showing in detail the facts upon which the conclusion that such patient is insane was predicated.

[2, 3] The adjudication, as seen, recites that two physicians (naming them) were required by the judge to attend the hearing for the purposes of the inquisition, that they testified thereat and made the certificate last above referred to. The adjudication is conclusive as to the essential facts therein recited, and that in the particular referred to the requirements of the statute were regularly complied with. There is, indeed, no showing here to the contrary, assuming that in this proceeding a showing aliunde the record itself of the proceedings at the hearing would be of avail as in impeachment of the validity of the adjudication or of the commitment.

3, 4. The two remaining contentions involve the construction of section 2174 of the Political Code. So much of said section as is necessary to be considered in this connection reads as follows:

> "If a person ordered to be committed, or any friend in his behalf, is dissatisfied with the order of the judge committing him, he may, within five days after the making of such order, demand that the question of his sanity be tried by a jury before the superior court of the county in which he was committed. Thereupon that court must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial. At such trial the cause against the alleged insane must be represented by the district attorney of the county, and the trial must be had as provided by law for the trial of civil causes before a jury, and the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury."

As seen, the petitioner declares that, even conceding that the original commitment was in all respects regular or valid, he is entitled to his discharge because the court did not cause a jury to be summoned and to be present in court for the trial of the question of the patient's alleged insanity until a date (November 15, 1921) subsequent to the expiration of 10 days from the date of the demand for a jury. In the first place, it is to be remarked that, so far as the express terms of the statute are concerned, the plain implication therefrom is that the only condition upon which an alleged insane person, after having been adjudged to be insane by the judge, is entitled to his discharge is the failure of three-fourths of the jury to whom the question of his insanity is submitted to reach a verdict that he is insane. In the second place, granting that he would in such case be entitled to his discharge, still, since the provision fixing the time within which an alleged insane person must be tried by jury after his demand therefor is, in our opinion, merely directory, he must, to preserve his right in that particular, make an objection to proceeding with the trial, upon that ground, at the time that the trial is about to be commenced. It is not made to appear in the record before us that either the petitioner or the alleged insane person made any objection to the trial by jury on the ground that said trial was fixed at a date more than 10 days subsequent to the demand for such a trial. It would certainly be very strange if the Legislature had intended to say that, because, perhaps for very good and substantial reasons, such a trial was not had within the time prescribed by the statute after a demand therefor, no such trial could be had at all, and no sound reason is apparent for holding that it did so intend. Hence failure by the patient or his legal representative to object at the time such trial was about to be started to proceeding therewith after the time within which the statute provided that it should be had carried with it a waiver of any objection on that score.

[4] But the most serious question presented here is whether Scott is entitled to his discharge by reason of the failure of the jury to find, by a concurrence of at least three-fourths of the members thereof, a verdict that he is or was insane. The provision of section 2174 of the Political Code that "the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury" by whom the question of his sanity is tried is in the nature of an appeal from the judge's adjudication that the patient is insane, and if the petitioner's construction of that provision of said section is sound, then, upon one trial of the issue the judgment of four members of a jury composed of the usual number will operate not only to nullify the legal force of the previous adjudication that the patient is insane, but to overrule the judgment of a majority of the members of the jury and the opinion of the medical experts that the patient is insane. Of course, precisely the same result might come about if the question were tried by a jury more than once, but, since the effect of a failure of three-fourths of a jury to agree that a patient already adjudicated to be insane is insane is rather far-reaching when it is considered that thus to a jury of laymen is submitted for solution an issue involving the investigation of pure questions of science with which, as a rule, experts only are competent to deal, we do not believe that the Legislature intended that so important an issue should be definitively determined on one trial thereof only by the mere negative action upon the part of a jury of laymen. We think that, where, in such a case, three-fourths of the jury are unable to reach the conclusion that the patient is insane, it is in the discretion of the court before which the trial is had, upon a full consideration of the evidence which had been brought to the attention of the jury, to determine whether the question should be retried before another jury. In other words, we do not think that the Legislature ever intended that, where there has been a mistrial before a jury of such an issue and the court is still of the opinion that the evidence is sufficient to justify the conclusion that the patient is insane, the patient must, notwithstanding the opinion of the court, be discharged. Evidently what the Legislature intended only to say, although not expressing it in very clear style, was that a concurrence of three-fourths of the members of a jury is required to find that the alleged insane person is insane; that is to say, that the legislative purpose of that provision was merely to fix the number of jurors of the panel necessary to determine and find that the alleged insane person is insane; and we, therefore, further conclude that, where there has been a mistrial —that is, where three-fourths of the members of a jury have not found a verdict that the patient is insane—it is entirely within the discretion of a trial court either to order a retrial of the issue before another jury or discharge the patient, according to what the trial court's opinion of the effect of the evidence adduced before the jury may be. If this be not a correct construction of the provision in question, then in such a case, although the evidence adduced before the judge at the previous hearing and before the jury at the trial might conclusively show that the alleged insane person was dangerously insane, a failure of three-fourths of the jury to find a verdict to that effect would result immediately in his liberation, with attendant detrimental consequences not only to the public but to the patient himself.

There is nothing in the statute requiring the retrial of the question of the patient's sanity before a jury within 10 days after a disagreement by a former jury trying the same question. Hence we think it is only a fair construction of the statute to hold that it is within the discretion of the court, after the question has once been tried by a jury and a disagreement of the jury has followed, to fix the date of the retrial within any reasonable time after the date of such disagreement. There is therefore nothing in the point so sought to be made.

For the reasons herein stated, the writ is discharged, and the said Tom Scott remanded to the custody of the sheriff of Yolo county, pending a retrial of the question of his sanity before a jury.

We concur: FINCH, P. J.; BURNETT, J.

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187 Cal. 770

Ex parte SCOTT. (Cr. 2434.)

(Supreme Court of California. Jan. 19, 1922.)

1. Insane persons 🔑19—Court does not lose jurisdiction in failing to proceed to trial within 10 days.

The provision in Pol. Code, § 2174, that court must cause a jury to be summoned within 10 days upon demand by one committed as insane, is directory only, and failure to comply therewith does not deprive court of jurisdiction to proceed with the matter, the remedy being a proceeding in mandamus in the District Court of Appeal or Supreme Court to compel the court to proceed, if there is unreasonable delay.

2. Insane persons 🔑24—Failure of three-fourths of jury to agree to insanity does not oust court of jurisdiction.

The provision in Pol. Code, § 2174, that an alleged insane person must be discharged unless a verdict that he is insane be found by at least three-fourths of the jury does not mean that he must be discharged if the jury fails to agree, and the court does not lose jurisdiction to retry the alleged insane person before another jury.

In the matter of the application of Tom Scott for a writ of habeas corpus, directed to the Sheriff of Colusa County. Writ denied.

See, also, 204 Pac. 568.

John R. Connelly, of Sacramento, for petitioner.

SHAW, C. J. The petitioner was detained upon a charge of insanity upon an affidavit as provided in section 2168 of the Political Code. He was arrested on a warrant issued thereon on September 1, 1921. An inquisition of insanity was held, and on September 7, 1921, he was ordered committed to the state hospital at Napa. Within 5 days thereafter he demanded in writing that the matter of his sanity be tried by a jury. The jury was not called until November 15, 1921. Upon the trial which then took place the jury failed to agree. On November 28, 1921, the matter was reset to be tried on December 1, 1921. So far as appears from the petition, the trial did not take place at that time, and the cause is still pending in the superior court for final determination. This is not alleged, but we will assume it to be the fact.

Upon these facts the petitioner claims the right to his release on the ground: (1) That the court lost jurisdiction to act in the matter by its failure to have the cause tried by a jury within the 10 days after the date of demand therefor. (2) That the detention is illegal because, as is claimed, the statute requires his discharge upon the failure of the jury to agree. These points, it is contended, are settled by section 2174 of the Political Code.

Section 2174 provides that—

> After the demand for a jury trial upon an inquisition of insanity, the court "must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial.
>
> "At such trial the cause against the alleged insane must be represented by the district attorney of the county, and the trial must be had as provided by law for the trial of civil causes before a jury, and the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury.
>
> "If the verdict of the jury is that he is insane, the judge must adjudge that fact and make an order of commitment as upon the original hearing."

[1] We are of the opinion that the failure of the court to impanel a jury and try the matter of insanity within the 10 days from the date of the demand does not deprive the superior court of jurisdiction to proceed thereafter with the matter. We deem the provision to be directory only. If the superior court should unreasonably delay the trial the remedy would be by a proceeding in mandamus in the District Court of Appeal or the Supreme Court to compel the court to proceed.

[2] We do not understand the provision that the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury, to mean that he must be discharged if the jury fails to agree. Our interpretation of the clause is that it was intended to provide that upon such trial a verdict could be returned by three-fourths in number of a jury of 12 in the same manner as in civil cases, and that he cannot be committed as insane unless a verdict of insanity is found and concurred in by at least three-fourths of the jury. The failure of the jury to agree did not oust the jurisdiction of the court to proceed in the matter. The charge still remains against the petitioner, and it is the duty of the superior court to proceed as speedily as is reasonably possible to a final determination upon the matter of his insanity by a verdict concurred in by at least three-fourths of the jury. Upon the facts stated in the petition we think the superior court has power to proceed in the matter and to detain the petitioner until it is finally disposed of.

The petition for a writ of habeas corpus is denied.

We concur: LAWLOR, J.; SLOANE, J.; WILBUR, J.; LENNON, J.; SHURTLEFF, J.; WASTE, J.

188 Cal. 150

RUBLE v. RICHARDSON. (L. A. 6650.)

(Supreme Court of California. Feb. 9, 1922.)

1. Witnesses 🔑167—Plaintiff's testimony as to facts occurring before decedent's death properly excluded in action for breach of contract to make will.

Under Code Civ. Proc. § 1880, subd. 3, providing that parties to an action on a claim against the estate of a decedent cannot by witnesses as to any fact occurring before the latter's death, the court, in an action for breach of a contract by decedent to provide for plaintiff in her will in return for services rendered, properly excluded plaintiff's testimony as to facts occurring before deceased's death; it being essential to such action that a claim against the estate be presented, though not founded on a contract enforceable against deceased during her lifetime.

2. Executors and administrators 🔑443(5)—Complaint for breach of contract to provide by will for services rendered held sufficient.

A complaint for breach of a contract by a decedent to provide for plaintiff by will in return for services, alleging that plaintiff performed the duties of a daughter to deceased, whose estate thereby became indebted to plaintiff for services so rendered during decedent's lifetime and at her special instance and request in the amount sued for, *held* sufficient as against the contention that it did not apprise defendant of the nature of the services rendered.

3. Appeal and error ⚿1056(3)—Exclusion of evidence insufficient for purpose offered not prejudicial.

In an action for the value of services rendered a decedent pursuant to contract to occupy the position of daughter towards her, where there was no evidence of any arrangement for compensation, the exclusion of evidence that plaintiff had performed the ordinary duties of a daughter and as to the reasonable value of such services was not prejudicial; such evidence being insufficient to raise an inference of a promise to pay therefor.

4. Work and labor ⚿7(1)—Services by members of family presumed gratuitous.

Ordinarily the law will imply a promise to pay for services voluntarily accepted, but services rendered by members of the family, including adopted children and orphans received into the family, will be presumed gratuitous favors, and, to recover therefor, the express promise of the party served or such facts and circumstances as will authorize a finding that the services were rendered and accepted in the expectation of pay must be shown.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick and Charles Monroe, Judges.

Action by Lulu Ruble against R. W. Richardson, as executor of the estate of Josephine G. Kitchen, deceased. From a judgment of nonsuit, plaintiff appeals. Affirmed.

James E. Kelby and Kemp & Clewett, all of Los Angeles, for appellant.

E. A. Tucker, Frank M. Gunter, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

WASTE, J. The plaintiff brought this action against the defendant, as executor of the estate of Josephine G. Kitchen, deceased, for the breach of an alleged contract of the decedent to make provision for plaintiff in her will, in return for personal services rendered. The trial court entered a judgment of nonsuit, and the plaintiff has appealed.

The basis of the action is the presentation by plaintiff and the rejection by defendant of a claim for the reasonable value of the services. The amended complaint is in two counts. The first, in addition to the usual preliminary facts as to the death of decedent, the appointment and qualification of the defendant as executor of her estate, sets out the making of the contract by the decedent with the plaintiff, the subsequent breach, and the presentation to, and the rejection of a duly verified claim by, the executor of the estate. The claim is set out in full in the complaint. It is in due form, properly entitled, duly verified, and alleges the claim of the plaintiff as follows:

> "That about the month of February, 1908, claimant herein, Lulu Ruble, entered into a contract with the deceased, whereby the deceased agreed with the claimant herein, Lulu Ruble, that if the said Lulu Ruble would remain in the household with the deceased and act as a daughter and perform the duties of a daughter to said deceased until the death of said deceased that the said deceased would amply provide for and adequately compensate said Lulu Ruble in her will, and that the said Lulu Ruble has performed all the terms and conditions of said contract and did remain with the said deceased from the date last above mentioned up to the time of the death of the said Josephine G. Kitchen, namely, until August, 1918, and has acted as a daughter to the said Josephine G. Kitchen and performed all the duties and bestowed all the love and affection of a daughter upon the said Josephine G. Kitchen, and in all respects complied with and performed each and every term of her said contract with the said Josephine G. Kitchen, and that the said Josephine G. Kitchen violated her said contract with the said Lulu Ruble, and did not perform said contract on her part to be performed, and did not provide in her said will for the said Lulu Ruble as provided by the terms of her said contract, but failed, refused, and neglected to carry out said contract; that by reason of the said breach of said contract on the part of Josephine G. Kitchen the said Lulu Ruble has been and is damaged in the sum of $25,000.
>
> "That the reasonable value of the services so rendered by the said Lulu Ruble to the said Josephine G. Kitchen were reasonably worth the sum of $25,000."

The second count of the amended complaint repeats, by reference thereto, those allegations of the first count which relate to the pendency of the administration of the estate and the presentation and rejection of the claim, which is also set out in full. Then follows an allegation:

> "That on or about the 4th day of August, 1918, there became due and payable to plaintiff from the estate of Josephine G. Kitchen, deceased, and said estate of Josephine G. Kitchen, deceased, became indebted to plaintiff on said date for and on account of services rendered and performed for the said Josephine G. Kitchen during her lifetime and at her special instance and request, in the sum of $25,000, and that said services so rendered and performed by plaintiff at the special instance and request of the said Josephine G. Kitchen were and are of the reasonable value of $25,000, and said sum of $25,000 was and is the reasonable value thereof."

This is followed by an allegation of nonpayment.

The answer denied all the allegations of the amended complaint, other than those showing the death of Mrs. Kitchen, the appointment and qualification of the defendant as executor, and the presentation and rejection of the claim. When the case came on for trial, on objection of the defendant, the court refused to permit the plaintiff to testify to any fact occurring before the death of Josephine G. Kitchen. Plaintiff thereupon offered to prove by competent testimony other than her own, under the second cause of action, the fact of the rendition of the services to the deceased and their reasonable value. Defendant objected upon the ground that the second count of the amended complaint did not state facts sufficient to constitute a cause of action. The objection was sustained, and the trial court refused to permit plaintiff to make any proof under the quantum meruit. Not being able, therefore, to substantiate her claim, plaintiff submitted to a judgment of nonsuit, from which this appeal is taken.

[1] We think the trial court was correct in refusing to permit the plaintiff to testify to any fact occurring before the death of Josephine G. Kitchen. The parties, or assignors of parties, to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or a demand against the estate of a deceased person, cannot be witnesses as to any matter or fact occurring before the death of such deceased person. Code Civ. Proc. § 1880, subd. 3. Appellant seeks to avoid the effect of this provision by restricting its application to such claims only as are founded upon a contract or liability which might have been enforced against the deceased during her lifetime. She contends that, where the action is based upon a liability which by its terms could not come into existence until the death of the deceased, there could never have been any claim or demand during the lifetime of the deceased, and that therefore the section should not apply to an action brought upon such claim. It is essential, however, to an action for breach of contract to compensate one for services by making provisions in such person's favor in a will that a claim against the estate be presented. No claim can exist against the estate in such case except one founded upon the fact that such services were performed and no provision made in the will for compensation. Morrison v. Land, 169 Cal. 580, 147 Pac. 259; Etchas v. Orena, 127 Cal. 588, 593, 60 Pac. 45. The trial court was therefore right in excluding the testimony of the plaintiff under the prohibitory section of the Code. Pearson v. Parsons, 173 Cal. 331, 335, 159 Pac. 1171.

[2] We think the trial court was in error in holding that the second count of the complaint did not state a cause of action. Morrison v. Land, supra, 169 Cal. 584, 147 Pac. 259; Zellner v. Wassman, 193 Pac. 84; Grant v. Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379, 384; Estate of Kessler, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74, 79. As to the contention that the claim did not apprise the executor of the nature of the services rendered, there should be considerable liberality in construing the pleadings when the foundation thereof is a claim against an estate. The facts stated therein should not be too strictly construed, for such a claim need not be drawn with the precision which would render a complaint good against a special demurrer, and its sufficiency is not to be tested by the rules of pleading. Doolittle v. McConnell, 178 Cal. 697, 705, 174 Pac. 305; Pollitz v. Wickersham, 150 Cal. 238, 250, 88 Pac. 911.

[3] Notwithstanding the fact that the trial court excluded the evidence offered in support of plaintiff's second count, we are of the opinion that the ruling was not prejudicial, and that the judgment should not be reversed for that cause. It is an elementary rule that no one can be held to pay for services unless there is an express or implied promise on which to base the right of recovery. The claim filed by plaintiff against the estate was based upon an express contract, under the terms of which plaintiff was to occupy the position of daughter towards Mrs. Kitchen, and she alleged that she had performed the ordinary duties arising from such a relation. The evidence offered under the second count, and rejected as before stated, was to the effect that plaintiff had performed the ordinary duties of a daughter in the household, and as to the reasonable value of such services. In making the offer plaintiff's counsel expressly disavowed the intention of proving an express contract, but relied upon an implied agreement arising from the circumstances under which the services were rendered. The offer was objected to and the objection was sustained. That no prejudicial error resulted can best be shown by an understanding of the circumstances under which the offer was made. Counsel for plaintiff in his opening statement to the jury said:

> "This is an action brought by Miss Ruble against Mr. Richardson, the executor of the last will and testament of Mrs. Josephine G. Kitchen, to recover the sum of $25,000, under a cause of action resting upon the express contract entered into between Miss Ruble and Mrs. Kitchen in the lifetime of the latter, whereby Mrs. Kitchen agreed to provide for her adequate compensation in her last will.
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> "The late James B. Kitchen and the late Josephine G. Kitchen were husband and wife. Mr. Kitchen was the uncle by blood of Miss Ruble, Mrs. Kitchen, of course, being her aunt by marriage.
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> "About the time that Miss Ruble reached her sixteenth year and while she was at Leaven-

worth, Kan., Mr. Kitchen, who then, with his wife, resided in Omaha, Neb., being childless, invited Miss Ruble to come and live with them. Miss Ruble accepted the invitation, and on or about her sixteenth birthday repaired to Omaha, Neb., and lived with Mr. Kitchen and his wife until his death—I think in 1907. The evidence will show the fact was that after Mr. Kitchen passed away, and perhaps within a week or 10 days thereafter, Mrs. Kitchen and Miss Ruble got together in Mrs. Kitchen's bedroom, and Mrs. Kitchen begged her to remain with her and to be a daughter to her, and told her that if she would do so she would adequately provide for her in her last will. Mrs. Kitchen passed away in August, 1918, I think, so that Miss Ruble remained with Mrs. Kitchen continuously from 1907 until Mrs. Kitchen's death in 1918, or about 11 years, during the last of which time Mrs. Kitchen was a confirmed invalid. Mrs. Kitchen left her the sum of $2,000 and some small pieces of jewelry; and our claim is that she gave her nothing during the 11 years that she remained with her, that Miss Ruble surrendered her entire life to her, waiting on her night and day, was most like a daughter, and that she performed every service of a greater delicacy. If we show you all of these facts, we think that you will agree that she ought to be entirely compensated."

[4] The plaintiff was prevented from making the case outlined, by reason of the exclusion of her own testimony under the bar of the statute, so that the situation presented by the record at the time of the offer to prove the value and rendition of services by the plaintiff was that it was conceded that when a child of 16 plaintiff had entered the home of her uncle and aunt, and had remained there until the death of her uncle, and thereafter until the death of her aunt, during that time occupying the position of a daughter. Under these circumstances, with no evidence of any arrangement between the deceased and the plaintiff for compensation, and no evidence of an express contract of any kind, plaintiff was compelled to rely upon circumstances in support of her cause of action from which the law might raise an implied promise to compensate her for services rendered. The evidence offered by her, and we may assume that it was intended to present her case in the most favorable light, if admitted, would not have the desired result; for, taking it at its full value, it is not sufficient to raise an inference in law that there was a promise to pay for the services rendered. She can recover for no other kind than those specified in her claim, which were the ordinary services of a daughter in the household, and the rendition of such services does not raise the implication relied on by plaintiff here. The rule in that regard is thus stated in 1 Beach on Contracts, § 653, pp. 788, 789:

> "Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where services are rendered by members of a family, living in one household, to each other, or necessaries are supplied by one near relation to another, the law will presume that they were gratuitous favors merely, prompted by friendship, kindness, and the relationship between them. And in such case, before the person rendering the service can recover, the express promise of the party served must be shown or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making compensation therefor."

"The same rule applies to children by adoption as to children by blood." (Id. § 656), and to orphans received into the family (Hogg v. Laster, 56 Ark. 382, 19 S. W. 975; Fross' Appeal, 105 Pa. 258). The decisions of our own state are in full accord with this rule. Murdock v. Murdock, 7 Cal. 511; Swartz v. Hazlett, 8 Cal. 118; Moulin v. Columbet, 22 Cal. 508; Friermuth v. Friermuth, 46 Cal. 42; Crane v. Derrick, 157 Cal. 667, 109 Pac. 31; Gjurich v. Fieg, 164 Cal. 429, 129 Pac. 464, Ann. Cas. 1916B, 111. See, also, 13 Corpus Juris, p. 286.

In the case at bar the plaintiff has foreclosed herself from relying upon the nature and character of the services performed by way of evidence on an implied contract, because she has expressly based her claim upon such services as would be rendered by a daughter. Under these circumstances the court or jury would not be warranted in arriving at any other conclusion than that which the plaintiff herself has arrived at, namely, that the services performed by her were those usually performed by a daughter, and from this logical conclusion it follows that there is no implied promise to pay therefor.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; LENNON, J.

188 Cal. 113

SOUTHERN PAC. LAND CO. v. DICKERSON. (L. A. 5769.)

(Supreme Court of California. Feb. 7, 1922.)

1. Quieting title 🔑47(2)—Verdict conclusive, when action legal rather than equitable.

When the pleadings in a statutory proceeding to quiet title and recover possession of land, under Code Civ. Proc. § 738, raise issues formerly cognizable in courts of law, as distinguished from those recognized in courts of equity, the action becomes to that extent legal, rather than equitable, and in so far as the action is legal the verdict is conclusive on the court and the parties.

2. Quieting title 🔑27—Under allegations of complaint, action held to have characteristics of ejectment.

Where the complaint in an action to quiet title and recover the possession of land alleged title in plaintiff, and possession and wrongful withholding by defendant, the action possessed the essential characteristics of the old legal action of ejectment.

3. Quieting title 🔑37(1)—Answer held to present legal defense.

In an action to quiet title and recover the possession of land, an answer denying plaintiff's alleged title and alleging possession by defendant under a claim of right presented a legal defense.

4. Quieting title 🔑47(2)—Jury held not to act in advisory capacity, where purely legal rights involved.

Where the complaint in an action to quiet title and recover possession of land alleged plaintiff's title, and possession and wrongful withholding by defendant, and the answer denied plaintiff's alleged title, and alleged possession by defendant under claim of right, the jury did not participate as a mere advisory body, but each party was entitled to a verdict on issues of fact as a matter of right, since the pleadings called for the adjudication of purely legal rights.

5. Trial 🔑141—Proper to grant nonsuit or verdict, in absence of conflict.

Where there is no conflict in the evidence, the question of plaintiff's right to recover is one of law, to be passed on by the court, and it is proper for the court, on motion, to withdraw the question from the jury by granting a nonsuit or directing a verdict.

6. Judgment 🔑199(3)—Cannot be rendered notwithstanding verdict, though there is no conflict in evidence.

When an issue has been dealt with as one of fact, and submitted to the jury for decision, and a single general verdict returned, the only method of obviating the binding effect of the verdict is by a motion for a new trial, and, though there is no conflict in the evidence, the court cannot set aside the verdict and render judgment for the party against whom the verdict was returned.

7. New trial 🔑68—May be granted when there is no evidence to support verdict.

Though Code Civ. Proc. § 656, defines a new trial as a re-examination of an issue of fact, under section 657, subd. 6, authorizing a new trial for insufficiency of the evidence to justify the verdict, a new trial may be granted, where there was no evidence to support the verdict and no conflict sufficient to make an issue of fact.

8. Appeal and error 🔑1170(12)—Rendition of judgment contrary to verdict not harmless, though evidence not in conflict.

Though all of the evidence was in plaintiff's favor, the entry of a judgment contrary to the verdict for defendant was a miscarriage of justice, not rendered harmless by Const. art. 6, § 4½, since defendant was thereby denied the right to present new evidence on a new trial.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Southern Pacific Land Company against W. W. Dickerson. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

B. D. Noel, of El Centro, Percy B. Lhoyd, of Los Angeles, and J. S. Larew, of El Centro, for appellant.

Frank Thunen, of San Francisco, for respondent.

LENNON, J. Southern Pacific Land Company instituted the present action against the defendant Dickerson for the purpose of quieting title to and recovering possession of certain land in Imperial county, Cal., and for damages for withholding possession of the said land. Defendant's answer specifically denied the material allegations of the complaint, and, in addition, interposed the defense of the statute of limitations and title by adverse possession. When the cause came on for trial, a jury was impaneled, and, after the introduction of evidence, argument of counsel, and oral instructions, the jury returned a general verdict in favor of the defendant Dickerson. Immediately upon the return of the verdict, counsel for plaintiff moved orally in open court for an order setting aside the verdict, and for judgment for plaintiff notwithstanding the verdict. After a hearing, the court granted this motion, made its own findings of fact and conclusions of law, and rendered a judgment decreeing plaintiff to be the owner of the premises, and that plaintiff recover possession of the same, without damages. From this judgment, defendant appeals upon the sole ground that the verdict, in the absence of an order granting a new trial, made in response to a motion therefor by the party aggrieved, was conclusive upon the court, and therefore that the court was without authority to grant a judgment for plaintiff.

[1-4] The action is a statutory proceeding, authorized by section 738 of the Code of Civil Procedure. Whenever the pleadings in such a proceeding raise issues formerly cognizable in courts of law, as distinguished from those recognized in courts of equity, the action becomes, to that extent, legal rather than equitable in nature, and, in so far as the action is legal, the verdict of the jury is conclusive upon the court and the parties. Donahue v. Meister, 88 Cal. 121, 127, 25 Pac. 1096, 22 Am. St. Rep. 283; Hughes v. Dunlap, 91 Cal. 385, 27 Pac. 642. The complaint in the case at bar alleged estate in the plaintiff, possession in the defendant, and a wrongful withholding, and therefore, although in the form of an equitable proceeding authorized by statute, the action possessed the essential characteristics of the old legal action of ejectment. Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140. The answer, denying plaintiff's alleged title and alleging possession by defendant under claim of right, presented a legal defense. Inasmuch as the pleadings called for the adjudication of purely legal rights, the jury did not participate as a mere advisory body, but each party was entitled to a verdict upon issues of fact as a matter of right. Gillespie v. Gouly, 120 Cal. 515, 52 Pac. 816; Haggin v. Kelly, supra. It has been held in this state that, where a party is entitled to a jury as a matter of right, the court is without authority to enter a judgment contrary to the verdict and that the determination of the jury is conclusive unless set aside upon the granting of a motion for a new trial or unless the general verdict is inconsistent with special findings of fact made by the jury. Montgomery v. Sayre, 91 Cal. 206, 27 Pac. 648; Farrell v. City of Ontario, 39 Cal. App. 351, 178 Pac. 740; Franklin v. S. P. Co., 40 Cal. App. 31, 180 Pac. 76.

[5-7] In the instant case, however, the judgment recites that the verdict was vacated "upon the ground that the evidence was conclusive that title and right of possession is, and at all times mentioned in the pleadings has been, in the plaintiff, and that there is no evidence to support the verdict." Plaintiff therefore raises the point that, since there was no evidence to support the verdict, the question as to which party must prevail was a question of law for the court to determine, and not one of fact for the consideration of the jury. The appeal was taken upon the judgment roll alone, and therefore the record does not disclose the evidence; but we may, for present purposes, assume that there was no substantial conflict in the evidence. Where there is an absence of conflict, the question of right of recovery is one of law, to be passed upon by the court only (Herbert v. S. P. Co., 121 Cal. 227, 229, 53 Pac. 651), and in such a case the proper procedure is for the court, upon motion, to withdraw the question from the jury by granting a nonsuit or directing a verdict. O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674; Estate of Caspar, 172 Cal. 147, 155 Pac. 631; Estate of Sharon, 179 Cal. 447, 177 Pac. 283.

However, when an issue has been dealt with as an issue of fact and submitted to the jury for decision, and a single, general verdict returned, our Code of Civil Procedure recognizes one method only for obviating the binding effect of the resulting verdict; i. e., upon a motion for a new trial the verdict may be set aside if, at the same time, a new trial is granted. Our statutes provide no other means for the correction of any error that may have been committed in submitting an issue to the jury. The argument that a new trial could not have been granted, for the reason that a new trial is a "reexamination of an issue of fact" (Code Civ. Proc. § 656), and there was no issue of fact in this case by reason of the absence of conflicting evidence, is specious. Subdivision 6 of section 657 of the Code of Civil Procedure authorizes a new trial upon the ground of "insufficiency of the evidence to justify the verdict," which has been interpreted as applying not only to cases where the verdict is contrary to the weight of the evidence, but where there is no evidence to support the verdict. Estate of Bainbridge, 169 Cal. 166, 170, 146 Pac. 427; Estate of Caspar, 172 Cal. 147, 155 Pac. 631. When the determination of an issue has been intrusted to a jury, it has, for the purposes of the trial, become an issue of fact, and if it is later discovered that the question should have been passed upon by the court instead of the jury, the mistake can be rectified only by ordering a "re-examination" of what has previously been treated as an issue of fact.

Even under the English common law there were only two well-recognized instances in which the verdict could be disregarded and the case disposed of without a new trial:

> "One [motion for judgment non obstante veredicto] was where the defendant's plea confessed the plaintiff's cause of action and set up matter in avoidance which, even if true, was insufficient in law to constitute a bar or defense; and the other [motion in arrest of judgment] was where the plaintiff's pleading, even if its allegations were true, disclosed no right of recovery." Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 384, 33 Sup. Ct. 523, 530 (57 L. Ed. 879, Ann. Cas. 1914D, 1029).

The present case falls within neither class. In passing, it may be stated that the case of Roe v. Standard Furniture Co., 41 Wash. 546, 83 Pac. 1109, cited by plaintiff, in which the appellate court of the state of Washington upheld the vacating of a verdict without granting a new trial, is not in point, for the reason that the Code of the state of Washington expressly recognized a motion for judgment notwithstanding the verdict.

[8] Section 4½ of article 6 of the Constitution of California is of no avail to plaintiff. Assuming all the evidence to have been in plaintiff's favor, nevertheless, by entering a judgment contrary to the verdict, the trial court denied to defendant the right to present new evidence upon a new trial, a right to which defendant was entitled in the event that the verdict was vacated. The denial of this right was clearly a miscarriage of justice. Farrell v. City of Ontario, 39 Cal. App. 351, 178 Pac. 740.

The judgment is reversed, with directions to the trial court to vacate the order setting aside the verdict, to restore and re-enter the verdict, and to enter judgment in conformity with the verdict as thus restored and re-entered, and to order restitution to appellant of the real property involved in this case. For all purposes of new trial and appeal, the verdict so restored and entered shall be deemed to have been returned on the date of its re-entry.

We concur: SHAW, C. J.; LAWLOR, J.; WASTE, J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.

188 Cal. 118

BURKE v. WATTS. (L. A. 6552.)

(Supreme Court of California. Feb. 7, 1922.)

1. Malicious prosecution 🔑64(2)—Evidence held to support finding of want of probable cause for prosecution for larceny.

In an action for maliciously instituting prosecutions for larceny and embezzlement because of plaintiff's removal of disappearing beds from an apartment, the furnishings of which he had purchased from the lessee, evidence *held* to justify a jury's finding of want of probable cause in view of Penal Code, § 511, under which an open taking under a claim of title preferred in good faith is not embezzlement.

2. Larceny 🔑3(3)—Taking of goods under honest claim of title does not constitute.

A person taking goods which he honestly thinks are his own, under claim of title, is not guilty of larceny.

3. Malicious prosecution 🔑20—Knowledge element of probable cause.

The owner of an apartment house had no probable cause for instituting prosecutions for larceny and embezzlement against one purchasing a lessee's furnishings because of his removal of disappearing beds, if he knew the purchaser was claiming the beds as his own.

4. Malicious prosecution 🔑64(2)—Finding of want of fair statement to district attorney warranted.

In an action for maliciously instituting prosecutions for larceny and embezzlement, where there was evidence that defendant did not inform the district attorney that plaintiff was claiming title to the property taken, and it was not shown that the district attorney learned of such claim from any other source, a finding that the statement upon which he based his advice did not constitute a full and fair recital of the facts was warranted.

5. Malicious prosecution 🔑22—Advice of district attorney not based on fair disclosure no defense.

The advice of the district attorney could not be relied upon to establish probable cause for prosecutions for larceny and embezzlement, if defendant's statement to the district attorney was not full and fair, in that the district attorney was not told that plaintiff was claiming title to the property taken.

6. Malicious prosecution 🔑20—Belief in guilt essential element of probable cause.

If defendant, though proceeding on the district attorney's advice in procuring plaintiff's arrest and prosecution for larceny and embezzlement, did not himself believe plaintiff guilty of an offense, there was no probable cause, though the district attorney's advice was based on a full and fair recital of the facts.

7. Malicious prosecution 🔑64(2)—Finding of malice justified.

Evidence, aside from any inference from want of probable cause, *held* sufficient to warrant a finding that an apartment house owner acted maliciously in procuring the arrest of one purchasing a lessee's furnishings because of his removal of disappearing beds.

8. Malicious prosecution 🔑59(9)—Bills of sale admissible to show good faith of accused.

In an action against an apartment house owner for maliciously instituting prosecutions against a purchaser of a lessee's furnishings because of his removal of disappearing beds, a bill of sale from the lessee and a bill of sale to the lessee from an earlier occupant, one of which specifically mentioned the beds, were admissible to prove plaintiff's claim of title and his good faith in asserting it; there being other evidence of defendant's knowledge of such claim.

9. Appeal and error 🔑232(2)—Objection that no foundation laid for evidence cannot be first raised on appeal.

Where newspaper articles admitted in evidence were objected to only as incompetent, irrelevant, immaterial, and hearsay, the objection that no proper foundation was laid could not be first raised on appeal.

10. Malicious prosecution 🔑62—Newspaper accounts of criminal charges admissible to show damage.

In an action for maliciously causing plaintiff's arrest and prosecution for larceny and embezzlement, true newspaper accounts of plaintiff's hearings before justices of the peace were admissible to show the damages, whether directly inspired by defendant or not, and though they did not show that the justices conformed to Penal Code, § 871, in dismissing the actions.

11. Malicious prosecution 🔑62—Photographs taken on arrest admissible on question of damages.

Where an apartment house owner caused plaintiff's arrest for removing disappearing beds which he claimed to have purchased from a lessee, and the beds were in his possession when arrested, the sheriff was justified, under St. 1917, p. 1391, in taking plaintiff's photograph, and such act was the lawful and natural result of his arrest and prosecution; and hence the photographs were admissible to show the indignities and consequent damages resulting from the prosecution.

12. Malicious prosecution 🔑72(2)—Instruction on probable cause held not objectionable as requiring determination of guilt.

In an action for malicious prosecution, an instruction that, if defendant at the time of filing the charges against plaintiff knew that plaintiff took property in good faith under claim of title, then he would not have probable cause for prosecuting him, was predicated on the information in defendant's possession, and did not cast on him the burden of investigating the facts and judicially determining plaintiff's guilt or innocence.

13. Trial 🔑296(7)—Instruction referring to presumption of malice and want of probable cause not misleading in view of other instructions.

In an action for malicious prosecution, an instruction that, if defendant in good faith communicated to the district attorney all the material facts known to him and then acted upon his advice, the "presumption" of malice or probable cause was rebutted, *held* not misleading or prejudicial, in view of other instructions from which the jury must have understood that the burden of proof rested on plaintiff.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Peter Burke against W. A. Watts. From a judgment for plaintiff, defendant appeals. Affirmed.

M. M. Gordon, of San Diego, for appellant.

Wright & McKee and A. Rosenthal, all of San Diego, for respondent.

LAWLOR, J. This is an appeal by the defendant from a judgment in favor of the plaintiff in an action for damages for malicious prosecution.

Appellant, W. A. Watts, owned the Virginia Apartments, in the city of San Diego, which he leased to one Mrs. Hannah F. Johnstone, who on December 28, 1917, purchased the furnishings from the former lessees of the premises, Augusta Svedin and Olaf Svedin, her husband. On March 14, 1919, respondent, Peter Burke, an auctioneer, purchased the furnishings from Mrs. Johnstone; the consideration being certain lands in Canada which he owned and the sum of $500. Mrs. Johnstone also assigned to respondent the lease of the apartment house, which terminated on April 30, 1919. Among the furnishings were eight Holmes disappearing beds, valued at about $200, which it appears both appellant and respondent claimed—appellant as a part of the realty, and respondent as a part of the furnishings conveyed to him by Mrs. Johnstone. On April 27, 1919, respondent conducted an auction sale of the furnishings on the premises and disposed of a portion thereof. The part remaining included the Holmes disappearing beds, which respondent, two days later, removed to a storage warehouse, in spite of appellant's claim of ownership and his declaration that he would prosecute respondent if the beds were taken from the building. The same day, upon discovering that the beds had been removed, appellant notified the police department that respondent had taken the beds away, and on the morning of April 30, 1919, while the latter was in the apartment house, appellant had him arrested. Appellant then went to the district attorney's office and, after discussing the matter with that official, swore to a complaint charging respondent with grand larceny. Respondent was then removed to the county jail, where his photograph and finger prints were taken. Later he was released on bail.

On May 7, 1919, a preliminary examination of the charge was had before a justice of the peace and the action was dismissed. Following this, appellant further consulted with the district attorney concerning the case, and on May 9, 1919, swore to another complaint charging respondent in two counts with grand larceny and felony embezzlement, respectively. There was a preliminary examination of these charges before another justice of the peace, and that action was also dismissed. On December 8, 1919, respondent brought this action, charging appellant with malicious prosecution. The case was tried by jury, and at the conclusion of the evidence appellant interposed a motion for nonsuit, which was denied. A verdict for $1,000 was rendered in favor of respondent, and judgment was accordingly entered. Appellant interposed a motion for a new trial, which was denied, and this appeal was taken.

Appellant's position is thus stated:

> "We contend on the part of the defendant and appellant that the verdict in this case is unwarranted and is not supported by the evidence.
>
> "First. It was not shown that the plaintiff was arrested without probable cause.
>
> "Second. It was not shown that the defendant was actuated through malice in causing the arrest of the plaintiff."

Appellant insists:

That "probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of the crime for which he was prosecuted;" that "the way and manner in which the plaintiff took the property of the defendant, and the particular kind of property he took, is certainly sufficient to cause a reasonable man to believe that a crime was committed;" and that "the undisputed evidence showed that the defendant made to the district attorney a full, fair, and complete statement of all the material circumstances surrounding the commission of the crime, for which the plaintiff was charged, * * * and after hearing all the facts he again advised this defendant to sign a second complaint for the arrest of the plaintiff."

Appellant also contends that—

> "There is no evidence in the case that shows or tended to show that the defendant was actuated through malice when he caused the arrest of the plaintiff."

On the other hand, respondent argues:

> That "one of the elements of probable cause is that the person making the charge has an honest belief that a crime has been committed and that the person accused is guilty of such crime; the question of whether the person making the charge, in this case the defendant, had such belief is one of fact for the jury;" that "if the jury finds that there was a want of probable cause in the institution of the prosecution of the plaintiff, then the jury may infer malice from such want of probable cause. Aside from this there was sufficient evidence to sustain the finding of the jury that the prosecution was malicious."

It is further contended that the evidence was sufficient to sustain the implied finding of the jury that the prosecution was instituted without probable cause.

The law on the subject of malicious prosecution is well established. In McKenna v. Heinlen, 128 Cal. 97, 60 Pac. 668, an action to recover for malicious prosecution, the court said:

> "It is well settled that before a plaintiff can recover in an action for malicious prosecution he must establish concurrently that the defendant proceeded in the action brought by him with malice, and without probable cause. The question of malice is one for the jury exclusively, but the court must determine, as matter of law, whether the facts and circumstances as they appear, or are found to exist, constituted probable cause. * * * While it is true that malice may be inferred from want of probable cause, the latter can never be implied from malice."

In Potter v. Seale, 8 Cal. 217, the court defined probable cause as:

> "A suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true."

In Harkrader v. Moore, 44 Cal. 144, also an action for malicious prosecution, it was declared:

> "The defense must be that he did believe and had reasonable grounds to believe at the time that the accusation he made was well founded."

In Dawson v. Schloss, 93 Cal. 194, 202, 29 Pac. 31, 32, a similar case, the court, speaking of the defense that defendant relied on the advice of counsel, said:

> "In order to avail himself of this defense, it devolved upon the defendant to prove that before receiving the advice he had fairly and fully communicated to his counsel, or at least that his counsel knew, all the facts within defendant's knowledge tending to prove or to disprove probable cause for the prosecution; and also that at the time of commencing the prosecution the defendant believed the plaintiff to be guilty as charged."

In Vann v. McCreary, 77 Cal. 434, 19 Pac. 826, a verdict for the plaintiff in an action for malicious prosecution was affirmed; the court saying:

> "It is contended that the verdict is not sustained by the evidence, in this, that the evidence shows that the defendant relied upon the advice of counsel. But in view of the testimony, the jury may well have concluded that the defendant did not believe that the plaintiff was guilty of the crime with which he was charged."

[1-3] 1. First, as to appellant's claim that the evidence is insufficient to show a want of probable cause. There is ample evidence to the effect that respondent claimed to be the owner of the beds he was alleged to have stolen, and that appellant knew of this claim. Respondent testified that before he purchased the beds he asked appellant if Mrs. Johnstone was really the owner of the furnishings, and that the appellant replied:

> "She is the owner all right. There was a man by the name of Ainsworth * * * paid $1,000 cash, and had the bill of sale made out in her name direct, from a Mrs. Svedin to Mrs. Johnstone."

A copy of that bill of sale was admitted in evidence, and one of its items was "eight disappearing wall beds." The bill of sale from Mrs. Johnstone to respondent was also admitted in evidence, and with reference to it respondent testified:

> "There is no itemized statement as to the separate articles in this Exhibit 1; there is no mention of the term 'disappearing beds,' except that it is included in a general way 'and entire furniture and fixtures.'"

Respondent further testified:

> "On the 15th day of April I saw and had a talk with Mr. Watts with reference to the disappearing beds. * * * He said, 'No;' that he had purchased the building and he believed that the beds were a part of the building. * * * I told him that Mrs. Johnstone's predecessor had conveyed the beds to her by way of a bill of sale; that if he had any legitimate claim to these beds his proper course would be to put a bill of replevin on the goods and estab-

lish his title in a court of law, otherwise I would dispose of the beds in conjunction with other furniture. He said: 'All right, I suppose I will have to do that.'"

Appellant testified:

> "Then he [respondent] brought up the question of the Holmes disappearing beds. He said something that led me to believe that he was the owner of the beds. I said to him: 'Mr. Burke, I will not discuss that matter at all.' I said: 'I have told you very clearly and very frankly that the beds belonged to me.'"

Appellant admitted having testified at the first preliminary examination that respondent had previously claimed ownership of the beds under a bill of sale and that he intended to sell them. He further testified:

> "I did not tell Mr. Utley [the district attorney] that Mr. Burke was claiming this property as his own under a bill of sale. At this time I knew Mr. Burke had been talking about claiming the property, and I told him that I would not discuss it as to the ownership because the ownership was with me."

In view of this evidence it cannot be said that the implied finding of the jury that the facts and circumstances surrounding respondent's taking of the beds were not such as would constitute probable cause for appellant's prosecution was not justified. A person taking goods which he honestly thinks are his own, under a claim of title, is not guilty of larceny (People v. Devine, 95 Cal. 227, 30 Pac. 378)), nor of embezzlement, if the property is openly and avowedly taken under a claim of title preferred in good faith. Pen. Code, § 511. As already shown, there is evidence that appellant knew respondent was claiming the beds as his own. In the presence of such knowledge it cannot be maintained that appellant, as a reasonable man, would have been warranted in believing respondent acted criminally in taking the beds, and consequently he would not have probable cause for instituting the prosecution. Harkrader v. Moore, supra.

[4-6] Touching the defense that appellant proceeded, not on his own judgment, but on the advice of the district attorney, we have referred to the evidence that appellant did not inform the district attorney that respondent was claiming title to the beds, and it was not shown that the district attorney had learned of such claim from any other source. The jury would therefore be justified in finding that the statement given to the district attorney, upon which he based his advice to appellant, in the first instance, did not constitute a full and fair recital of the facts. Under such circumstances the opinion of the district attorney could not be relied on to establish probable cause for the prosecution. In addition, as pointed out above, the jury may have concluded that appellant, even though proceeding on the district attorney's advice, did not himself believe respondent guilty of an offense in removing the beds. If this were so, there would have been a want of probable cause, even though the advice of the district attorney were based on a full and fair recital of the facts. Dawson v. Schloss, supra.

[7] 2. We shall next consider appellant's contention that it was not shown the prosecution was malicious. In Runo v. Williams, 162 Cal. 444, 450, 122 Pac. 1082, 1085, it is said:

> "The two essential facts which must concur to support an action for malicious prosecution are want of probable cause and malice and the burden of proving both is upon the plaintiff. Malice in fact is really the foundation of the action and is usually the pivotal point upon which the action turns. It is always a fact directly in issue. Its existence may be inferred by the jury from want of probable cause for the prosecution or from acts or declarations of the defendant expressing or indicating prejudice, ill will or malicious motive in the matter of the prosecution. The want of probable cause does not raise a legal presumption of malice; the law presumes nothing on that issue any more than it does on any other issue of fact in a civil action. The jury may, however, if they find that there was no probable cause for the prosecution infer malice therefrom, although malice is not a necessary inference to be deduced therefrom."

It was held in Moneyweight Co. v. McCormick, 109 Md. 170, 72 Atl. 537, that—

> "The malice which is required to be shown is the wrongful motive that prompted the prosecution, and may be established by proof of any other motive than that of bringing a guilty party to justice."

Aside from any inference which might be drawn from a want of probable cause, there is ample evidence in the case at bar from which the jury might have concluded appellant was actuated by malice. Respondent testified:

> That the day before his arrest, and before he had removed the beds, appellant said to him, "I will fix you; I fixed you once; I will fix you again all right; I will fix you;" that at the time of the arrest appellant said to the officers: "There he is; arrest him and take him down; lock him up; put him in jail; he is a crook; hold him there until I go down to the district attorney to get a warrant for grand larceny. I am going to send him to the penitentiary; he is a crook. Take him away." And he turned to my face and said: "I will fix you; I told you I would fix you, you * * * crook; I will fix you all the time."

There is other evidence that before this conversation appellant showed anger toward respondent as a result of their dealings. From this testimony and evidence that appellant knew respondent actually claimed title to the beds the jury might have concluded that appellant was prompted by a malicious motive in causing the prosecution of respondent.

[8] 3. Appellant assigns error to the admission in evidence over his objection of the bills of sale of the furnishings from Mrs. Svedin to Mrs. Johnstone and from Mrs. Johnstone to respondent. The bills of sale were offered to prove respondent's claim of title to the beds, his good faith in asserting such claim, and also, by other evidence of conversations between appellant and respondent concerning the bills of sale, to prove appellant's knowledge of such claim. Proof of the existence of the bills of sale, one of which specifically mentioned the beds, and of respondent's knowledge of the bills, tended to establish these facts, and therefore the bills themselves were admissible.

[9, 10] 4. Error is also assigned to the admission in evidence of six newspaper articles which gave accounts of the two preliminary examinations. Appellant asserts there was no evidence introduced that tended to show that respondent is the party mentioned in the articles. It appears from the record that at the trial the only objections made to the admission of these articles were that they were incompetent, irrelevant, immaterial, and hearsay. It was not urged that no proper foundation was laid, and that objection cannot be raised for the first time on appeal. French v. Atlas Mill. Co., 17 Cal. App. 226, 119 Pac. 203. The articles were admitted for the sole purpose of proving the damage caused by the prosecution. In Filer v. Smith, 96 Mich. 347, 355, 55 N. W. 999, 1002 (35 Am. St. Rep. 603), the court said:

> "The fact of the publication in a newspaper of the fact of plaintiff's arrest was set up in the declaration; and as tending to show the publicity given to that fact, and consequent injury, the publication should have been admitted. It was a plain, unvarnished account. Its publication was privileged. The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts causing the damage were the necessary or legal and natural consequence of the wrongful act. The publication was such a natural, usual, and ordinary consequence of defendant's act that it must be deemed to have been contemplated."

The articles in this case are in substance ordinary reports such as are usually made of justices' court proceedings, and no objection was made at the trial that they were not plain, unvarnished, privileged reports of the proceedings of the court. We cannot say that they are not true accounts of what actually happened upon the two hearings, notwithstanding they do not represent the justice of the peace as having conformed to the language of section 871 of the Penal Code in dismissing the action. The articles were the natural result of the prosecution, whether appellant directly inspired them or not, and their admission in evidence to show the damage suffered by respondent was not erroneous.

[11] Two photographs of respondent, taken by the authorities when he was removed to the county jail, were admitted in evidence over appellant's objection that they were incompetent, inadmissible, and irrelevant. They were introduced as tending to show the humiliation and consequent damage which respondent suffered. Appellant insists the taking of the photographs was an independent act of the sheriff, for which he was not responsible. Respondent contends that the sheriff in taking the photographs acted entirely within his rights and pursuant to law; that the taking of such photographs is one of the natural sequences of events which follow the arrest of a person upon a felony charge; that therefore appellant was responsible for the taking of the photographs, which act was one of the elements of damage naturally resulting from his arrest and prosecution. In Garvey v. Wayson, 42 Md. 178, an action for malicious prosecution, the court said:

> "The fact that pursuant to the regular custom of the detective police department, the appellant's name was entered upon the detective police annals of the city and open to the inspection and use of the police force, as tending to show the publicity of the charge made against him and the consequent injury to him, was clearly not admissible evidence against the appellee, unless there was some law requiring such a record to be kept, or unless the appellant was prepared to show by proof that the appellee knew that the name of the appellant would be so entered as the consequence of the charge of theft being preferred against him. The acts of the detective force were certainly not admissible for the purpose of inflaming the damages against the appellee without further proving that there was some law, of which the appellee would be bound to take notice, requiring an entry on their books of the name of any party against whom a criminal charge might be preferred, or that it was their custom to make such entry and that the appellee had a knowledge of that fact."

It is not necessary for us to decide whether, in the absence of a statute, the taking of such photographs as those objected to here is lawful, or whether the fact that such photographs would be taken must be brought to the attention of the party causing the arrest, for there is a statute in this state (Stats. 1917, p. 1391), of which appellant had presumptive knowledge, which provides:

> "It is hereby made the duty of the sheriffs of the several counties of the state of California * * * to furnish to the said bureau [of criminal identification] daily copies of finger prints * * * and descriptions of all such persons arrested who in the best judgment of such sheriffs * * * in whose possession at the time of arrest are found goods or property

reasonably believed by such sheriffs * * * to have been stolen by them." Section 8.

Clearly, the photographs in question were taken as a part of respondent's description. Respondent, at the time of his arrest, had in his possession in the warehouse the eight beds, and we cannot say the sheriff could not reasonably have believed them to have been stolen by respondent. The sheriff was therefore justified, under the statute, in taking respondent's photograph, and such act became the lawful and natural result of respondent's arrest and prosecution. The photographs were sufficiently identified by James C. Byers, a witness, who had them in charge, and were properly admitted to show the indignities and consequent damage suffered by respondent as a result of the prosecution.

[12] 5. Appellant's next contention is that certain portions of the instructions were erroneous. The jury were instructed that, if appellant at the time of filing the charges against respondent knew that respondent was taking the beds in good faith under a claim of title, then appellant would not have probable cause for prosecuting him. Appellant insists this instruction cast upon him the burden of making an investigation of the facts and of judicially determining respondent's guilt or innocence. We do not understand this to be the import of the instruction. The instruction has reference to knowledge already in the possession of appellant at the time he filed the charges, and it does not require that he have made any investigation to ascertain the validity of respondent's claims. As already pointed out, if appellant had such knowledge there would be a want of probable cause for the prosecution. The instruction correctly stated the law.

[13] The jury were further instructed that—

> "If you find from the evidence that the defendant, in good faith, communicated to the district attorney of this county all the material facts known to him, affecting the question of the guilt of the plaintiff before a warrant was issued, and then acted upon the advice of the district attorney, the presumption of malice and want of probable cause is rebutted, and this action against him for malicious prosecution must fail."

This instruction is objected to on the ground that it implies there is a presumption of malice which appellant must rebut. It is true that the instruction, if considered alone, by using the word "presumption," might tend to convey the impression that the burden of proving that appellant acted without malice and had probable cause for prosecuting respondent was on appellant. However, we do not think the use of the term could have prejudiced appellant, for in preceding instructions the jury was repeatedly informed that in order to recover it was necessary that respondent establish the fact that he was prosecuted maliciously and without probable cause. The jury was further told what facts must be established by respondent in order to show want of probable cause. From these instructions it is clear the jury must have understood that the burden of proof rested on respondent. The subject-matter of the instruction complained of was in favor of appellant, in that it conveyed the meaning that, if he, in good faith, sought the advice of the district attorney, he had established a defense to respondent's allegations of malice and want of probable cause. We are of the opinion that the use of the word "presumption" did not detract from the soundness of the charge as a whole, and that it could not have misled the jury.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; SHURTLEFF, J.

188 Cal. 133

In re COVER'S ESTATE. (L. A. 6983.)

(Supreme Court of California. Feb. 8, 1922.)
Rehearing Denied March 9, 1922.)

1. Executors and administrators 🔑32(1)—Widow could set up invalidity of marriage settlement in answer to petition to revoke letters on husband's estate.

On petition by decedent's son for revocation of letters of administration issued to decedent's widow, on the ground that by a marriage settlement she had waived her marital rights, she could defend on the ground that the settlement was void because procured by fraud and undue influence, and was not required to bring direct proceeding to have the settlement set aside, since her right to administer depended on the right to succeed to his personal estate under Code Civ. Proc. § 1365, which in turn depended on the validity of the settlement.

2. Executors and administrators 🔑32(1)—Limitation of actions 🔑40(2)—Limitations and laches inapplicable where wife sets up fraud in marriage settlement as defense to petition for revocation of her letters of administration on husband's estate.

On petition to revoke letters of administration granted surviving wife on husband's estate on theory that wife had released her marital rights in husband's estate by marriage settlement, the wife was not barred by limitations under Code Civ. Proc. § 338, subd. 4, or by laches, from setting up the invalidity of the settlement because of fraud and undue influence; limitations and laches being inapplicable, since wife was merely seeking defensive relief, in view of sections 22, 23, 1063.

3. Limitation of actions 🔑40(2)—Limitations do not run against defense of fraud.

One who has been defrauded need not go into court and seek relief, but may abide his time, and, when enforcement is sought against him, may excuse himself from performance by proof of the fraud; limitations not running against such defense.

4. Contracts 🔑94(1)—One in whom another confides is in fiduciary relationship to such other; "confidential relation"; "fiduciary relation."

Confidential and fiduciary relations are in law synonymous, and exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another, and the very existence of such relation precludes the party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the parties to the relation, under Civ. Code, §§ 2219, 2228, 2235.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confidential Relation; Fiduciary Relation.]

5. Husband and wife 🔑36—Husband who benefits by transaction with wife must prove the transaction was fair, just and fully understood by the wife.

Confidential relations are presumed to exist between husband and wife, and, in his dealings with his wife, the husband, if he obtains an advantage over her, must stand unimpeached of any abuse of the confidence presumptively reposed in him by the wife resulting from the marital relations, and, failing in this, he must bear the burden of showing that the transaction was fair and just, and fully understood by wife, under Civ. Code, § 158.

6. Husband and wife 🔑36—Husband dealing with wife must act in good faith and make full disclosure of what wife should know to protect her interests.

A husband in dealings with wife must act in good faith, and to avoid the presumption of undue influence emanating from the procurement of any advantage over her must make a full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or must deal with her at arm's length, as he would with a stranger, advising her as to her rights in the premises.

7. Husband and wife 🔑30—Marriage settlement agreement held to have been procured by presumptive undue influence.

Marriage settlement agreement whereby wife released her expectancy in husband's $200,000 estate, in consideration of property valued at about $14,000, entered into 21 years after marriage by wife in ignorance of her rights, and without independent advice as to the effect of the contract, and without disclosure by the husband of the value of his estate, or of the rights which she by such agreement surrendered, *held* to have been procured by husband by presumptive undue influence.

8. Husband and wife 🔑30—Husband's reputation as a man of wealth did not impute to wife knowledge of the value and character of his estate so as to excuse husband's failure to make disclosure thereof in making marriage settlement agreement.

Where husband's business was scattered over a wide range of territory and consisted of the lending of money and the taking and buying of notes and mortgages, the fact that he had the reputation of being a wealthy man, and that wife must have known of such reputation, did not impute knowledge to wife of the value and character of his estate so as to excuse husband of failure to make disclosure thereof, in making marriage settlement agreement with wife.

9. Husband and wife 🔑33—Wife's acceptance of benefits under marriage settlement without knowledge that she had waived expectancy in husband's estate did not estop her from denying validity for undue influence.

That wife accepted and retained benefits of marriage settlement agreement without knowledge that she had waived expectancy in husband's estate by such agreement did not estop her from denying validity of the agreement on the ground of undue influence after discovery thereof.

10. Evidence 🔑265(5)—Admitted fact that decedent left estate controls as against evidence.

On petition to revoke letters of administration, admitted fact that the deceased left an estate in certain county controls as against evidence that deceased died without leaving such estate in support of finding that he left an estate in such county.

11. Trial 🔑388(4)—Admitted fact treated as found.

An admitted fact must be treated as found.

12. Appeal and error 🔑909(4)—Order granting letters of administration presumed to have been made on a sufficient showing that deceased died leaving an estate in the state.

In proceeding to revoke letters of administration, in which the petition for revocation did not assail their issuance on the ground that deceased died without leaving any estate, it will be presumed, in the absence of the record of jurisdictional facts requisite to the granting in the first instance of the letters of administration, that the order granting letters of administration was made upon a proper and sufficient showing that the deceased died leaving an estate in the state.

13. Husband and wife 🔑33—Wife could attack validity of marriage settlement releasing her expectancy on husband's death intestate, though husband's estate was his separate property, practically all of which he had conveyed to his son.

Where husband died intestate, leaving some property, the surviving wife could attack, on the ground of undue influence, validity of marriage settlement agreement releasing her expectancy in husband's estate, though husband's property at time of agreement was his separate property, which the husband could have conveyed or willed to others than the wife, and after execution of agreement the husband conveyed practically all such property to his son.

14. Husband and wife 🔑33—On petition to revoke wife's letters of administration on husband's estate, her answer attacking validity of marriage settlement held to tender what she received under settlement.

On petition for revocation of letters of administration granted to surviving wife on husband's estate on ground that wife had released her rights in husband's estate by marriage settlement agreement, wife's answer attacking validity of agreement and alleging that she "offers to account to the legal representatives of the estate * * * for each and singular all the property received by her pursuant to the terms of said contract and to do equity" *held* a sufficient tender of the property received by her under the agreement.

15. New trial 🔑102(3)—Party relying on newly discovered evidence must make strong showing of diligence.

Ordinarily newly discovered evidence is looked on with disfavor on motion for new trial on ground thereof, and the party relying thereon must make a strong showing of diligence on his part in preparing for the trial.

16. New trial 🔑102(3)—Denial held proper for want of diligence.

In proceeding involving validity of marriage settlement agreement, denial of motion for new trial on ground of newly discovered testimony of witnesses who were either related to or social friends of the wife, and who had come into frequent and intimate contact with the wife prior to the hearing, *held* proper in view of movant's failure to show that he did not know of the existence of the witnesses and their association with wife, or that he had made inquiries among the friends, relatives, and associates of the wife to ascertain what, if any, such persons knew in relation to the matters in issue; there not being a sufficient showing of diligence.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

In the matter of the estate of Aaron Cover. Petition by S. A. Cover for revocation of letters of administration issued to Mary Ann Cover. Petition denied, and petitioner appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

Frank G. Tyrrell and Jarrott & Jarrott, all of Los Angeles, for respondent.

LENNON, J. The deceased, Aaron Cover, died intestate September 15, 1916, at Pasadena, Cal., where he had resided for the period of 15 years. His widow, Mary Ann Cover, applied for letters of administration upon his estate, and the same were granted and issued to her on October 8, 1919. She qualified as administratrix on October 14, 1919, and ever since has been acting in that capacity. This appeal is prosecuted from a judgment of the superior court of Los Angeles county, sitting in probate, entered upon the verdict of a jury denying the petition filed November 17, 1919, of S. A. Cover, a son of the deceased, praying for the revocation of the letters of administration previously issued to the widow of the deceased. The petition for revocation was grounded primarily upon allegations that under the terms of a marriage settlement agreement entered into in writing and executed December 24, 1909, by and between the deceased and his widow, the latter ceased to be an heir of the deceased because by virtue of the terms of the said marriage settlement agreement she, "in consideration of * * * and in respect of the wishes of the said husband," expressly released and waived "all right or claim which she may have in or to the estate of Aaron Cover at his death by virtue of being wife or widow * * * and every part and parcel of the said estate from all of her marital claims at his death * * * and all community right and dower right of whatsoever nature or kind which she has against the estate. * * *" The petition for revocation of letters of administration alleged that said deceased left an estate in the county of Los Angeles consisting of an interest in certain designated and described real property in said county, and, after setting out in hæc verba the said marriage settlement agreement, alleged its full performance by the deceased, and prayed, therefore, that said Mary Ann Cover be removed as administratrix of said estate, and that in her place and stead petitioner, said S. A. Cover, be appointed administrator of said estate. Answering the petition for revocation, the widow, in effect, admitted that, as alleged in said petition, the deceased died leaving an estate in the county of Los Angeles, and expressly admitted that she signed the alleged marriage settlement agreement on December 24, 1909, and under and pursuant to its terms and in consideration thereof received from the deceased property of the value of about $14,000. She denied, however, that she thereby waived or intended to waive any of her marital rights in and to the estate of the deceased, or any of the rights vested in her by law, or that she thereby waived or intended to waive her right to act as administratrix of said estate, and in this behalf, further answering, alleged in substance and effect, throughout three separately stated defenses, an admixture of facts which, taken in their entirety, present the defense that she was induced to make the agreement as the result in part of actual undue influence, consciously and designedly exerted upon her by the deceased, his son, U. G. Cover, and one John Stoner, and proceeds in part upon the theory of presumptive undue influence, having its inception in and emanating from the fiduciary relation of husband and wife subsisting between her and the deceased at the time of the execution of the agreement. Concluding her answer to the petition for revocation, the widow of the deceased expressly offered "to account to the legal representative of the estate of Aaron Cover for each and singular

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

all the property received by her pursuant to the terms of said contract, and to do equity," and then prayed that the petition of S. A. Cover for revocation of letters of administration issued to her be denied, that she have her costs, "and such other and further relief as may be meet and agreeable to equity."

[1] Appellant makes the contention that the superior court sitting in probate was without jurisdiction to hear and determine the issue of the invalidity of the agreement in controversy, claiming in this behalf that such issue was wholly collateral to the proceeding for the probate of the estate of the deceased, and could therefore be determined in the first instance only by a direct equitable action instituted in another forum for that purpose. There is no merit in this contention. Section 1365 of the Code of Civil Procedure, in operation at the time of the making of the said agreement and at the time of the death of the deceased, provides that a surviving wife may be granted letters of administration upon the estate of her deceased husband only when she is "entitled to succeed to his personal estate or some portion thereof."

It is conceded, as indeed it must be, that the agreement in question, if valid, operated to release and relinquish whatever right the widow of the deceased may have had, as widow and technical heir of the deceased, to succeed to any portion of his estate, and therefore, under the provisions of the Code section last quoted, deprived her of the right to administer said estate. Estate of Walker, 169 Cal. 400, 146 Pac. 868; Elmendorf v. Lockwood, 57 N. Y. 322; Estate of Warner, 6 Cal. App. 361, 92 Pac. 191; Warner v. Warner, 144 Cal. 615, 78 Pac. 24; In re Davis, 106 Cal. 453, 39 Pac. 756.

It must be conceded that if, on the other hand, the agreement was invalid for fraud, it was ineffectual for any purpose, and could not, therefore, be interposed as an estoppel to the right of the widow to succeed to and administer the estate of her deceased husband. Malloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335; Estate of Warner, supra.

The proceeding in the instant case was no more nor less than a contest for letters of administration, and therefore it was the duty of and within the jurisdiction of the superior court sitting in probate to determine which of the two contesting parties was entitled to letters of administration, and obviously, before such determination could be made, the court was required to consider and determine the validity of the agreement which purported to relinquish the right of one of the contesting parties to administer the estate.

The same situation, involving practically the same contention made here, was presented in the Estate of Warner, supra, where the respondent, a son of the deceased, was petitioning for letters of administration, and, at the same time, opposing the right of the widow to letters upon the ground that by virtue of a pleaded written agreement she had waived and relinquished all interest in the estate of the deceased. The widow, by answer to the opposition, alleged matters and things tending to show that the agreement was entered into as the result of fraud, and was not therefore legally binding upon her. In that case the court, in holding against the sufficiency of a special demurrer to the answer of the widow, based in part upon the ground that the court sitting in probate could not inquire into the matter of fraud, said:

> "An inspection of the written agreement when presented showed that she [the widow] was not entitled to administer on the estate. She had anticipated this by alleging in an appropriate pleading facts which, if true, would show that the agreement ought not to be held binding upon her. Before it could be determined whether she was entitled to administer, it was necessary for the court to determine the validity of the agreement, an issue as to its validity and binding force having been raised. The matter was being heard in the superior court, the jurisdiction of which is fixed by the Constitution and not by acts of the Legislature, and if the answer contained allegations of facts which, if true, showed that the agreement was procured by fraud or mistake or had not been executed by the parties, it was the duty of the court and it had the power to pass upon these issues. This view seems to be in harmony with the law as stated In re Burton, 93 Cal. 463 [29 Pac. 36], wherein it is said: 'No distinct court of probate has been created or recognized by the present Constitution of this state. The Constitution has created superior courts and has given them original jurisdiction of the subject-matter of various classes of actions and special proceedings more or less distinct from each other, among which are "all actions at law which involve the title or possession of real property" and "all such special cases and proceedings as are not otherwise provided for" and "all matters of probate." * * * The superior court, while sitting in matters of probate, is the same as it is while sitting in equity, in cases at law, or in a special proceeding; and when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such case. This is an incidental power pertaining "to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them."' "

The statute of limitations and laches were pleaded by demurrer to the widow's answer as a bar to the defense of the invalidity of the agreement. Appellant relies apparently, in so far as the plea of the statute of limitations is concerned, and by analogy with reference to the plea of laches upon subdivision 4 of section 338 of the Code of Civil Procedure, which provides that a cause of action for relief on the ground of fraud is barred within three years, but that such cause of action is not deemed to have accrued until discovery by the aggrieved party of the facts constituting the fraud.

[2] Apart from a consideration of the fact that the answer of the widow pleaded facts which, if true and necessary to her defense, removed that defense from the bar of the statute and beyond the bar of the doctrine of laches, we are of the opinion that neither the limitation of the statute nor the doctrine of laches may be invoked and applied against the widow's right to defend against the operation of the agreement.

The petition for a revocation of letters of administration previously issued to the widow was the initiatory step in a special proceeding as distinguished from a civil action (Code Civ. Proc. §§ 22, 23; Estate of Joseph, 118 Cal. 660, 50 Pac. 768), and the appellant, being the party prosecuting such proceeding, was the plaintiff, and the widow, as the adverse party, was the defendant therein (Code Civ. Proc. § 1063). In other words, the position of the widow as a party to the proceeding is that of a defendant defending against the enforcement of an alleged fraudulent agreement, and the position of the appellant is that of a party plaintiff seeking affirmatively to interpose and enforce that agreement against her in extinguishment of a right to administer upon the estate of the deceased, to which, in the absence of such agreement, she would have been entitled. That is to say, the widow, by her answer, is merely seeking defensive relief (Toby v. Oregon, etc., R. R. Co., 98 Cal. 490, 33 Pac. 550), and, while it is the rule generally that a cause of action grounded in fraud must be instituted within three years from the time of the discovery of the fraud, that rule does not apply to a defense interposed upon the ground of fraud in a case where it is affirmatively sought to have declared valid and enforceable a contract claimed to have been conceived and consummated in fraud. In such a case neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for, so long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense.

[3] In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Hart v. Church, 126 Cal. 471, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195; Evans v. Duke, 140 Cal. 22, 73 Pac. 732; McColgan v. Muirland, 2 Cal. App. 6, 82 Pac. 1113; Secret Valley Land Co. v. Perry, 202 Pac. 449; Robinson v. Glass, 94 Ind. 211; Butler v. Carpenter, 163 Mo. 597, 63 S. W. 823; State v. Tanner, 45 Wash. 348, 356, 88 Pac. 321.

Responding to the issues made by the pleadings, the trial court found substantially in accord with the allegations of the answer to the petition for revocation and the evidence adduced at the hearing, that the deceased died intestate on September 15, 1916, leaving an estate in Los Angeles county consisting of the property described in the petition for revocation; that no application for letters of administration was filed in that court, or any other court, save and except the petition for letters by the widow of the deceased and the application of S. A. Cover for letters contained in the petition for revocation; and that the children of Aaron Cover refrained from making any application for letters of administration upon the estate of the deceased, for the purpose of concealing said estate and depriving the widow of her lawful interest therein. The court further found that on December 24, 1909, the date of the making and execution of the alleged marriage settlement agreement, the deceased was possessed of property valued at $200,000, the greater portion of which, subsequent to the making of the marriage settlement agreement and pursuant to a purpose to defraud his widow, was conveyed by the deceased to his son, U. G. Cover, without consideration; that the widow was an heir of the deceased, and as such was entitled to succeed to her share of the real and personal property of the deceased. The latter finding was apparently predicated upon further findings of the trial court to the effect that the widow did not enter into the marriage settlement agreement in controversy, and this finding was, in turn, rested upon the further finding that said agreement was secured from her as the result of the undue influence and fraud of the deceased and his son, U. G. Cover. The jury, in response to 17 interrogatories submitted to them, made special findings which were adopted by the trial court, to the effect that the marriage settlement agreement was read to the widow at the time she signed it; that she did not, however, understand its purpose and effect; that she did not at that time know that she was to receive no property from the estate of the deceased save that described and designated in the marriage settlement agreement, or that she was receiving the same in consideration of waiving all her right in the property and estate of the deceased; that she did not sign the said agreement with the understanding that she was waiving her right to administer the estate of the decedent; that John Stoner, in his dealings with the widow at the time of the execution of said agreement, was acting for the deceased, and that said Stoner at that time falsely and fraudulently represented to the widow that, if the deceased died in his then illness, she would receive nothing from the estate of the deceased because of the manner in which the son of the deceased, U. G. Cover, was spending the money of the deceased; that the property which the widow received under said marriage settlement agreement was not fair nor adequate to the value of the rights which she thereby surrendered; and finally that the widow did not discover until some time in October, 1918, that fraud and undue influence had been practiced upon her in the procurement of the agreement, and that on or about said last-mentioned date she discovered and knew for the first time that she would not receive any of the property of the deceased save that which she had alreeady received under the agreement.

It is contended in support of the appeal that the findings of the trial court and jury to the effect that the deceased obtained the agreement from the widow by undue influence, actual or presumptive, are not supported by the evidence. We will not stop to consider whether or not the evidence adduced upon the whole case supports the findings of undue influence upon the theory that actual undue influence, as distinguished from presumptive undue influence, was the compelling cause of the wife's assent and signature to the marriage settlement agreement, for we are satisfied that the evidence supports the finding of undue influence, and therefore supports the judgment upon the theory that the agreement in question was procured from the wife as the result of constructive fraud, having its origin in the confidential and fiduciary relation of husband and wife which admittedly existed between the parties to the agreement at the time of its making.

[4] Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. The very existence of such a relation precludes the party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the parties to the relation. Civ. Code, §§ 2219, 2228, 2235; Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; Robins v. Hope, 57 Cal. 493.

[5] Confidential relations are presumed to exist between husband and wife, and, in his dealings with his wife, the husband, if he obtains an advantage over her, must stand unimpeached of any abuse of the confidence presumptively reposed in him by the wife and resulting from the marital relation, and, failing in this, he must bear the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained. Bacon v. Soule, supra; Smith on Fraud, § 190; Robins v. Hope, supra; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189. It is the rule in this state that transactions between husband and wife shall be subjected to the general rule which controls the actions of persons occupying confidential relations with each other, as provided in section 2235 of the Civil Code (Civ. Code, § 158), which, when applied to the relation of husband and wife, has been interpreted to mean that—

> "In every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption." Odell v. Moss, 130 Cal. 352, 62 Pac. 555; White v. Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; 2 Pomeroy Eq. Juris. §§ 955, 956, et seq.; Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189.

[6] Of course, the mere existence of the marriage relation alone will not, in and of itself, suffice to initiate and support the presumption of undue influence where the transaction between husband and wife is prima facie, or, from all of the circumstances thereof, shown to be fair and free from any material advantage to the husband from and over the wife. But in those transactions between husband and wife, where admittedly the husband secures an advantage over the wife, the confidential relation existing between them may be invoked to bring into operation the presumption of the use and abuse of the relation. In short, a husband, by reason of the marital relation, is bound in his dealings with his wife to the highest and best of good faith, and as a consequence is obligated in such dealings not to obtain and retain any advantage over her resulting from concealment or adverse pressure, and he must, if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her, make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else he must deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice as to her rights in the premises. Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4.

[7] The evidence bearing upon the issue of undue influence shows, in part, that at the time of the making of the agreement the deceased and his wife had been married for

21 years, and that as the issue of this marriage one child had been born to them. The deceased, at the time of the marriage, was 62 years of age, and the wife was 32 years of age. It was an admitted fact in the case that the deceased and his wife, during all of their married life, lived in harmony and that the marriage relation was ideal, and that she was in every respect a loyal, dutiful, and helpful wife. We do not deem it essential to a decision of the case to further recite in detail the evidence bearing upon the issue of undue influence. Suffice it is, we think, for us to say that the finding that the agreement was conceived and consummated in presumptive undue influence is sufficiently sustained, when measured by the equitable principles which governed and controlled the dealings of the parties and by a consideration of the evidence—standing in the record practically uncontradicted—of the circumstances preceding and immediately attending the execution of the agreement, showing in substance, as it does, that the widow executed the same in ignorance of her rights and without independent advice as to its meaning and effect; that she thereby released her expectancy to a substantial portion of a $200,000 estate in return for a consideration obviously inadequate; and that the agreement was drafted at the direction of the deceased and executed by the widow at his instigation "in respect for the wishes" of the deceased, without any disclosure by him to her of the then value and character of his estate or of the rights which she was called upon to surrender by the agreement. Hessick v. Hessick, 169 Ill. 486, 48 N. E. 714; Graham v. Graham, 143 N. Y. 573, 38 N. E. 722; In re Haberman's Estate, 239 Pa. 10, 86 Atl. 641; Egger v. Egger, 225 Mo. 116, 123 S. W. 928, 135 Am. St. Rep. 566; Simpson v. Simpson's Ex'rs, 94 Ky. 586, 23 S. W. 361, 15 Ky. Law Rep. 353.

[8] The fact that the widow may have known at the time of the execution of the agreement that the deceased had the reputation of being a very wealthy man did not, in and of itself, suffice, as appellant contends, to impute knowledge to her of the value and character of his estate at that time. The business of the deceased, scattered as it was over a wide range of territory and consisting as it did of money lending and the taking and buying of notes and mortgages, was largely invisible. Under such circumstances, the mere reputation of his wealth was a thing too indefinite and intangible to be made the basis of knowledge or the means of knowledge on the part of the widow as to the character and value of the property of the deceased (Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712), and therefore, "when dealing with his inexperienced and confiding wife, it was his duty not only to have explained to her what rights she was surrendering, but to develop to her approximately, at least, the value of his estate." Simpson v. Simpson's Ex'rs, supra.

[9] It is argued on behalf of the appellant, in effect, that even though the doctrine of laches may not be formally pleaded in avoidance of the defense of fraud, nevertheless the widow, having accepted and retained, without protest or repudiation, the benefits of the agreement during a period of several years after its making, is estopped from defending against its operation. There might perhaps be much force in this contention if it had been shown in evidence that the widow had discovered, at any time subsequent to the making of the agreement and prior to the death of the deceased, the fraud alleged to have been practiced upon her by the deceased. But the pleadings, the evidence and the supported findings show, in substance, that the widow was ignorant of the scope and effect of the agreement, not only at the time of its making, but at all times thereafter until shortly before she petitioned for letters of administration, and that not until then did she have occasion to doubt the bona fides of the deceased. Accepting the agreement in the belief that the deceased was dealing honestly with her, she was justified in resting in that belief, and was not called upon then or thereafter to make independent inquiry as to his good faith. Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34. Accepting and retaining the benefit of the agreement, as the evidence shows she did, in continuing ignorance of the effect thereof upon her right to succeed to a portion of the estate of the deceased in the event of his dying intestate, did not operate as an estoppel, for to constitute an estoppel it must be made to appear that she acted with full knowledge of all the material facts and circumstances and with full knowledge of her rights in the premises. Burke v. Adams, 80 Mo. 505, 514, 50 Am. Rep. 510; Garesche v. Levering Inv. Co., 146 Mo. 436, 451;[1] Egger v. Egger, 225 Mo. 116, 123 S. W. 928, 135 Am. St. Rep. 566; Wheaton v. Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Puterbaugh v. Wadham, 162 Cal. 611, 123 Pac. 804.

[10, 11] The point is made that the evidence adduced upon the hearing of the contest shows that the deceased died without leaving any estate in California or elsewhere, and that, as a consequence, the widow was not entitled to letters of administration in the first instance. This point is made and based upon the fact that there is some evidence in the record, which came in incidentally, tending to show that the only piece of property standing of record in Los Angeles county in the name of the deceased was that covered by a sheriff's deed to the deceased following a mortgage foreclosure sale, which deed was recorded after the death of the deceased, and from this it is argued, as we understand the contention of appellant, that, inasmuch as the uncontradicted evidence shows elsewhere that the deceased had previously conveyed by grant, bargain, and sale deed all of the property which he possessed in California and elsewhere, the after-acquired title, if any, to the property described in the sheriff's deed vested in the grantee of the deceased named in the prior deed. Granting the latter proposition to be correct, still we are confronted with the fact that by the pleadings of the parties it was an admitted fact in the case that the deceased died leaving in California an estate consisting of the real property described in the petition for revocation. This being so, the admitted fact must control as against the evidence referred to, in support of the finding that the deceased left an estate in Los Angeles county, for it is the rule that an admitted fact must be treated as "found," and if the court in this case had found adversely to the admitted fact that the deceased left estate in Los Angeles county we would be compelled to ignore such finding on this appeal. In re Doyle, 73 Cal. 564, 15 Pac. 125; Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80; Nuttall v. Lovejoy, 90 Cal. 163, 27 Pac. 69.

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[1] 48 S. W. 653, 46 L. R. A. 232.

[12] Moreover, we have not before us the record of the jurisdictional facts requisite to the granting in the first instance of the letters of administration to the widow, and the absence of such a record, coupled with the fact that the issuance of such letters is not assailed by the petition for revocation upon the ground that the deceased died without leaving any estate, warrants the presumption, which must stand in the absence of proof responding to a pleading to the contrary, that the order granting letters of administration was made upon a proper and sufficient showing that the deceased died leaving an estate in California.

[13] The court below found that all of the property possessed by the deceased, at the time of the making of the agreement and at the time of his death, was separate property. This finding is supported by the evidence. His estate being separate property, the widow would have been entitled to succeed to a portion thereof only in the event of the deceased dying intestate. Therefore it may be conceded that the deceased, without regard to the marriage settlement agreement, might have conveyed or willed away his entire estate had he been so disposed, to the entire exclusion of the widow, without legal let or hindrance from her. From this it is argued, as we understand the contention of appellant, that, having deeded practically his entire estate to his son immediately following the making of the agreement in controversy, the situation at the time of the death of the deceased was, in effect, the same as if he had willed his estate to others than the widow, and, not being entitled in either event to any portion of the estate of the deceased, the widow has no just ground for complaint against the making of the agreement. The answer to this contention is to be found in the fact that the deceased died leaving an estate undisposed of by will, and thus, but for the interposition of the agreement in controversy, the widow would be entitled to succeed to a portion thereof coupled with the concurrent preferential right to administer his estate.

[14] Conceding, as is contended, that the offer by the widow to restore to the estate of the deceased the property which she received in consideration of making the agreement was indispensable to her right to defend against the obligation of the agreement, still, as we read and understand her answer, that is just what she offered to do. Her answer alleges that she "offers to account to the legal representatives of the estate * * * for each and singular all the property received by her pursuant to the terms of said contract, and to do equity." This offer could be made to no one else but the representative of the estate, and the fact that the widow herself happened to be such representative did not militate against its efficacy. The offer in its entirety and in the particular to do equity was, in effect, an offer to credit the estate with the property received under the agreement and subject it to administration, and, so construed, was a sufficient offer to restore. The allegation in the defendant's answer in this behalf, in conjunction with the evidence adduced upon the hearing of this phase of the case, was sufficient to support the finding that the widow did "tender back the consideration which she received under the property settlement agreement." Wilks v. Wilks, 176 Ala. 151, 57 South. 776; Gidney v. Chappell, 26 Okl. 737, 110 Pac. 1099; Hurst v. Knight (Tex. Civ. App.) 164 S. W. 1072; Cecil v. Henry, (Tex. Civ. App.) 93 S. W. 216; Pinkston v. Boykin, 130 Ala. 483, 30 South. 398.

Complaint is made of certain instructions given in the charge of the court to the jury, and also of the refusal to give certain instructions requested by the appellant. In view of what we have previously said with reference to the law and the facts of the case, we are satisfied that the charge of the court as a whole was correct, and that the instructions requested by appellant were in each instance properly refused and modified by the court.

[15, 16] Finally, it is contended that appellant's motion for a new trial should have been granted upon the showing of newly discovered evidence made in support of the motion. Ordinarily newly discovered evidence is looked upon with disfavor, and a party relying thereon must make a strong showing of diligence on his part in preparing for trial. Harralson v. Barrett, 99 Cal. 607,

34 Pac. 342; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; Arnold v. Skaggs, 35 Cal. 684. And, granting the importance of the alleged newly discovered evidence, the motion, upon the ground stated, was properly denied, because a sufficient showing was not made in the affidavits offered and received in support of the motion that reasonable diligence was exercised, prior to the hearing of the petition, for the procurement of the alleged newly discovered evidence. It was the duty of appellant and his counsel, in the preparation of the case, to make every reasonable search for and inquiry of witnesses who might be reasonably expected to give testimony concerning the facts in issue. Butler v. Estrelle, etc., Co., 124 Cal. 239, 56 Pac. 1040; Koskela v. Albion Lbr. Co., 25 Cal. App. 12, 142 Pac. 851; 20 Standard Ency. of Proc. p. 570. It appears from the affidavits of the witnesses who were alleged to have been newly discovered that they were known to be either related to or social friends of the widow, with whom they came in frequent and intimate contact prior to the hearing; and, while it is alleged generally in the affidavits that these witnesses could not have been discovered by reasonable diligence prior to the hearing, nevertheless it was not made to appear in the affidavit of appellant that he did not know of the existence of the witnesses and their association with the widow, or that he or any one in his behalf made any inquiry at all among the friends, relatives, and associates of the widow to ascertain what, if anything, such persons knew in relation to the matters in issue. This being so, it cannot be said that the affidavits make a showing of sufficient diligence in the preparation of the case, and therefore do not make a sufficient showing of the requisite diligence to warrant a granting of the motion for a new trial upon the ground of newly discovered evidence. Du Souchet v. Dutcher, 113 Ind. 249, 15 N. E. 459.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; LAWLOR, J.; WASTE, J.; SHURTLEFF, J.; SLOANE, J.

188 Cal. 175

LUCKENBACH v. LAER et al.
(L. A. 7047, 7048.)

(Supreme Court of California. Feb. 15, 1922.)

1. Appeal and error 🔑113(1)—Judgment 🔑348—Motions 🔑59(2)—Void judgment or order may be set aside at any time by court making it.

An order or judgment which was void for want of jurisdiction of the court to make it can be set aside at any time by the court that made it, and, if the court refuses to vacate on motion such an order made after judgment, the party aggrieved may appeal under Code Civ. Proc. § 963, subd. 2.

2. Appeal and error 🔑477, 479(2)—Supersedeas issued under inherent power of court.

The writ of supersedeas may be issued by an appellate court in virtue of its inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving respondent of a substantial right, and application for such writ is addressed to the discretion of the court.

3. Appeal and error 🔑480—Appellants held entitled to supersedeas to stay prosecution of suit by receiver pending appeal from refusal to vacate receivership.

Where defendants had appealed from an order appointing a receiver, and from another order authorizing the receiver to bring suit against the defendants on behalf of the corporation to enable it to satisfy plaintiff's judgment against the corporation, on the ground that the appointment of the receiver was void for want of jurisdiction, a writ of supersedeas will be granted to appellants to stay the prosecution of the action by the receiver pending the appeal on their giving a bond sufficient to secure the payment of plaintiff's judgment.

In Bank.

Action by John Luckenbach against John B. Laer and others. From an order denying a motion to vacate a previous order appointing a receiver, and authorizing him to bring suit against certain individual defendants, defendant William H. F. Preston and defendants Chris Krempel and others separately appeal. On application by appellants for a writ of supersedeas to prevent the trial of an action instituted by the receiver. Writ granted.

John T. Jones, Stevens, Mumper & Pinney, Norman A. Bailie, and Henry J. Stevens, all of Los Angeles, for appellants.

Alfred McAdoo, of Los Angeles, for respondent.

SHAW, C. J. The appellants ask for a writ of supersedeas. The writ is asked to stay proceedings for the collection of a judgment for $5,955.40 recovered by Luckenbach against Krempel-Preston Company in the superior court of Los Angeles county on January 6, 1919. There are separate appeals, one by the defendant Preston and the other by the three defendants, Chris Krempel, Anna Krempel, and Lucy Hauerwaas. As they both involve the same question they will be considered together.

On April 15, 1919, on application of the plaintiff the court appointed Willard L. Goodwin receiver of the property of said company. On May 3, 1919, the court made an ex parte order, purporting to authorize said receiver to sue the above-named appellants or either of them for any amounts due from them or either of them to said company. On May 5, 1919, said Goodwin, as such receiver, began an action in said superior court against said appellants to recover the sum of $164,231.62, alleged to be due from said persons to said company.

On April 8, 1921, Preston moved the court below for an order vacating the two orders of April 15 and May 3, 1919, appointing a receiver and authorizing him to sue, as aforesaid. On April 8, 1921, this motion was denied. On April 26, 1921, the court denied a similar motion by the other appellants to vacate the aforesaid orders. From these orders denying said motions these separate appeals were taken by the respective moving parties. Upon these appeals, and by the writ of supersedeas prayed for, the appellants seek to restrain further proceedings by the receiver and in the court below, pending the appeals, in the prosecution of any action or actions against the appellants, or either of them, based upon debts claimed to be due from them to said Krempel-Preston Company.

[1] The motions to set aside the order appointing the receiver were each made on matters appearing on the face of the record, and on the ground that the court had no jurisdiction to appoint the receiver, in other words, that the order was void because of a lack of jurisdiction in the court to make it. If that order was void, the orders purporting to authorize the receiver to sue would also be void. A judgment or order which is void on the face of the record thereof may be set aside at any time by the court that made it, on the ground that it is void. People v. Davis, 143 Cal. 675, 77 Pac. 651; Wharton v. Harlan, 68 Cal. 422, 9 Pac. 727; People v. Greene, 74 Cal. 400–405, 16 Pac. 197, 5 Am. St. Rep. 448. If the court refuses to vacate such an order on motion, it being an order made after judgment, the party aggrieved may appeal and have the order reviewed and reversed. Code Civ. Proc. § 963, subd. 2. The appeals herein present just such a question and if the appellants are successful the order appointing a receiver will be vacated and all proceedings thereunder will be rendered null and void, including the order authorizing the receiver to sue on behalf of the corporation defendant.

[2] The writ of supersedeas may be issued by an appellate court in virtue of its "inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right." Hill v. Finnigan, 54 Cal. 495; Dulin v. Pacific, etc., Co., 98 Cal. 306, 33 Pac. 123; Williams v. Borkwardt, 115 Cal. 617, 47 Pac. 594; Brown v. Rouse, 115 Cal. 620, 47 Pac. 601; Nonpareil Mfg. Co. v. McCartney, 143 Cal. 3, 76 Pac. 653; McAneny v. Superior Court, 150 Cal. 9, 87 Pac. 1020; Southern P. Co. v. Superior Court, 167 Cal. 252, 139 Pac. 69; Halsted v. First Sav. Bank, 173 Cal. 610, 160 Pac. 1075. These cases also show that an application for such a writ is addressed to the discretion of the court. See, also, 3 Cor. Jur. 1290.

[3] We think this is a case in which the writ may well be issued. In the court below the receiver is prosecuting an action against the appellants herein to recover of them a large sum of money, greatly in excess of the amount of the judgment against the Krempel-Preston Company. That action is being prosecuted for the benefit of the plaintiff herein solely for the purpose of collecting his said judgment. The defendants in said action have set up the invalidity of the order appointing the receiver in their defense thereto. If that defense is successful, the action will fail because of the want of authority in the receiver to maintain the same. Preston v. Superior Court, 195 Pac. 916. That question may not be finally decided in that action until long after the defendants have been compelled to expend large sums of money for conducting the trial and maintaining such defense as they may have on the merits of the action. The present appeals directly involve the question of the validity of the order appointing the receiver, and consequentially the validity of the order authorizing the receiver to sue and the question of his authority to prosecute that action. These appeals will soon come on for a hearing, and the question upon which all this litigation largely depends will then be determined. It is to the interest of all the parties to have the action below suspended until this decision can be made. If this is not done, and the appellants are successful in the end, they will be injured to the extent of their expenditures in carrying on the litigation in the court below or on appeal therein if they are unsuccessful below.

The writ will not be issued except upon ample security to the plaintiff herein. He has nothing at stake except the amount of the judgment he recovered against the company. A bond in the sum of $12,000 will be sufficient security for its payment.

It is ordered that a writ of supersedeas issue staying all proceedings in the court below in any action begun by said receiver under and in pursuance of the order appointing him, or in pursuance of the order authorizing him to institute actions against persons claimed to owe debts to said Krempel-Preston Company, upon the execution and filing in this court of a bond in the sum of $12,000, the sureties thereon to be approved by any judge of the superior court of Los Angeles county, and said bond to be conditioned that if the defendants fail in the appeals herein and shall pay any judgment that may be recovered against them in the action of said receiver begun in pursuance of said orders, not exceeding the amount of principal, interest, and costs then due upon the said judgment of plaintiff against said Krempel-Preston Company, then the said bond shall be void; otherwise to be in full force.

We concur: LENNON, J.; SHURTLEFF, J.; WASTE, J.; WILBUR, J.; SLOANE, J.

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188 Cal. 170

FREEMAN v. DONOHOE et al. (Sac. 3308.)

(Supreme Court of California. Feb. 14, 1922. Rehearing Denied March 16, 1922.)

1. Judgment 🔑526—Scope and effect determined by judgment roll.

In determining the scope and effect of a judgment, the entire judgment roll may be looked to for the purpose of its interpretation.

2. Partnership 🔑340—In suit for accounting of profits, sale of partnership real estate before property of individual defendants held proper.

In a suit by a partner for an accounting of profits of a real estate partnership business, which profits were invested in real estate, such real estate should first be sold, and the proceeds be divided among the partners according to the interest in the property before resorting to property of the individual defendants.

3. Partnership 🔑344—Under terms of judgment held that there could be no issuance of general execution until after partnership property was subjected to claims of plaintiff in suit for accounting.

Where in suit by a partner for an accounting a judgment for plaintiff in a certain sum declared that a third of the real estate owned by the firm belonged to plaintiff and declared a lien for plaintiff on the interests of defendants, and directed a sale of the real estate and payment of one-third of the proceeds to plaintiff, and application of so much of the remaining two-thirds as was necessary to liquidation of any amount remaining unpaid at the time of the judgment, the purpose of the court was to subject partnership property to a sale for the satisfaction of the amount due plaintiff, and, the money judgment and the direction for the sale of the real estate being interdependent, there should be no general execution issued until after subjection of the partnership assets to the claims of the plaintiff.

4. Appeal and error 🔑479(1)—Writ of supersedeas should issue to prevent taking out general execution on judgment against partnership assets.

In a suit by a partner against his copartners for an accounting, in which a judgment for plaintiff was given in a certain sum and for the sale of partnership real estate in which the plaintiff had an interest, from which defendants appealed, since the bond to stay the sale of the real estate given by them in pursuance of Code Civ. Proc. § 945, did not stay an execution for a money judgment, a writ of supersedeas should issue to prevent the issuance of a general execution as on a money judgment pending the appeal.

In Bank.

Suit by Frank Freeman against C. L. Donohoe and another. From judgment for plaintiff, defendants appealed, and pending the appeal applied for writ of supersedeas directed to the superior court of Glenn county, J. E. Prewett and H. V. Bell, judges, to prevent an issuance of general execution. Writ granted.

W. T. Belieu, of Willows, and Hankins & Hankins, of San Francisco, for appellants.

George R. Freeman and Jackson Hatch, both of Willows, for respondent.

WILBUR, J. This is an application by the defendants for a writ of supersedeas to prevent the issuance of a general execution as on a money judgment pending the appeal. The plaintiff brought suit against the defendants for an accounting of partnership profits and to have it adjudged that the title of certain real estate was held in trust by the defendants for the partnership. The defendants denied the existence of a copartnership, but the court found the facts to be as alleged by the plaintiff, ordered an accounting, and thereafter entered its findings and judgment that the plaintiff's share in the copartnership profits, after the payment of all of the debts of the copartnership, was $31,504.85, together with interest from May 26, 1914, at the rate of 7 per cent. per annum, amounting to $15,755.46, making a total of $47,260.31.

The judgment "orders, adjudges, and decrees as follows: (1) That plaintiff have and recover from the defendants, jointly and severally, the sum of $31,504.85 in lawful money of the United States, together with interest thereon from the date of the commencement of this action, to wit, May 26, 1914, at the rate of 7 per cent. per annum, making a total of $47,260.31." It is upon this portion of the judgment that the plaintiff threatens to secure an execution, in default of a stay bond in twice the amount of $47,260.31, in accordance with section 942, Code of Civil Procedure.

The other portions of the judgment may be summarized as follows: In paragraph 2 of the judgment it is declared that plaintiff and defendants were copartners doing a general real estate business until June 1, 1910. In paragraph 3 it is provided that the real property belongs to the copartnership, and that plaintiff is the owner of one-third and the defendants of two-thirds thereof. In paragraph 4 it is declared that all the debts and obligations of the copartnership have been paid, and in paragraph 5 that no other property belongs to the copartnership other "than the said profits and the said lands, save and except the properties described in the next paragraph." In paragraph 6 certain items of property are described, and these items by the plaintiff's consent are assigned to the defendants, plaintiff waiving all interest therein. In paragraph 7 a lien is declared in favor of the plaintiff upon the interests of the defendants in and to the real property belonging to the copartnership and remaining unsold and described in paragraph 8. In paragraph 9 all other property is awarded to defendants by consent. Paragraph 10 directs the sale of all real estate belonging to the copartnership and provides that one-third of the net proceeds thereof shall be paid to the plaintiff "for and on account of his one-third interest in said properties," and that the clerk "shall also pay to plaintiff so much of the remaining two-thirds of such proceeds as may be necessary to be applied to the liquidation of any amount remaining unpaid at that time on this judgment, and shall thereupon enter in the judgment book of this court containing the record of this judgment a credit of the said amount of money so paid to plaintiff and representing the two-thirds interest therein of the defendants, and shall pay to defendants any proceeds remaining after the payments provided for herein."

[1, 2] The defendants gave a bond of $300 on appeal and also a bond for $2,500, the amount fixed by the court for rental and waste for the purpose of staying the sale of the real estate under section 945, Code of Civil Procedure. If the judgment is to be construed as directing the sale of the partnership real estate and the application of the proceeds thereof to the plaintiff's claim and thereafter the docketing of a deficiency judgment, if any, the writ of supersedeas should be issued. Section 945, Code Civ. Proc. If, on the other hand, the judgment is in effect a personal judgment for $47,260.31, and the provision for the sale of the real estate is merely ancillary to the money judgment, the bond staying the sale of the real estate would not stay an execution for the money judgment pending the appeal. In determining the scope and effect of the judgment the entire judgment roll may be looked to for the purpose of its interpretation. It appears therefrom that plaintiff was seeking an accounting of the profits of real estate partnership claimed to amount to $250,000, but found by the trial court to amount to a trifle less than $100,000. These profits were invested in real estate standing in the names of the defendants in trust for the copartnership. The trial court found that plaintiff's interest in the partnership was $31,504.85 and interest, plus one-third of the real estate. It is clear from the findings that the real estate belongs to the copartnership. That being true, it was appropriate that the copartnership real estate should first be sold and the proceeds divided among the partners according to their interest in the copartnership, before resorting to the property of the individual defendants. Painter v. Painter, 98 Cal. 625, 33 Pac. 483; Moran v. McInerney, 129 Cal. 29, 61 Pac. 575; Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303; Shuken v. Cohen, 179 Cal. 279, 283, 176 Pac. 447.

Whether or not the trial court could have properly rendered a general money judgment against the defendants, before the partnership assets are sold and applied to plaintiff's claim, may well be doubted. Clark v. Hewitt, supra; Shuken v. Cohen, supra. The question here, however, is as to the proper construction of the judgment.

[3] In considering a contention similar to that of the plaintiff as to the proper interpretation of a judgment which contained a clause suitable in terms to declare a money judgment, this court said in the case of Owen v. Pomona Land, etc., Co., 124 Cal. 331, 57 Pac. 71:

> "This claim is based upon the following language in the first part of the judgment: 'That said plaintiff do have and recover of said defendant, Pomona Land & Water Company, the amount of the several sums of money hereinafter named,' et cetera. This language, considered by itself, certainly does sustain the contention of the respondent. But it cannot be taken by itself disconnected from other parts of the decree, and when the whole decree is read together it is found to be in substance an ordinary decree of foreclosure, in which certain property is ordered sold and its proceeds applied upon an ascertained debt, the balance remaining due, if any, to be docketed as a personal judgment. The provision for the sale of the property and the application of the proceeds is not merely a cumulative remedy given for the enforcement of an ordinary money judgment. It is a part and an essential part, of the only procedure for the enforcement of the judgment, and no execution could have issued against other property than that mentioned in the decree until it had been sold, its proceeds applied, and the deficiency ascertained."

[4] So it may be said in the case at bar in the judgment the clause relied upon would be sufficient, taken alone, to justify the issuance of a general execution upon a money judgment, but the balance of the decree, construed in the light of the pleadings, shows that the purpose of the court was to subject the partnership property to a sale for the satisfaction of the amount adjudged to be due to the plaintiff, and, although there is no specific provision in the judgment that a deficiency judgment should be entered for the balance, and the judgment proceeds upon the theory that the original judgment for the full amount will have been docketed before the sale, it is clear, we think, from the whole judgment, that the two matters are interdependent, and that there should be no general execution issued until after the subjection of the partnership assets described in the judgment to the claims of the plain-

tiff. This being true, it follows that a writ of supersedeas should issue as prayed for.

Let the writ issue as prayed for.

We concur: SHAW, C. J.; LENNON, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; WASTE, J.

188 Cal. 229

McCARTHY v. SECURITY TRUST & SAVINGS BANK. (L. A. 6473.)

(Supreme Court of California. Feb. 17, 1922.)

1. Appeal and error 🔑1010(1)—Finding as to a lost deed based on grantee's testimony alone not disturbed.

In an action to quiet title based on a lost deed, a finding in favor of the plaintiff based on the testimony of plaintiff alone as to the execution and delivery of the deed, the grantor and the notary who took the acknowledgment being dead, and the notary's records lost, cannot be disturbed on appeal, if such testimony tended to establish all the facts necessary to a valid conveyance.

2. Deeds 🔑208(1)—Testimony of grantee held to support inference of delivery.

Testimony by the grantee that after grantor executed the deed it was left with the notary, who handed it to grantee, and that when grantee returned it to grantor the latter told her to keep it, and record it after the grantor's death, and subsequently requested the grantee to convey the property to grantor's son, reserving a life estate in grantee so as to protect the son in case grantee should die, *held* sufficient to warrant the inference that the deed was delivered.

3. Deeds 🔑60—Request to withhold recording does not defeat delivery.

An oral request of the grantor that the deed be not recorded until after her death does not defeat a delivery otherwise effective, in view of Civ. Code, § 1056.

4. Deeds 🔑60—Possibility of retaking by grantor does not negative delivery.

The fact that the key to grantee's trunk in which a deed was placed after grantor had handed it to grantee was kept in the house in which both parties lived, on a shelf accessible to the grantor, does not show that she retained such control over the deed as to defeat the delivery otherwise established.

In Bank. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Catherine McCarthy against the Security Trust & Savings Bank to quiet title. Judgment for the plaintiff, and defendant appeals. Affirmed.

Andrew J. Copp, Jr., and Sherill B. Osborne, both of Los Angeles, for appellant.

J. Vincent Hannon and J. E. Hannon, both of Los Angeles, for respondent.

SLOANE, J. This appeal is from a judgment of the superior court of the county of Los Angeles, quieting title in plaintiff and respondent to real estate in the city of Los Angeles.

An appeal was taken to this court by the defendant, and was transferred to division 1 of the First District Court of Appeal. The case comes back to this court upon an order for hearing after a reversal of the judgment by the District Court of Appeal.

The opinion of the district court summarizes the facts in the case as concisely and clearly as it could be put into words:

"Plaintiff's action is declared upon a deed claimed to have been witnessed and acknowledged before a notary. The deed itself is lost, the notary dead, his records destroyed, and it is admitted that no one other than the plaintiff, her grantor and the notary, ever knew of its existence, plaintiff keeping knowledge of the conveyance an absolute secret. Aside from this, the deed was never recorded, and the grantor after the alleged conveyance assumed apparent ownership in the property. She remained in absolute possession and exercised full and complete dominion over the same. She collected the rents, paid the taxes, and mortgaged the property, the acknowledgment to which instrument was taken before the very notary who plaintiff alleged prepared her deed and who knew of the existence and contents thereof.

* * *

"From plaintiff's testimony it appears that one Mary G. Nicolson was for many years prior to the conveyance here alleged the owner of the property in question. In the month of April, 1915, she became seriously ill, and was advised by her physician that she had not long to live. Upon receiving this information she sent for the plaintiff, her sister, who remained with her for about two months. A few days after plaintiff's arrival, Mrs. Nicolson, believing she was about to die and for the purpose of disposing of her estate, requested plaintiff to summon a Mr. Stedman, a notary public who had attended to her business affairs, for the purpose of preparing a deed to the property in question. Accordingly, so plaintiff testifies, the notary was directed to and did prepare the conveyance from Mrs. Nicolson to plaintiff. A day or so thereafter a deed to the same property was, under the direction of Mrs. Nicolson, made by plaintiff to a son of Mrs. Nicolson, who was her only child. By the terms of this last-mentioned deed the plaintiff, so far as can be gathered from her testimony, retained a life interest in the property with remainder over to the son of the original grantor. Both deeds were signed by the respective grantors, duly acknowledged, with notarial seal affixed. The deed so executed by plaintiff to the son of the grantor was made by plaintiff at the request of Mrs. Nicolson, who feared that plaintiff might accidentally get killed."

Mrs. Nicholson died about a year and a half later. It must be conceded that the plaintiff's case as to the execution of the deed on which her claim of title rests is based upon about as insecure a foundation as could be imagined. The circumstances, as narrated, present either a deliberate fabrication or a most unusual absence of all the primary evidence accompanying such a conveyance. The really suspicious feature of the case is the loss and disappearance of all the physical evidence of the alleged transaction. But the witness testified in the presence of the trial judge. Her appearance, her manner, and evident credibility on the stand may have justified the trial court in believing every word she said. She testified that her sister told her she wanted to deed her this property and sent her for the notary to prepare the papers. She testified to the execution of the deed, and sufficiently stated its contents to show that it was a grant deed in due form purporting to convey the property as described in the complaint from her sister to herself, and to the loss of the deed and the death of the notary, the only other witness to its execution, and to the loss of his notarial records. These latter facts were substantiated by other witnesses. The only other corroborating evidence was that of a witness who testified that Mrs. Nicholson had subsequently to the alleged date of this deed told her that she had provided for her sister, the plaintiff, and that her sister would always provide for Walter, her son, and that she had made deeds of her property.

The trial court on the evidence before it found that—

"Mary Grace Nicolson was at the date of the deed hereafter mentioned the owner of said real property described in the complaint, and on or about the 29th day of April, 1915, made, executed and delivered to the plaintiff a grant deed thereof, and the plaintiff thereupon became and ever since has been the owner of the said real property."

[1] We cannot question this finding so far as it is supported by the evidence, no matter how unusual the circumstances or inherently improbable the conditions. If the judge who tried the case was satisfied of the credibility of the witness, the facts testified to were sufficiently established.

The only particular in which it is questioned that the facts given in evidence failed to show an executed conveyance is in the matter of delivery. It is contended that it does not appear that Mrs. Nicolson ever parted with the custody and control of the deed to her sister. The testimony of the plaintiff on this point was in substance as follows:

"After the deed was signed and acknowledged the notary took it up to his office, and I went up in a day or two, and he gave me the deed, and I took it down and gave it to her, and she says, 'Kate, you take it and take care of it, and when I die, you put it on record,' and I did. She said, 'If you should get killed accidentally, or not have a chance to make out a deed to Walter, if you still held it, I wish you would make out a deed now to him.' Walter was her son. He was about 26 years old. She requested that I make a provision for Walter, so that he would get the property when I was through with it, and I made him a grant deed. I made the deed at Mr. Stedman's office. This was a day or two after the other deed had been delivered to me. I put both deeds in my trunk. I never recorded them. I had the deeds after my sister's death, and after that the deeds disappeared. My sister died September 11, 1916. I had the deeds until July, 1917. They were in my trunk. I discovered that the deeds were no longer in my possession in August.

"I had been looking over my papers, destroying some old insurance papers, and I had all my papers together, these deeds along with them, and I feel that I must have burned them. Walter was not to receive the deed to him until I died, if there was anything left. I never delivered it to him.

"I kept the deed to me all the time in my trunk. I was in the house with my sister about two months after it was handed to me by my sister. When she handed it to me she said, 'Kate, you take care of this deed, and after I die you put it on record.' I kept my trunk locked all the time it was there. My sister could have had access to it if she wanted to; the key was right there on a shelf. The only thing my sister said to me afterwards about the deed was in the summer after she returned from the hospital. One day she asked me if I had the deed, and I said I had. She never asked me for the deed. My sister asked me never to say anything to Walter about the deed from her to me, and in that way I never spoke about them to anybody."

[2] We think this testimony justifies the finding of the trial court that there was a sufficient delivery of the deed to pass title to the plaintiff, especially in view of the declared purpose of the grantor to deed the property to the plaintiff. What the intent of the grantor was in handing over the completed instrument to the grantee was a question of fact for the trial court, under all the circumstances of the transaction, and this intent of the grantor to pass title was a fair inference from the facts given in evidence.

It is true that her statement requesting that the grantee take care of the deed until she, the grantor, was dead, and then record it, did not show conclusively an intent to surrender all control of it, but, taken in connection with her request a day or two afterwards that the grantee, in turn, make a deed to the son, would indicate the grantor's understanding that she had conveyed the title to her sister. The fact that Mrs. Nicolson thereafter executed a mortgage on the premises, while tending to show a continuing claim of title, was merely a circumstance to be weighed against the affirmative evidence of delivery.

[3] The oral request of the grantor that the deed be not recorded until after her death does not defeat a delivery otherwise effective. Section 1056, Civ. Code; Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216; Lewis v. Brown, 22 Cal. App. 38, 133 Pac. 331.

[4] It does not appear, as contended, that the deed after being handed to plaintiff did not remain in her exclusive custody and control. She kept it in her trunk under lock and key. The fact that while she remained in her sister's house the key to the trunk was accessible to the latter does not suggest any right to open or remove the contents of the trunk.

The judgment is affirmed.

We concur: SHAW, C. J.; SHURTLEFF, J.; WILBUR, J.; LAWLOR, J.

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188 Cal. 179

DAVIES v. TORRANCE et al.

HARRIS v. SAME.

(L. A. 6868, 6869.)

(Supreme Court of California. Feb. 17, 1922.)

1. Corporations 🔑237—Indebtedness to sureties accrues at time they paid note.

A corporation's indebtedness to the sureties on its note accrues at the time they paid the note.

2. Corporations 🔑269(3)—Evidence held to show that a promise to pay note was made at corporation maker's request.

In actions against stockholders of the corporate maker of a note to recover amounts paid thereon on the maker's default, evidence *held* sufficient to sustain the court's finding that plaintiffs' promise to pay the note was made at the corporation's request, within Civ. Code, § 2831, defining a surety.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Consolidated actions by E. W. Davies and by Fred R. Harris against J. S. Torrance and others. Judgments for plaintiffs, and defendants appeal. Affirmed.

Andrews, Toland, Gregg & Andrews, of Los Angeles, for appellants.

J. Wiseman Macdonald and W. W. Wallace, both of Los Angeles, for respondents.

Dexter & Ellis, of Los Angeles, for H. O. Gardner.

WILBUR, J. These actions, consolidated by stipulation, were brought to recover from defendants upon their statutory liability as stockholders in the California Shoe Manufacturing Company, hereinafter called "the corporation," their proportion of the amount of a promissory note, wherein the First National Bank, hereinafter called "the bank," was payee, the corporation was payor, and the plaintiffs were either joint guarantors or sureties. The note was given July 13, 1915, in renewal of an obligation of the corporation incurred June 6, 1911, and was payable upon demand. Both plaintiffs were stockholders and directors, and E. W. Davies was president of said corporation at the time the note was given. Upon the default of the corporation one-half of the amount due thereon, $4,040 was paid March 30, 1917, by each plaintiff to the bank.

[1] If the plaintiffs were sureties for the corporation, then the indebtedness of the corporation to them accrued at the time they paid the note, to wit, March 30, 1917. Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094; Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939.

[2] Appellants claim that plaintiffs were

not sureties but were guarantors, and that therefore, if they have any remedy against the stockholders at all, it is by subrogation or contribution against those who were stockholders at the time the original indebtedness was incurred by the corporation (Redington v. Cornwall, 90 Cal. 49, 27 Pac. 40), and not against the appellants who first became stockholders September 27, 1913.

The court found that the plaintiffs were sureties upon said note and that they executed the instrument of suretyship at the request of and upon agreement with the defendant corporation. Without directly attacking this finding, appellants argue that the relationship of the plaintiffs to the corporation was that of guarantors, and that they are not sureties within the meaning of our statutes and decisions for the reason that the contract was made without the knowledge or consent of the corporation and in direct violation of the wishes thereof. Our Civil Code (section 2831) defines a surety as:

> "One who at the *request of another*, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." (Italics ours.)

The question for our consideration is whether or not there was sufficient evidence to sustain the finding that the contract of the plaintiffs to pay the note was made to the bank at the request of the corporation. We will pass to a consideration of the evidence and findings not attacked to determine that question.

The trial court found that on June 6, 1911, the corporation became indebted to the bank on a promissory note for $10,000; that on that day plaintiffs became "sureties for and guarantors" of the indebtedness of the corporation under a written contract of suretyship whereby said plaintiffs guaranteed to the bank the payment of all present and future indebtedness of the corporation to the bank, not exceeding the sum of $20,000; that this written contract was a continuing guaranty which could only be satisfied by the payment of all the obligations due to the bank; that on September 23, 1913, the corporation was indebted to the bank for $19,000, and that plaintiffs were obligated in writing as guarantors of and sureties for said indebtedness; that on the 12th of July, 1915, the sum of $12,000 was due from the corporation to the bank on account of said indebtedness and on said date the corporation paid $3,000 and delivered "a new promissory note for the sum of $9,000 for the balance of said indebtedness to the First National Bank; that said note was given in renewal of the remaining portion of said indebtedness; that it was not true that the same was not a new obligation."

On June 6, 1911, a resolution of the corporation was adopted wherein the president and secretary of the corporation were directed and empowered to borrow from time to time of the bank and in the name of the corporation any sum or sums not to exceed $20,000 for such time and on such terms as they might from time to time arrange for, and to execute and deliver the note or notes of the corporation therefor and any renewal or renewals thereof; the said note or notes to be in the form commonly used by the First National Bank of Los Angeles.

According to the minutes of the corporation on July 12, 1915, at 2 o'clock p. m., Directors Torrance, the appellant, Harris and Davies, the plaintiffs, and Wagner were present. The minutes state that—

> "On motion of Mr. Davies, seconded by Mr. Torrance, it was agreed to pay the First National Bank of Los Angeles, at Los Angeles, California, $3,000 out of the receipts of the first assessment, and ask the First National Bank of Los Angeles to accept a new note for the balance of $9,000 due them, without the directors' indorsements."

On the same date another resolution was passed reciting that the corporation had borrowed $9,000 from the bank and authorized and directed the president or vice president and secretary to execute a corporation note therefor payable in 60 days from date, etc. The bank refused to accept a new note without security. It demanded the indorsement of all the directors, but when told that the indorsement of all the directors could not be obtained, it accepted the separate written agreement of plaintiffs to pay the same, which agreement the court found to be one of suretyship. Three of the four directors of the corporation who participated in the meeting of July 12, 1915, joined in the consummation of the agreement with the bank, to wit, E. W. Davies, president, and Charles H. Wagner, secretary, who signed the promissory note on behalf of the corporation as such president and secretary, and Fred R. Harris, who, with E. W. Davies, signed the agreement now relied upon by plaintiffs as a contract of suretyship.

In June 1911, at the time of the inception of the original indebtedness to the bank by the resolution of June 6, 1911, the president and secretary were authorized to borrow money from the bank upon such terms as they could arrange for and to execute the corporation's notes and renewals therefor. The trial court found that as to the original indebtedness, the plaintiffs, Harris and Davies, were sureties, and hence that they had been requested by the corporation to execute their obligation to the bank. In order to secure such initial loans it was evidently necessary to give the bank the personal obligation of Harris and Davies. The court might well have based its conclusion that the obligation of July 13, 1915, was executed upon the request of the corporation, made in June, 1911, for that was the inception of the plaintiffs' obligation, and so far as we can see, bound the plaintiffs to pay the new note for $9,000 executed July 13, 1915, as well as the obligation theretofore due the bank, of which the latter note was a renewal. Hence plaintiffs' promise of July, 1915, was merely a renewal of an agreement of suretyship theretofore existent. Moreover, if this be true, plaintiffs would be entitled to the judgment they obtained because, in satisfying the note of the bank, they were required to do so by the agreement of June, 1911, as well as by that of July, 1915, and the mere fact that the complaint was predicated upon the later promise rather than the earlier one did not result in a miscarriage of justice. However, the finding of the trial court that the plaintiff's agreement of July, 1915, was one of suretyship is manifestly sustained by the evidence, not only because of what has just been stated, but for the further reason that if the officers of the corporation in order to renew the note which the corporation had authorized them in July, 1915, to renew, found it necessary to themselves execute or renew their personal obligation to pay the indebtedness in order to carry out the instructions of the board of directors of July 12, 1915, to renew the note and the resolution of June, 1911, to secure the money upon such terms as it could be secured, and to renew the note given therefor, it must be obvious that the personal obligation so given must be deemed to have been given at the request of the corporation expressed by its duly authorized officers. There is nothing in the conduct of the board of directors or in the resolution passed on July 12, 1915, which in any wise restricted the power of the president and secretary as conferred upon them by the original resolution of June 6, 1911. The point relied upon by the appellants in these resolutions is that it was therein provided that the bank should be asked to make the renewal without the personal indorsement of the directors. The request was made and promptly denied. Notwithstanding this prompt denial, the president and secretary executed a note by which the time for payment was extended, as it was no doubt expected they would do. The resolution of June 6, 1911, was still in force and authorized Davies as president and Wagner as secretary to make such terms with the bank as might be necessary. Those terms included the securing of the Harris and Davies agreement to pay the bank. At the time the new agreements were executed the corporation paid $3,000, thus reducing the indebtedness of the corporation from $12,000 to $9,000.

On December 15, 1915, the corporation paid $1,000 upon said note and paid interest thereon. The corporation secured the full benefit of the transaction. It is true that the appellant Torrance refused to sign the note as an indorser and stated that he declined to pay anything or assume any obligation which the law did not impose upon him. He did, however, join in the resolution of the board of directors for the borrowing of the money from the bank and the execution of the note therefor and in the request that the bank make the new note without requiring the endorsement of the directors. The appellants contend that the obligation of Harris and Davies to the bank was made voluntarily and surreptitiously given and claim that the appellants knew nothing about it for some months thereafter. This is wholly immaterial. The officers of the corporation charged by it with the duty of making arrangements with the bank also made the arrangements with plaintiff and in doing so acted for the corporation. The appellant stockholders are as much bound by the acts of the officers and directors as if they had consented thereto, and are no worse off than they would have been if the corporation had borrowed the money in July, 1915, from some other bank and therewith discharged its overdue obligation to the First National Bank.

Judgment affirmed.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; SHURTLEFF, J.; LAWLOR, J.

188 Cal. 279

Ex parte SHACKLEFORD. (Cr. 2439.)

(Supreme Court of California. Feb. 24, 1922. Rehearing Denied March 13, 1922.)

1. Insane persons 🔑19—Jury trial of sanity question may be after 10 days mentioned in statute.

Trial by a jury of the question of sanity of a person ordered by a judge to be committed to the hospital as an insane person may be had after the 10 days within which, by provision of Pol. Code, § 2174, the jury are to be caused to be in attendance.

2. Insane persons 🔑18—Verdict of less than all jurors may be authorized on question of sanity.

The jury trial authorized by Pol. Code, § 2174, of the question of sanity of one ordered by a judge to be committed to the hospital as insane, not being the common-law jury trial, the Legislature may, as it there does, authorize a verdict by less than the whole number of the jury.

3. Habeas corpus 🔑3—Where petitioner withdrew request for jury trial on question of sanity, its absence no reason for release.

Where one ordered committed to the hospital as insane withdraw his request for jury trial under Pol. Code, § 2174, the absence of such trial or the claim that the authorization therein of a verdict by less than the whole jury is invalid, furnish no reason for release on habeas corpus.

4. Habeas corpus ⚷48—Writ issued for inquiry into sanity returnable to superior court of county of confinement.

While the question of sanity of one committed to the hospital as insane may be tried on habeas corpus, the writ will be issued returnable to the superior court of the county in which petitioner is confined.

5. Habeas corpus ⚷57—Writ issued though petition is not verified.

Writ to inquire into sanity of petitioner confined in the hospital as insane will be issued though petition is not verified as required by Pen. Code, § 1475, petitioner asserting that he was refused opportunity to verify it; but the court before which writ is made returnable will be ordered to allow petitioner before the hearing to make oath to the petition.

In Bank.

Petition by Thomas Wheatly Shackleford for writ of habeas corpus. Writ ordered for inquiry into sanity of petitioner.

Thomas W. Shackleford, in pro. per.

PER CURIAM. The petitioner, as grounds for release on habeas corpus, claims: (1) that he is not, and never has been, insane; (2) that the commitment is void because no jury trial was had within the 10 days allowed by the Code (Pol. Code, § 2174); (3) that section 2174 is void in this, that it allows a commitment to be issued upon a verdict by less than the whole number of 12 jurors.

[1, 2] With respect to the second and third grounds, the court has recently decided (In re Scott, 204 Pac. 568) that, under section 2174, a trial by jury may be had after the 10 days mentioned in the section. As to the third ground, we are of the opinion that the jury trial authorized by the section is not the common-law jury trial, and hence that the Legislature may authorize a verdict by less than the whole number of the jury.

[3] In another petition, also filed, the petitioner claims that this commitment is null because no jury trial was had after his demand therefor. Upon receiving that petition the court made an examination of the proceedings which led to the commitment in the superior court of the city and county of San Francisco, and found that the files there show that the petitioner had withdrawn his request for a jury trial. The court is therefore clearly of the opinion that no reason for release on habeas corpus on the second and third grounds exists.

[4] With respect to the first ground, the question of his sanity may be tried in this manner; but for this court to take up such matters would require too much of our time, and would be too great an inconvenience to the witnesses who might be required to attend the trial. In such a case it is proper to issue a writ returnable before the superior court of Santa Clara county, that being the county in which the petitioner is confined.

[5] It is further to be noted that the petition is unverified, and that the statute now provides that such petitions must be under oath. Pen. Code, § 1475. The petitioner asserts that he was ready to verify his petition, but that the medical authorities at the hospital where he is confined refused to allow him an opportunity to do so. We have deemed it best to issue the writ with the direction that the court to which he is taken for a hearing thereof shall, before proceeding therein, allow the petitioner to make oath to his petition before some authorized officer.

It is ordered that a writ of habeas corpus issue herein solely for the purpose of inquiring into the sanity of the petitioner, returnable before the superior court of Santa Clara county, on February 27, 1922, at 10 o'clock a. m., and that before proceeding with the hearing the judge of said court shall allow the petitioner an opportunity to make oath to the petition.

SHAW, C. J., SHURTLEFF, WASTE, and LAWLOR, JJ., and RICHARDS, Justice pro. tem., concur.

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188 Cal. 289

CORBETT v. STATE BOARD OF CONTROL et al. (S. F. 10004.)

(Supreme Court of California. Feb. 25, 1922.)

1. Statutes ⚷188—Words are to be given common and approved meaning.

Words and phrases in a statute are to be construed according to the approved usage of the language, and words of common use are to be taken in their ordinary and general sense, under Pol. Code, § 16.

2. Taxation ⚷446½—Practical construction and common usage allow hotel bills as traveling expenses to state board of equalization.

Under the uniform practice ever since the adoption in 1878 of the statute allowing members of the Supreme Court "their actual traveling expenses," and since the adoption of Pol. Code, § 3702, in 1887, the actual traveling expenses allowed by the latter section to the members of the state board of equalization, many of whom must reside away from Sacramento, where they are required to meet, under Const. art. 13, § 9, and Pol. Code, §§ 125, 352, 3692, includes necessary hotel expenses while the members of that board are in Sacramento attending its meetings.

In Bank.

Application for mandamus by John C. Corbett against the State Board of Control and the members thereof, to require respondents to approve claim of petitioner as a member of the State Board of Equalization for traveling expenses in attending meetings of said Board. Writ granted.

Milton T. U'Ren, of San Francisco, for plaintiff.

Ralph W. Smith, of Sacramento, for defendants.

SHAW, C. J. This is an application for a writ of mandate to the state board of control, and G. B. Daniels, C. E. Jarvis, and Edgerton Shore, as members thereof, directing said board to audit, approve, and allow the claim of the plaintiff for $220.75, allowed him by the state board of equalization for his traveling expenses in attending upon the sessions of the last-named board.

The matter was submitted upon a statement of facts agreed to by the parties. At the time the expenses in question were incurred the plaintiff was a member of the said board of equalization for the first equalization district. He was a resident of San Francisco and had his home there. Meetings of the state board of equalization were duly called to be held at Sacramento at various times during the fiscal year of 1920–21. He attended these meetings, and in doing so he incurred expenses in traveling to Sacramento from his home in San Francisco and in returning to his home, and also for room rent and meals at hotels in Sacramento while there in attendance upon said meetings. The sum in dispute is the amount expended for the said room rent and meals. It is admitted that the charges were not extravagant or exorbitant. His claim for the $220.75 thus expended was duly approved and allowed by the state board of equalization on June 30, 1921. On the same date it was duly presented to the state board of control, which board refused to allow, audit, or approve the same.

The state is divided into four equalization districts. The city and county of San Francisco constitutes the First district. The county of Sacramento lies in the Second district, and the other two districts embrace counties far distant from Sacramento. Pol. Code, § 125. The law requires that one member of said board shall be elected from each of such districts by the electors thereof for a term of four years. Const. art. 13, § 9; Pol. Code, § 352. The board is required by law to meet at Sacramento on the second Monday of each month, and at the August meeting it is required to remain in session until the third Monday of that month. Other meetings may be called by the chairman of the board at such time and place as he may direct, and when deemed necessary the board as a whole, or a member thereof, is authorized to visit the "several counties and cities for the purpose of inspecting property," or obtaining information. Pol. Code, § 3692, subds. 4, 5, 6, and 7. It is also provided that—

> "The members of the board and secretary are entitled to their actual traveling expenses, and for contingent clerical assistance, while traveling, incurred by them in the discharge of their duties." Pol. Code, § 3702.

The appropriation act of 1919 included $5,000 to cover these expenses for the ensuing two years. Stats. 1919, p. 1317. Enough of this fund remains to pay the plaintiff's claim.

The argument of the defendants appears to be that the phrase "actual traveling expenses" must be strictly construed in favor of the state, and that it does not embrace any expenses except such as are incurred for railroad or water transportation or other method of conveyance. It is suggested that the members of the board after they arrive at their destination and while remaining there to perform the duties of the session which they are attending, are not traveling but are remaining stationary.

[1, 2] If the meaning of the phrase "traveling expenses" prevents its application to anything except expenses paid for some kind of locomotion or conveyance, doubtless this interpretation might be sustained. But it is a familiar rule of statutory interpretation that words and phrases are construed according to the approved usage of the language, and that words of common use are to be taken in their ordinary and general sense. Gross v. Fowler, 21 Cal. 396; Pol. Code, § 16. Ever since the year 1878 the law has provided that the members of the Supreme Court shall be allowed their "actual traveling expenses" in going to and from their respective places of residence to attend the sessions of the court. It has been the universal practice for that period to allow the members and officers of that court, not only their railroad fare, but also their hotel bills during the time of their attendance on the sessions. The phrase quoted has always been understood to include these expenses. Section 3702 of the Political Code was enacted in its present form in 1887, and the same practice has prevailed ever since that time with relation to the traveling expenses of the members of the board of equalization. The Legislature has undoubtedly acquiesced in this interpretation, since the law has remained unchanged. It would seem that it is too late to claim the technical and literal construction now contended for. Furthermore, it is not in accordance with the common use of the phrase "traveling expenses." It is common knowledge that in commercial affairs agents are traveling over the country constantly under an arrangement with their principals that their traveling expenses are to be paid. Often they are required to remain in one place for considerable periods of time in the transaction of the business, but it is commonly understood that their hotel bills are a part of the traveling expenses, unless some provision of the contract shows a different meaning.

Let a writ of mandate issue as prayed for.

We concur: SHURTLEFF, J.; WILBUR, J.; LAWLOR, J.; SLOANE, J.

188 Cal. 234

ASHLEY et al. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA.
(S. F. 10151.)

(Supreme Court of California. Feb. 20, 1922.)

1. Waters and water courses 🔑257(1)—Making of rules and regulations governing rates discretionary with Railroad Commission.

The matter of making rules and regulations governing rates of a canal company for water is largely, if not entirely, discretionary with the Railroad Commission, and the courts cannot interfere with its refusal to make rules and regulations, in the absence of a showing of abuse of discretion.

2. Waters and water courses 🔑217—Railroad Commission has no jurisdiction to entertain proceedings to compel public utility to pay debts.

The Railroad Commission has no jurisdiction of a proceeding to compel a canal company, supplying water for irrigation, to pay debts owing for money borrowed to enable it to construct its canals or works.

In Bank.

Application by P. N. Ashley and others for supersedeas to review a decision of the Railroad Commission of the State of California dismissing complaint asking for certain relief. Writ denied.

John S. Partridge, K. C. Partridge and Mastick & Partridge, all of San Francisco, and Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for petitioners.

PER CURIAM. The petitioners, seven in number, have presented a petition to this court asking a review of a certain decision of the Railroad Commission made on July 30, 1921, dismissing a complaint made by said petitioners to the Railroad Commission asking for certain relief at its hands. The petition to this court does not, in itself, state any facts which show that the Railroad Commission has exceeded its jurisdiction. It contains nothing more than general statements that the decision of the Railroad Commission complained of violates the rights of the petitioners, and that it is unreasonable and discriminatory.

From the exhibits attached thereto it appears that the Sutter-Butte Canal Company is the owner of certain water rights and a system of ditches and canals, the nearest of which was about seven miles from the lands of the petitioners; that in the year 1918 the petitioners and the Canal Company entered into an agreement whereby the canal company agreed to construct a ditch leading from its canal to the lands of the petitioners, and to conduct water therein from its water system to said lands for the irrigation thereof, in consideration whereof the petitioners agreed to advance and loan to the canal company the money necessary for such construction, and thereafter to take water from the canal from year to year as desired at the rate of $7 per acre per year. The canal company agreed to repay to said petitioners, respectively, the amounts advanced, by applying thereto a certain proportion of its revenues in succeeding years until the amounts so advanced should be repaid without interest. The agreement further provided that if any differences arose between the parties the same should be referred to, and should be settled by the Railroad Commission, and that the contract was "to be subservient to any ruling of the Railroad Commission in the matter of rates or other matters" covered by the contract. Differences arose between the parties, complaint was made to the Railroad Commission, and thereupon the commission made an order establishing different rates than those fixed by the agreement. Thereupon other differences arose, and the petitioners filed with the commission the complaint in question asking that certain rules and regulations be made by the commission governing the rates of the canal company, and directing the canal company to repay to the petitioners and to each of them the sum of money advanced by them respectively for the construction of the aforesaid canal, together with interest thereon.

Upon this petition, after taking evidence, the commission made an order dismissing said complant, which order it is now claimed was in excess of its authority and discriminatory.

[1] With respect to the request for the making of rules and regulations, it seems sufficient to say that such matters are largely, if not entirely, discretionary with the commission, and no facts are set forth which show such abuse of discretion as to make its refusal an excess of jurisdiction.

[2] With respect to the part of the complaint asking for an order by the commission upon the canal company requiring it to repay to the petitioners the money advanced by them, we think the commission properly dismissed the application. It was in effect a complaint to recover money, and it necessarily assumed that the commission has jurisdiction to entertain actions to compel public utilities to pay debts owing by them for money borrowed to enable it to construct its canals or works. We are not advised that the commission has jurisdiction of that character. It is part of the jurisdiction of the superior courts of the state; our attention has not been called to any act of the Legislature which purports to give to the commission such jurisdiction, and we have not found any statute purporting to do so. Such jurisdiction is not included in any direct constitutional grant of power to the commission.

It is not pointed out wherein the order dismissing the complaint and refusing to give the relief asked thereby has produced or will produce any unlawful discrimination between the petitioners and other persons.

For these reasons we deny the application for the issuance of a writ of review.

SHAW, C. J., RICHARDS, Justice pro tem., and LAWLOR, WASTE, SHURTLEFF, and WILBUR, JJ., concur.

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188 Cal. 55

In re POTTER'S ESTATE.

POTTER v. CHAMBERS, Controller.

(S. F. 9452.)

(Supreme Court of California. Feb. 2, 1922.)

1. Appeal and error 🔑1071(1)—Insufficiency of stipulation to sustain finding of immaterial fact held harmless.

In proceedings to fix amount of inheritance tax under St. 1905, p. 341, § 1, a finding that decedent's gift to her son was "intended to take effect in possession and enjoyment after her death, and was made in contemplation of death" though erroneous except in so far as it found that gift was intended to take effect in enjoyment after death, because not sustained by the stipulation on which the finding was based, *held* harmless, since the property was taxable under the statute if the gift was intended to take effect in enjoyment after death, regardless of whether made in contemplation of death.

2. Taxation 🔑879(1)—Gift intended to take effect in enjoyment after donor's death taxable.

Gift intended to take effect in enjoyment after donor's death was subject to the inheritance tax imposed by St. 1905, p. 341, § 1.

3. Taxation 🔑856—Inheritance tax levied on transfer of title, or right to transfer and to receive title, and not on property itself.

The inheritance tax is levied on the transfer of title or on the exercise of the right to transfer the title, including the right of the transferee to receive it, and not on the property itself.

4. Taxation 🔑859(7)—Rate of tax under law in force when the title passed cannot be changed by Legislature.

Recipient of present transfer of title, made in contemplation of death, or to take effect in enjoyment at death, is bound only for the inheritance tax due under the law in force at the time the title passed; the Legislature having no power to raise the rate or increase the tax on such transfer by a subsequent act.

5. Taxation 🔑861—State could not increase amount of inheritance tax after transfer with intent that gift take effect in enjoyment at time of donor's death.

Where title was transferred at a time when Inheritance Tax Law of 1905, § 1, was in effect, to take effect in enjoyment at donor's death, the state did not, under such statute, become vested with an interest in the property entitling it to subsequently impose a succession tax greater than that imposed by such statute during donor's lifetime, but merely acquired a lien upon the property for the tax imposed by such statute, not payable until donor's death, under section 7.

6. States 🔑89—Taxation 🔑859(1)—Rate of inheritance tax cannot be reduced subsequent to date of vesting of right, since to do so would be a gift of state property, contrary to Constitution.

The right to inheritance tax vests in the state at the date of the taxable transfer, and the Legislature cannot, by subsequent acts, reduce the rate of taxation thereon, since to do so would be to make a gift of the property of the state to the extent of the reduction, contrary to Const. art. 4, § 31.

7. Taxation 🔑861—Inheritance tax and exemption governed by statute in force at time of taxable transfer, notwithstanding enactment of other statutes prior to donor's death.

Where transfer made in 1908 was subject to inheritance tax, because not intended to take effect in enjoyment until the donor's death, the tax payable and the exemption to be allowed on donor's death in 1916 were governed by St. 1905, p. 341, §§ 1, 4, and not by St. 1913, p. 1066, §§ 1, 5, 6, 7, 9, 14, as amended by St. 1915, pp. 418, 435.

8. Taxation 🔑886½—Inheritance tax under statute imposing rate on specified amount at certain per cent. of the clear value on property received computed on difference between such sum and the exemption.

Under Inheritance Tax Law 1915, § 5, fixing the rate on estates of $25,000 or less, given to a child of the decedent, at 1 per cent. of the clear value of the property received by the child, the rate where the value of the property received equals or exceeds the sum of $25,000 is to be computed only on the amount of the difference between the exemption and such sum.

9. Taxation 🔑856—Legislature had power to impose succession tax of 12 per cent. without exemption, and regardless of value.

The Legislature was empowered to impose a succession tax of 12 per cent. upon all inheritances or successions that might occur after the passage of the act, regardless of the value, and without any exemption; the rights of inheritance and of testamentary disposition not being inherent rights of the individual.

10. Taxation 🔑2—Authority to impose and collect taxes must be given by statute.

The authority to impose and collect taxes upon the person or upon the property of an individual for public purposes must be expressly given by statute.

11. Statutes 🔑245 — Tax laws construed strictly in favor of the individual as against the state.

Laws imposing taxes where ambiguous are to be strictly construed in favor of the individual as against the state, whether the property is to be taken by seizure or by suit.

12. Statutes 🔑263—Not construed to have retroactive effect unless intent is clear.

A statute is not to be construed so as to have a retroactive effect unless the intent that it is to be retroactive clearly appears from the statute itself. Code, § 3.

13. Constitutional law 🔑48—Unconstitutional construction avoided if possible.

The courts will never, if it can be avoided, impute to the Legislature an intent to enact a law that is contrary to the Constitution.

14. Taxation 🔑859(7)—Inheritance tax statute, imposing tax on transfer made prior to enactment of statute, would be unconstitutional.

Inheritance Tax Law 1913, § 2, subd. 3, imposing transfer tax where transfer is made without valuable and adequate consideration, in contemplation of death, or is intended to take possession in enjoyment after death or at death, when recipient "becomes beneficially entitled in possession of expectancy to any property, or the income therefrom, by any such transfer, whether made before or after the passage of this act," if construed to impose tax on transfer made prior to its enactment on death of donor, subsequent to enactment, would be unconstitutional.

15. Taxation 🔑861—Inheritance tax law not applicable to transfer made before enactment of statute.

Inheritance Tax Law 1913, § 2, subd. 3, imposing transfer tax where transfer is made without valuable and adequate consideration, in contemplation of death, or is intended to take effect in possession or enjoyment after death or at death, when recipient "becomes beneficially entitled in possession or expectancy to any property, or the income therefrom, by any such transfer, whether made before or after the passage of this act," does not impose tax on transfer made prior to enactment on donor's death subsequent thereto; the provision vesting the state with the right to the tax when the person to be charged "becomes beneficially entitled" to the property, having reference to the estates or interests created by instruments made before the passage of the act, but which do not become vested until after its passage, in view of Civ. Code, §§ 693–695.

16. Statutes 🔑226—Statute of other state or country adopted with construction given it by courts of such state or country.

Where a statute is adopted from another state or country, and such statute has previously been construed by the courts of such state or country, the statute is deemed to have been adopted with the construction so given it.

17. Taxation 🔑861—Inheritance tax act not applicable to transfer vested before its passage.

St. 1917, p. 880, § 2, subd. 9, providing that when "either before or after the passage of this act" more than one transfer has been made by a decedent to one person, the tax shall be imposed upon the aggregate value of all such transfers as if the property had passed by one transfer," *held* not retroactive as to transfers vested before enactment of statute.

18. Taxation 🔑886½ — Value of property transferred before enactment of Inheritance Tax Law of 1915 not added to value of devise to donee after enactment of statute for taxation thereunder.

Where gift was made in 1908, to take effect in enjoyment at time of donor's death, and donor died in 1916, leaving donee other property, the value of the previous gift will not be added to the value of the property devised and taxed according to the rate specified, and the exemption allowed by the Inheritance Tax Law of 1915, but such statute cannot be applied to transfers made before its enactment, and the two transfers are to be treated as separate taxable units, having no relation to each other.

19. Taxation 🔑861—Inheritance Tax Acts of 1911, 1913, 1915, held not to have adopted act of 1905.

Inheritance Tax Acts of 1911, 1913, and 1915 *held* not to have adopted the act of 1905, so as to make such statutes applicable to transfers made before their enactment, but subsequent to enactment of act of 1905, under Pol. Code, § 325.

Wilbur and Sloane, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse and Frank H. Dunne, Judges.

In the matter of the estate of Melissa Amelia Potter, deceased. Proceeding by John S. Chambers, as Controller of the State of California, to fix amount of inheritance tax. From the order made, Jesse S. L. Potter appeals. Reversed.

Chas. W. Kitts, Mountford S. Wilson and Charles H. Lovell, all of San Francisco, for appellant.

Garret W. McEnerney, of San Francisco, amicus curiæ.

Robert A. Waring, of Sacramento (H. C. Lucas, of San Francisco, and James L. Atteridge, of Sacramento, of counsel), for respondent.

SHAW, C. J. Jesse S. L. Potter, a son of the deceased, Melissa A. Potter, appeals from an order of the superior court fixing the amount due from him under the inheritance tax law, upon the property received by him under the will of the decedent, and upon certain property transferred to him by the decedent prior to her death. The case involves the question of the rates of computation of inheritance tax upon the valuations of the property given at the death of the decedent and that given prior to her death, respectively.

Melissa A. Potter died testate on November 30, 1916. By her will she gave to Jesse S. L. Potter, and he has received it, property of the value of $146,773.57. On October 22, 1908, she transferred to him certain other property, without any valuable consideration therefor, which at that date, and also at the time of her death, was of the value of $850,300. The parties stipulated in the lower court that, ever since said transfer, said Jesse S. L. Potter has been the owner and in possession of said property; that he had, up to the time of her death, collected and delivered to her all the income therefrom, and that the property was liable to taxation under the Inheritance Tax Law of 1905 (section 1, Stats. 1905, p. 341).

The cause was submitted upon this stipulation, and thereupon the court below found or concluded that the gift was "intended to take effect in possession and enjoyment after her death and was made in contemplation of death," within the meaning of the Inheritance Tax Law.

[1, 2] This finding or conclusion is not sustained by the stipulation on which it was based, except so far as it declares that the gift was intended to take effect in "enjoyment" after death. The stipulation states that he immediately took, and ever afterwards held, the possession; it says nothing whatever that raises the inference that it was made "in contemplation of death," and it implies that possession was to be taken at once by the donee. Carpentier v. Small, 35 Cal. 346. However, the fact that it was intended to take effect in "enjoyment" after her death is sufficient to make it taxable under the law of 1905, then in force, so the error is not important on the subject of its liability to taxation at the time it was made.

[3, 4] The transfer of October, 1908, immediately passed to Jesse S. L. Potter the title to the property as of that date. It is settled law that the tax is levied on the transfer of title, or on the exercise of the right to transfer the title, including, of course, the right of the transferee to receive it, and not on the property itself, and that, while the provisions imposing the tax on prior transfers in contemplation of death, or with intent that they take effect in enjoyment at death, are but safeguards against attempts to evade the tax, the recipient of a present transfer of that character is bound only for the inheritance tax due upon it under the law in force at the time the title passes, and the Legislature has no power to raise the rate or increase the tax on such transfer by a subsequent act. Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961; Estate of Felton, 176 Cal. 663, 169 Pac. 392; Estate of Gurnsey, 177 Cal. 214, 170 Pac. 402; Nickel v. State, 179 Cal. 128, 175 Pac. 641; Estate of Brix, 181 Cal. 671, 672, 186 Pac. 135; Estate of Murphy, 182 Cal. 746, 190 Pac. 46; Estate of Miller, 195 Pac. 417; Chambers v. Gibb, 198 Pac. 1032; Chambers v. Lamb, 199 Pac. 34.

[5] Counsel for the respondent make an elaborate argument, the purpose of which seems to be to induce this court to overrule these decisions, or in some way to qualify the rule just stated, or to convince the court that the Legislature has done so. We are of the opinion that the decisions are sound, and should be adhered to, and that the Legislature cannot change a rule established by constitutional provisions. We see no force in the argument that the present case can be differentiated from Hunt v. Wicht, supra, on the ground that the transfer involved in that case was made prior to the enactment of the act of 1905, while the transfer here involved was made subsequent thereto, and that, since that act imposed a tax on that transfer, it is competent for the Legislature to increase the rate by a subsequent law. This theory is based on the proposition that, under the act of 1905, there became vested in the state an interest in the property transferred to the extent necessary to enable it to afterward impose thereon a succession tax greater than was imposed by that act. This would be doubtful, at best, in any event, but it is based on the untenable premise that the act of 1905 creates in the state, during the life of the donor, an interest in property given inter vivos in contemplation of death, or with the intent that it shall take possession or enjoyment after death. The act has no such effect; it merely gives the state a lien upon the property, not for any tax afterwards imposed by subsequent acts, but for the tax imposed by that act.

[6] It is also settled that the right to such tax vests in the state at the date of the taxable transfer, and that the Legislature cannot, by subsequent acts, reduce the rate of taxation thereon, since to do so would be to make a gift of the property of the state to the extent of the reduction, contrary to section 31, art. 4, of the Constitution. Estate of Stanford, 126 Cal. 118, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788; Trippet v. State, 149 Cal. 521, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210; Estate of Woodard, 153 Cal. 39, 94 Pac. 242; Estate of Martin, 153 Cal. 227, 94 Pac. 1053; Estate of Kennedy, 157 Cal. 527, 108 Pac. 280, 29 L. R. A. (N. S.) 428; Estate of Rossi, 169 Cal. 149, 146 Pac. 430. These were all cases where the title to the property vested in the successor, and the right to tax vested in the state at the death of the ancestor; but on this point no distinction can be made between such cases and those where the rights to the property and to the tax, respectively, vest on the passing of the title by gift in the lifetime of the ancestor. The fact that the collection of the tax is postponed, in the latter class of cases, until the death of the ancestor cannot affect the question of the vested right of the state thereto.

The result of these two propositions is that the right of the state to the tax on the property given to Jesse S. L. Potter in 1908, and the liability of Potter for such tax, were alike irrevocably fixed as of that date, subject to the condition stated in the act of 1905, § 7; that is to say, it was not to become payable until the death of the donor, but that, under section 1 of that act, the tax became a lien on the property at the time the gift was made, and so remained until the tax was paid. The act declared that, if the person chargeable with the tax was an adult child of the decedent, a part of the property transferred "of the clear value" of $4,000 should be exempt from the tax imposed by the act. Section 4. Potter, an adult son, was entitled to this exemption. His liability, as fixed at the time of the transfer, was a liability to pay a tax measured by the value of the property given to him, less the $4,000 declared to be exempt, the tax on the remainder to be computed at the rates fixed by the act of 1905. These were the rights and liabilities vested and fixed by the law in force in 1908, and the Legislature could not, by subsequent enactment, change them or either of them.

[7] The Legislature afterwards amended the law on the subject of inheritance taxes. A complete revision was enacted in 1911. Stats. 1911, p. 713. This act repealed all prior acts, but provided that rights of the state, and pending proceedings under such prior acts, should not be affected thereby. Another complete revision was enacted in 1913. Stats. 1913, p. 1066. This act also repealed prior acts, including that of 1911 and amendments thereto, and reserved the rights of the state under any prior act. Sections 1, 5, 6, 7, 9 and 14 of this act were amended in 1915 (Stats. 1915, pp. 418, 435), and an inheritance tax department, to be maintained and directed by the controller, was established (Stats. 1915, p. 430). It was the law as thus amended that was in force in 1916, at the date of the death of Melissa A. Potter.

The taxes on the gift of 1908 at the value fixed by the court below, if computed upon the rates and exemption fixed by the act of 1905, amounted to $22,094. The act of 1915 gave an adult son an exemption of $10,000. The court below was of the opinion that this exemption was applicable to the gift of 1908, and deducted that sum therefrom. This reduced the tax on that gift to $22,034, a decrease of $60 from the correct amount. In this respect the court erred against the respondent.

In computing the tax on the value of the property received by Potter from his mother at her death in 1916, $146,773.57, the court below allowed no deduction for exemption, being of the opinion that the exemption of $10,000 allowed under the amendment of 1915 was the total exemption allowed, both on the gift of 1908 and the subsequent legacy. It was of the opinion, moreover, that, for the purposes of ascertaining the rate of taxation on the legacy, its value should be added to the value of the previous gift, and that the rate on the legacy should be ascertained upon the theory that it was included in the portion of the combined total in excess of $500,000, the rate upon which portion, by the amendment of 1915, was fixed at 12 per cent. Upon this theory it fixed the tax on that legacy at $17,612.83.

The appellant contends that this theory is erroneous; that the $10,000 exemption of 1915 is to be deducted from the value of the legacy, and that the rates of 1915 are to be computed on the balance in the same manner as if there had been no gift received in 1908, since the entire estate which vested in the son in 1916 was the $146,773.57 included in said legacy. By the rate of 1915 the tax thereon, so computed, would be $5,924.15.

The controller contends that the $850,300 given in 1908 is to be added to the $146,773.57 received in 1916, making a total sum of $997,073.57, and that the rate on the final $497,073.57 thereof is the rate chargeable on the $146,773.57 composing the legacy. These conflicting theories present the main question for decision.

[8] Section 5 of the act, as amended by the law of 1915, fixes the rate on estates of $25,000 or less, given to a child of the decedent, at 1 per centum of the clear value of the property such child receives. The language is the same as that of the act of 1905, and, under the rule stated in Estate of Timken, supra, 158 Cal. 51, 109 Pac. 608, that rate is to be computed only on the amount of the difference between the exemption and the sum of $25,000 where the value of the property received equals or exceeds the latter sum. Section 6 of the act, as amended by the law of 1915, fixes the rates on the excess over $25,000 of the property received by the particular person as follows: (a) On all over $25,000 up to $50,000, 2 per cent.; (b) over $50,000 up to $100,000, 4 per cent.; (c) over $100,000 up to $200,000, 7 per cent.; (d) over $200,000 up to $500,000, 10 per cent.; (e) over $500,000 up to $1,000,000, 12 per cent. It will be observed that, under the theory of the controller, the $146,773.57 is to be considered as the last part of the combined sum of the gift of 1908 and legacy of 1916, and the two are to be taxed together as a single transfer, or as two transfers made at the same time, in which case it would come within the excess over $500,000 and under $1,000,000.

[9] It must be conceded at the outset of the inquiry that the Legislature had power, by the act of 1915, to impose a succession tax of 12 per cent. upon all inheritances or successions that might occur after its passage, regardless of the value, and without any exemption. The so-called right of inheritance, and also the right of testamentary disposition, are not inherent rights of the

individual, nor are they safeguarded or secured in futuro by any provision of our Constitution. They are both subject to legislative control, and are creatures of legislative will. Consequently the Legislature has the power to take away both rights, and to make the state the successor to all property upon the death of the owner. The right and power to impose a succession tax rests on this principle.

It must be remembered, however, that the Legislature has not, by the inheritance tax law, attempted to impose a tax on any ordinary disposition of property inter vivos. The sole reason for mentioning dispositions inter vivos made without adequate consideration is to prevent the evasion of the tax imposed on inheritances, bequests, and devises by such dispositions. In contemplation of that law, the gifts inter vivos therein mentioned are all presumed to have been made with the intent to evade the tax imposed on transfers taking effect by succession at death.

The question for consideration, therefor, is whether or not the law in force in 1916, when Mrs. Potter died, does expressly, or by reasonable construction or implication, provide that, in computing the tax on the $146,773.57, received by appellant at her death, the $850,300 given to him in 1908 shall be added to the $146,773.57, for the purpose of subjecting the $146,773.57 to the rate of taxation imposed on that part of a succession which exceeds $500,000 in value, so that it shall all be taxed at 12 per cent. instead of being subjected to a tax computed at the graduated rates set forth for property not exceeding $200,000 in value.

[10, 11] It is proper to first state the established rules of statutory construction applicable to the case. It is said that authority to impose and collect taxes upon the person or upon the property of an individual for public purpose—

> "must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state. Whether his property is to be taken by seizure or by suit, the rule is the same. In the one case the officer must show his warrant for the seizure, and in the other the plaintiff must establish every fact essential to the maintenance to his right of recovery." Merced Co. v. Helm, 102 Cal. 165, 36 Pac. 399; approved in Hellman v. Los Angeles, 147 Cal. 657, 82 Pac. 313, and Connelly v. San Francisco, 164 Cal. 106, 127 Pac. 834.
>
> "All tax laws are construed rigidly, and must be closely followed, in order to divest or vest title." Bensley v. Mountain, etc., Co., 13 Cal. 316, 73 Am. Dec. 575.
>
> "Laws imposing taxes are strictly construed, and doubts are resolved in favor of the taxpayer. * * * Duties are never imposed upon a citizen upon vague or doubtful interpretations." Lewis' Suth. on Stat. Const. § 537, formerly Section 363.

The notes show that the courts of Michigan, Connecticut, and Idaho have made statements not entirely consistent with the rule of the text, but that it is uniformly followed in other jurisdictions. Mr. Cooley states the doctrine thus:

> "Strict construction is the general rule in the case of statutes which may divest one of his freehold by proceedings not in the ordinary sense judicial, and to which he is only an enforced party. It is thought to be only reasonable to intend that the Legislature in making provisions for such proceedings would take unusual care to make use of terms which would plainly express its meaning, in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such cases seems reasonable, because presumptively the Legislature has given in plain terms all the power it has intended to be exercised." 1 Cooley on Taxation, p. 453.

This rule is, of course, to be applied only where some ambiguity exists or doubt arises from the language used as to the meaning intended.

> "Beyond the words employed, if the meaning is plain and intelligible, neither officer or court is to go in search of the legislative intent." Id. 450.

[12] It is also an established rule that a statute is not to be construed so as to have a retroactive effect unless the intent that it is to be retroactive clearly appears from the statute itself. The rule is expressly declared in section 3 of each of our Codes.

> "The statute should not be given a retrospective effect unless the language demands such a construction." Chambers v. Gibb, 198 Pac. 1032.

All the decisions are to the same effect. 8 Kerr's Dig. p. 8496, tit. "Statutes," § 101.

[13] Another rule of interpretation that is important to this case is that the courts will never, if it can be avoided, impute to the Legislature an intent to enact a law that is contrary to the Constitution:

> "If a particular construction has the effect to declare the act or any part of it unconstitutional, such construction must be avoided, when it can be fairly done, for the legal presumption is that the Legislature could not have so intended. * * * If the language upon its face is ambiguous and susceptible of different constructions, it may be forced, so to speak, to the extent of adopting the less obvious construction, in order to uphold the law." French v. Teschemaker, 24 Cal. on page 554.

See, also, Bates v. Gregory, 89 Cal. 394, 26 Pac. 891; People v. Frisbie, 26 Cal. 139; Bacon v. Bacon, 150 Cal. 486, 89 Pac. 317; and Chesebrough v. San Francisco, 153 Cal. 568, 96 Pac. 288.

The respondent relies on section 2 of the act. The parts of this section material to the case are as follows:

> "A tax shall be and is hereby imposed upon the transfer of any property * * * to persons, institutions or corporations, * * * in the following cases: [1. When the transfer is by will, descent or succession from a resident of the state; 2. When the succession comes from a non-resident, but is of property within the state.] 3. When the transfer is of property * * * within this state, by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death. When such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, *whether made before or after the passage of this act.*"

It is claimed that the italicized clause of the last sentence shows the legislative intent to impose a tax on previous transfers, so far as lawfully possible, and that it supports the contention that, in computing the tax on the value of the transfer of 1916, the value of the transfer of 1908 is to be added to it, and the rates of the 1915 act extended on the whole sum to find the tax on the transfer of 1916 so as to treat it as a transfer exceeding $500,000 in value. It may be remarked that the insertion of a period instead of a comma, preceding the word "when," and so dividing subdivision 3 into two distinct sentences, as above shown, is obviously a typographical or clerical mistake, and that it should be read as if the comma were inserted. This does not change the effect, but it makes the meaning clearer.

[14, 15] We have seen that the Legislature had no power to add to or take from the tax upon the gift of 1908 after it was made. If taken literally and apart from its immediate context, the clause above italicized would express the intent to do so, but the result would be that, under the rule established by Hunt v. Wicht and the other cases first above cited, the act would be to that extent unconstitutional and void. Such a result, as we have seen, is to be avoided when it can be fairly done. We must therefore look to the context to ascertain if a meaning is apparent that would produce a result that does not make the subdivision retroactive in effect, and brings it within the scope of the legislative power. The first part of this final sentence or clause, in connection with the opening part of the subdivision, states that such transfer tax is to be imposed "when such person, institution or corporation *becomes* beneficially entitled in possession or expectancy to any property." In a very common acceptation of its meaning the word "becomes" betokens futurity; something that is yet to happen. The right of the state to the tax is not to vest until the person to be charged therewith "becomes beneficially *entitled*" to the property. This evidently refers to some time after the passage of the act, and in view of the fact that it would be void if it referred to a past vesting of title, it must be presumed that it was intended to refer to a future vesting of title in possession or expectancy. This would make it inconsistent with the literal meaning of the last clause unless we find that there may be a vesting of title, a becoming *entitled*, after the passage of the act, which vesting arises from a "deed, grant, bargain, sale, assignment or gift" executed before the passage of the act whereby the words may have literal effect upon transfers vesting in future. It is obvious that the phrase "such transfer" in the last clause refers back to these methods of transfer, and that the clause is to be understood as if it read:

> "By any such deed, grant, bargain, sale, assignment or gift, whether made before or after the passage of this act."
>
> "A future interest is either: 1. Vested; or, 2. Contingent." Civ. Code, § 693.
>
> "A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest." Civ. Code, § 694.
>
> "A future interest in contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain." Civ. Code, § 695.

It is competent for the Legislature to impose a tax upon any transfer of this character, where the property passing by transfer does not become vested under it until after the act imposing the tax is enacted. Transfers are often made under these sections by some instrument in writing, whereby contingent interests are created to pass in the future and which do not become vested until years after the execution of the instrument. Transfers of this character were considered in Estate of Rogers, 94 Cal. 530, 29 Pac. 962; Estate of Winter, 114 Cal. 186, 45 Pac. 1063; Estate of Blake, 157 Cal. 460, 108 Pac. 287; Estate of Carothers, 161 Cal. 588, 119 Pac. 926; Taylor v. McCowen, 154 Cal. 804, 99 Pac. 351; Hall v. Wright, 17 Cal. App. 504, 120 Pac. 429; and Estate of Washburn, 11 Cal. App. 740, 106 Pac. 415. Bearing in mind the aforesaid constitutional limitations upon legislative power, we may easily see that the phrase "becomes beneficially entitled in possession or expectancy" was intended to include, among others, estates or interests of this character where the instrument creating them was made before the passage of the act, and the contingent title thereby provided for should not become vested until after its passage. With this possibility in mind, we see at once the occasion and purpose of the insertion of the clause "whether made before or after the passage of this act." It was intended to make it clearly include instruments of transfer of this character. Thus all the words of the section may have a clear practical effect in full harmony with the Constitution. This we think must be held to be its true meaning. The result is that it is not retroactive in effect, that it was not so intended, and that this section does not, by implication or otherwise, refer to or affect the gift which vested in 1908, or authorize the value thereof to be added to the value of the legacy of 1916 for the purpose of boosting the latter into a higher tax rating value.

[16] Another consideration confirms this conclusion.

> "Where a statute is adopted from another state or country and such statute has previously been construed by the courts of such state or country, the statute is deemed, as a general rule, to have been adopted with the construction so given it." Lewis' Suth. on Stats. § 401; Silva v. Campbell, 84 Cal. 420–424, 24 Pac. 316.

Section 2 of the law was first enacted in this state in 1911. Stats. 1911, p. 713, § 1. Subsequent acts have re-enacted it without change, except as to the number. The language is taken from section 1 of the New York Taxable Transfer Act of 1892 (Laws 1892, c. 399), of which it is substantially a literal copy. The Court of Appeals of that state, in Matter of Curtis, 142 N. Y. 219, 36 N. E. 887, decided in 1894, considered a case where an estate in remainder had been left to one Racey upon condition that he should survive his aunt or should die leaving issue, failing which it passed to persons exempted from the tax. He died without issue, and therefore never became vested of any estate in the property. He left other property, and an attempt was made to hold his estate liable for the inheritance tax upon the value of the remainder so left to him. It was held that this could not be done, the court saying that he took no beneficial estate, that his estate could take nothing, and that to compel payment of the tax by the estate was a thing too unjust to be tolerated. This case came under a previous tax law of that state, that of 1885 (Laws 1885, c. 483). A year later the court considered a case where a tax was claimed under the act of 1892, upon an estate in remainder which had become vested in interest in 1876, before there was any inheritance tax law, but which did not vest in possession or enjoyment until 1894. The court held that the words of the act of 1892 from which our section 2 aforesaid is copied could not lawfully be given a retroactive effect, so as to apply to an estate which vested prior to its passage, that they "have their full and natural force when applied to * * * grants and gifts causa mortis," made prior to the act, but not passing a vested title until afterward, and that the remainder vested in 1876 was not taxable under the act. Matter of Seaman, 147 N. Y. 69, 41 N. E. 401. As was said in Silva v. Campbell, supra, referring to a part of section 1161, Code of Civil Procedure, which had been taken literally from the statutes of New York:

> "We presume that subdivision 1, supra, was enacted in this state with an understanding of the construction which had been placed upon it in the state from which it was taken."

The same presumption applies here. The act must be understood to have the same meaning that at the time of its passage here had already been given to its language by the courts of New York.

Other parts of the act of 1911, re-enacted in 1913, and again in 1915, show that the Legislature understood that this interpretation of this language in subdivision 3, aforesaid, had been made in New York, and that provision was made for the application thereof. Section 9 of the act provides that, when the transfer to be taxed consists of an estate in expectancy "the entire property or fund by which such estate" is supported shall be appraised immediately after the death of the decedent and the market value thereof determined; that the person chargeable with the tax may elect not to pay it until he shall come into actual possession or enjoyment of such property, in which case he must give bond to secure such payment, and renew the same every five years thereafter until he comes into such possession and enjoyment. Subdivision "a."

Subdivision "d" reads as follows:

> "Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited."

It is plain from this provision, in connection with those of subdivision "a," aforesaid, that subdivision "d" was intended to provide for the taxation of estates in expectancy which had been created by instruments of conveyance, executed before the death of the decedent, but which did not become vested in the donee or grantee or person beneficially interested until some time subsequent to such death, as suggested in Matter of Seaman, supra. Thus the reference in section 2 to gifts made either "before or after the passage of this act" are shown to be effective upon the estates mentioned in subdivision "d," aforesaid, and to have been intended to refer thereto. No occasion, therefore, arises for giving the act a retrospective effect.

It is also to be noted that the statute that was in force in 1916 contains nothing expressly declaring that, in computing the tax due upon a transfer by gift which had completely vested before the death of the donor, the value of that property is to be added to the value of property received by descent, devise, or bequest at the death of the donor, and the sum of the two taxed at the same rate as if they had constituted a single transfer. Provision is made for the appraisement of the property of the decedent immediately after the death of the decedent for the taxation of all ordinary transfers of present vested interests taxable under the act. Sections 16 and 17. In Chambers v. Lamb, 199 Pac. 33, where there was a gift inter vivos which passed a present title at its execution, and taxable under the act of 1905, we held that the property must be appraised at its value as of the time the title vested, and not at the value as of the time of the death of the deceased donor. The subsequent act could not change or affect this rule so as to require the value to be fixed as of the time of the death, for, if it purported to do so, and could have that effect, it would either add to or take from the vested right of the state to the tax, according to whether the value had increased or diminished in the meantime, and correspondingly diminish or increase the liability of the donee therefor, neither of which can be done under the authorities already cited on that point. It is obvious, in view of the rules of statutory construction hereinbefore stated, that the above provisions cannot be taken to require the value of the gift of 1908 to be fixed according to its value in 1916. Likewise it is clear that the language does not indicate an intent to declare that, for the purpose of taxing the property received at the death of Mrs. Potter in 1916, it shall be raised into the class above $500,000 in value in order to tax it at 12 per cent. on the whole thereof.

[17] The only statute which purports to authorize such a combination of values for computing the tax is the act of 1917 (Stats. 1917, p. 880). Section 2 of that act declares that when, "either before or after the passage of this act," more than one transfer has been made by a decedent to one person, the tax shall be imposed upon the aggregate market value of all such transfers as if the property had passed by one transfer. Subdivision 9. This act cannot be given a retroactive effect upon transfers vested in 1916, so as to increase the tax thereon. Any attempt to do so would, of course, be void.

The method of computation contended for by counsel for the controller would, in many cases, result in a discrimination between persons similarly situated in point of law. For illustration, assume that in the present case Mrs. Potter had died possessed of an estate worth $300,000 which had descended in equal shares to two sons, the appellant and a brother, the latter having received no gift from the mother in her lifetime. By the rates in force at her death the brother would be taxed in the sum of $6,150 for his moiety. But the appellant, having received a gift in 1908 of the value of $800,000, which could only be taxed at the rates fixed in 1905, which tax he had paid, would be compelled to pay a tax of 12 per cent. on his half of the estate, amounting to $18,000, on a transfer of the same value as that upon which his brother had paid only $6,150. This would seem to put the Legislature in the position of attempting to do indirectly what it could not do directly; that is, to increase the burden of his tax on his share of the estate and discriminate between him and his brother in that respect, solely upon the ground that he had received a prior gift taxed at a lower rate, which the state was unable to increase by the subsequent statute. A construction imputing to the state a design so indicative of resentment or regret should not be adopted. Such meaning, if intended by the Legislature, should be clearly expressed in the statute.

Another reason for rejecting the method of combining the two values in computing the tax arises from the complications that would ensue concerning the exemption allowed. The act of 1905, which alone can be applied to the gift of 1908, allowed an exemption of $4,000 to an adult child. This, as we have seen, could not have been increased or diminished by a statute enacted after 1908. The acts of 1913–1915, in force when the legacy was received, allow an exemption of $10,000 to an adult child. If the legacy is to be considered as a distinct taxable unit, to be entirely separated from the gift of 1908 in ascertaining the rate and computing the tax, the exempt $10,000 of the value would be taken from the first $25,000 thereof, taxable at 1 per cent., and would result in a deduction of only $100 from the tax otherwise chargeable. The tax thereon, in that case, would amount to $5,924.15. But if, for computation of the tax on the legacy, the gift and legacy are to be combined, the total would be $997,073.57; and if the legacy, by any permissible construction, is to be considered as composing what may be styled the "upper crust" of the total, it would be taxed at 12 per cent. Various theories have been suggested as to the method of disposing of the exemption in such a case. One theory is that the $10,000 exemption of 1915 cannot be allowed to apply in full, but that it must be reduced by deducting the $4,000 exemption allowed by the act of 1905, which this theory concedes is applicable only to the gift of 1908, so that the exemption on the legacy is only $6,000 instead of $10,000, as the 1915 act prescribes. Such a construction would convict the Legislature of again attempting to discriminate where it could not change, and again endeavoring to increase the tax on the legacy of 1916 for the sole reason that it could not raise the tax on the prior gift. It would also be a work of judicial legislation, for the statute contains no language indicating that any diminution of the $10,000 exemption is to be made under any circumstances, and nothing purporting to authorize an inference of a design to produce a result so novel and remarkable. This plan is wholly without statutory warrant, and, since it would add to the burden of tax, it must be rejected under the authorities heretofore cited.

Another theory is that the 12 per cent. is first to be computed on the entire value of the legacy, $146,773.57, without deduction, producing the sum of $17,612.83; that the deduction from the tax on account of the exempt $10,000 is then to be found by computing the lowest rate, 1 per cent., on that sum, amounting to $100, and that the balance, $17,512.83, is the lawful tax on the legacy. The act (section 7), declares that "property of the clear value" of $10,000 going to an adult child shall be exempt "from the tax." It is the property of that value that is exempt. To that extent there is no tax on the transfer. There is no provision that 1 per cent. of that sum shall be deducted from the tax computed at 12 per cent. on the value of the whole. It is plain that the above theory, if applied, would impose a tax of 11 per cent., or $1,100, on the exempt property itself. It must be conceded that this theory is untenable.

The only remaining method of disposing of the exemption, under respondent's theory of the other provisions of the act, is that usually followed where the title to all the property is received at death by the person to be taxed. The $10,000 or whatever the exemption may be in the particular case, is first deducted from the property value as being a nontaxable part thereof, and the rates, according to the graduated scale in force at the death, are then computed on the balance. If, still following respondent's theory as to the rate, the 12 per cent. rate is applied, the result would be this: Value remaining for taxation, $136,773.57; tax thereon at 12 per cent., $16,412.83, or $1,200 less than the court below found to be chargeable on the legacy. In that case the order appealed from would be to that extent erroneous.

[18] Upon a consideration of all that has been said in the preceding portion of this opinion, the only reasonable, practical, and lawful solution of the main question is to hold that, in a case where a gift from a parent to a child, made in 1908 vests the title to and possession of the property at that date, but is made with the intent that it should not take effect in possession or enjoyment until after the death of the parent, so that neither the tax rate thereon nor the amount thereof exempt from such tax can be afterwards changed by the Legislature, and thereafter, and before the death of the parent, the law in force at the date of such gift is amended by changing both the tax rate and the amount exempted from the tax, and upon the death of such parent such child succeed to other property, the value of the parcel of property transferred by the gift and the value of the parcel transferred at death cannot be combined for the purpose of ascertaining the rate chargeable upon the property left to the child at the death, but that the rate thereon is to be calculated and the exemption therefrom allowed solely upon the value of the property vesting in the child at the death of the parent, without adding the value of the previous gift. In such cases the two transfers are to be treated as separate taxable units having no relation to each other.

[19] Against this conclusion the respondent invokes the rule that, if a part of a statute is amended, such part is not to be considered as repealed and re-enacted, "but the portions which are not altered are to be considered as having been the law from the time they were enacted." Pol. Code, § 325. This rule, under some circumstances, has been extended so as to apply to a case where the new statute expressly repeals the whole of the former statute. Estate of Martin, 153 Cal. 228.[1] In the Martin Case the Inheritance Tax Act of 1905 had expressly repealed the act of 1893 (St. 1893, p. 193) on that subject. In the latter act, however, there were two sections, one of which was a literal copy of a section of the prior act, and the other was the same as another section of the prior act, save a few words of trifling importance. These sections provided the mode of collecting the tax, and were strictly remedial in character. It was held that the mode they prescribed could be adopted in collecting a tax after the act of 1905 which had accrued to the state under the act of 1893. The respondent points out that, where the person who had received from a decedent a gift inter vivos, taxable under the act, also succeeds to a part of the estate of such decedent at death, the act of 1905 provided for an appraisement after such death of all taxable interests of such person, and he claims that it also provided that the computation of the graduated tax rates prescribed in that act should be made upon the combined value of the two transfers. This, however, is not expressly declared anywhere in the act. He asserts that this provision was, in substance, re-enacted by the revised law of 1911, the revision of 1913, and the amendment of 1915 thereto. The act of 1905 required the court to appoint an appraiser to ascertain and report the "value of any inheritance, devise, bequest, or other interest subject to the payment of said tax" where the value was uncertain, and upon the report of the appraiser to "forthwith assess and fix the market value of all inheritances, devises, bequests, or other interests, and the tax to which the same is liable." Section 14. The

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[1] 94 Pac. 1053.

act of 1913 required the court to appoint an appraiser "to ascertain and report to said superior court the amount of inheritance tax due on any property passing in any probate proceeding or a lien thereon, or upon any other property transferred," within the meaning of subdivision 3 of section 2 of the act, to any person taking property under the probate proceedings. The appraiser was to report the "value of the several interests in the estate of the decedent," and the "amount of inheritance or transfer tax chargeable against, or a lien upon such interests, acquired by virtue of said probate proceedings or by any transfer within the meaning of this act to any person" acquiring property by virtue of said probate proceedings. Thereupon notice was to be given of the hearing upon the report, and the court at the hearing was to determine the amount of the tax. Section 16, Stats. 1913, p. 1077.

A comparison of the respective sections of the acts of 1905 and 1913 on this subject shows that, while each act provides for an appraisement of all property subject to tax, including that passing by a prior gift as well as that passing at death, and perhaps the imposition of the tax on the whole thereof passing to the same person at the tax rates fixed by the respective acts, the language in which these provisions are expressed is not, by any means, the same in the two cases. The sections on the subject have been entirely recast; the 1913 section contains many things not included in that of 1905, and the provisions here in question are not couched in the same or similar language. It cannot be truly said that any part of the act of 1905 on this subject has not been altered, at least with respect to words, in the revision of 1913. The rule stated in the Political Code and in Estate of Martin, supra, applies in all proper cases, but, like all other rules of statutory construction, they are subject to the controlling principle that the object and purpose of all interpretation is to arrive at the intent of the Legislature. Applying this principle to the present case, we think it cannot be reasonably believed that the Legislature intended that the provisions of the act of 1913 should be considered as re-enacting those of 1905 in this particular, with regard to the present case, where the result of such assumed re-enactment would be that the $497,073.57, the value in excess of $500,000, would be divided into two parts, one of which, $350,300, would be taxed at the rate of 3 per cent., as provided in the act of 1905, and the other part, $146,773.57, would be taxed at the rate of 12 per cent. fixed by the act of 1915 upon the excess over $500,000. Certainly no such remarkable process of computation as this, in such cases, is expressed or directed in either of the acts. Furthermore, it could not reasonably be applied where the later act provides a higher exemption than the prior act, and the Constitution forbids any increase or decrease of the exemption on the prior gift, so that it is necessary, as we have seen, to allow the full exemptions on each portion of the combined properties vested. For these reasons we are of the opinion that the rule sought to be invoked cannot be applied to the present case.

The order appealed from is reversed.

We concur: LENNON, J.; SHURTLEFF, J.; LAWLOR, J.

WILBUR, J. I dissent. Melissa A. Potter died testate on November 30, 1916. On October 22, 1908, she made a gift to her son of property valued at $850,300. He took immediate possession of such estate, but thereafter, during his mother's life, paid to her the whole income therefrom. The trial court found as a fact that from and after said transfer the son had been the owner of and in the possession of the property conveyed to him by his mother; that the transfers to said son "were intended to take effect in possession and enjoyment after death, and were made in contemplation of death, within the meaning of the Inheritance Tax Law of the state of California"; "that said transfer was made without valuable and adequate consideration or valuable or adequate consideration, and was a gift from Melissa Amelia Potter to her said son." These findings are not attacked because of the insufficiency of the evidence to sustain them, either by specification of insufficiency in the bill of exceptions or in the briefs of counsel, and hence must be taken as true. 2 Cal. Jur. § 407, p. 708, and cases cited. Notwithstanding that the findings are based upon a stipulation, the legal conclusion from these findings would seem to be that the mother, in contemplation of death, conveyed the legal title to her son without consideration as a gift, reserving a beneficial life estate to herself, with a remainder in the beneficial estate to the son, and that his ownership and possession during her life was in subordination to her equitable life estate; otherwise it could not be said that the transfer was intended "to take effect in possession and enjoyment after her death." The significance of these findings will be considered later in this opinion, when we discuss the method of appraisal for inheritance tax purposes.

It was stipulated between the parties that the gift was taxable under the inheritance tax law of 1905, in effect at the time of the transfers, and the court so decreed, and that tax has been paid. Estate of Felton, 176 Cal. 663, 169 Pac. 392. Appellant has also paid the amount of $5,924.14 upon the legacy, but contests the balance of the tax thereon as fixed by the court. The difference between the parties arises out of the claim of the state controller that the legacy is taxable at 12 per cent. of its value. The 12 per cent. rate, however, is only permissible upon the theory that the gift of $850,300 is to be taken into consideration in connection with the bequest of $146,773.57, as constituting the taxable entity at the death of the decedent, and that when thus considered the entire estate is to be taxed upon a basis of a total valuation of the sum of these two amounts, $997,073.57, taxable at the rate of 12 per cent. on amounts over $500,000, under the inheritance tax law in force at the time of her death (Stats. 1913, p. 1066, as amended in 1915, p. 435). For convenience we will hereafter refer to this law as the law of 1913, and the law in force at the time of the transfer as the law of 1905.

This precise point raised by this appeal was involved in the Estate of Felton, supra, but, by reason of the fact that the tax upon the legacy had been assessed and collected as a separate matter, and the order fixing the tax had not been appealed from by the state, it was there held that the tax upon the transfer should be assessed without regard to the tax already assessed by the order of court, and theretofore paid. The first question involved is whether or not the Legislature, in enacting the law of 1913, intended to include property theretofore transferred as a part of the estate to be appraised at the time of the death as a basis of fixing the inheritance tax, and, second, whether or not such intention can be enforced without violating the Constitution. The first question can be determined from the terms of the act itself. Where property is transferred "in contemplation of death, or intended to take effect in possession or enjoyment at or after such death," such transfer is made taxable by section 2, subd. 3, of the law of 1913. The inheritance tax appraiser is required to—

> "ascertain and report to said superior court the amount of inheritance tax due upon any property passing in said probate proceeding, or a lien thereon, *or upon any other property transferred within the meaning of subdivision 3 of section 2 of this act, to any person * * * taking property under and by virtue of said probate proceedings.*" Section 16. (Italics ours.)

At the conclusion of his investigation it is provided that the appraiser must report to the court—

> "the amount of inheritance or transfer tax chargeable against, or a lien upon such interests, acquired by virtue of said probate proceedings *or by any transfer within the meaning of this act to any person * * * acquiring any property by virtue of said probate proceedings.* * * *" Section 16. (Italics ours.)

Now, the son is a person who was a person taking property by "virtue of the probate proceedings," and hence the law expressly directed the appraisal of his legacy, and also of the property transferred to him, for the purpose of ascertaining the amount of the inheritance or succession tax to be paid by him.

By section 4 of the law of 1913, all inheritance taxes remain a lien upon property passed or transferred by conveyance, by will or by succession. Section 1, subd. "c," § 4. This section also provides that—

> "The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted; and provided, that in determining said market value no deductions shall be made for any family allowance made out of the said estate."

These rates are stated in section 6 of the law of 1913, as amended in 1915 (Stats. 1915, pp. 418, 420), as follows:

> "When the market value of such property or interest passed or transferred to any of the persons mentioned in subdivision one of section five [husband, wife, lineal issue, etc.] exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:
>
> "(a) upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars two per centum of such excess * * *
>
> "(e) upon all in excess of five hundred thousand dollars, and up to one million dollars twelve per centum of such excess. * * *"

It should be borne in mind that the word "transfer" as used in the act includes the passing of property both by deed and by will. Section 1, subd. "c," defining transfer. So that, when section 4 directs the market value of the interest "passed or transferred," it includes the gift as well as the legacy. There is no suggestion that the property transferred by deed should be assessed separately from the property passing by will. The tax in both instances is upon the right of succession, accruing and payable at death. Section 8 of the law of 1913 expressly provides that all taxes imposed by the act, unless otherwise therein provided for, "shall be due and payable at the death of the decedent. * * *"

It would be doing violence to the requirement concerning appraisal to hold that there should be a separate appraisal of property passing by deed and by will, and that the succession tax should be reduced by allowing double exemptions, and by starting again in each instance at the basis rate. In view of the nature of the tax, and of the fact that the tax upon conveyances is only in aid of the tax upon the right of succession at death, there is no reason for a segregation of the two interests passing to one person, one by deed and one by will. In contemplation of the law he receives each by succession, one part actually, the other constructively, and the tax is upon the right of the individual who receives the property to take by succession. It is reasonable to assume that the Legislature would treat the property so received as an entity unless otherwise clearly indicated. The system of a taxation by a graduated scale of percentages upon the value of the property shows the intention so to do. It is apparent from these provisions that, where a legatee or devisee takes property by will, and also by reason of a previous transfer, the entire amount of the tax is to be assessed and collected as a whole. It is clear, therefore, that, as to transfers and devises and bequests made after the enactment of the law of 1913, the tax upon the legacy in question being assessed as a part of the whole, the property received by the legatee or devisee will be assessed as property over $850,000 and under $1,000,000, to wit, at the rate of 12 per cent.

The recent decisions of this court in Re Miller's Estate, 195 Pac. 413, and Chambers v. Lamb, 199 Pac. 33, bear upon the question of appraisement for purposes of taxation. The former holds that, where a remainder is predicated upon the decedent's life, that remainder is to be appraised at its market value at the time of death of the life tenant, less deductions from the estate due to the federal tax, which was held to be a tax upon the whole estate at death, in that case amounting to $4,000,000, rather than upon the right of the beneficiaries of the estate to succeed. That decision was based upon section 5 of the law of 1905, which specially provides for the assessment of an estate in remainder. The law of 1913 contains a similar provision in section 9 which, under that decision in the case at bar, would require the appraisal of the appellant's estate in remainder if it be such at its value at the time of death. In Chambers v. Lamb it was held that, where the transfer in contemplation of death was of the fee, the tax should be fixed upon the market value at the time of the transfer, and not at the time of death, which, if appellant's title was a fee, would require its appraisal at the date of the transfer. In that case, however, the tax was collected in a separate action, and the question of its constituting a part of the estate assessable to a legatee who also receives property under a will was neither involved nor discussed, as that question was involved in this case then pending on a rehearing.

For the reasons stated I think it clear that, where a person takes property by deed, and later also takes an estate by will or succession from the grantor, and where both are taxable under the inheritance law of 1913, the value of both should be considered in fixing the rate to be paid by the owner of the property. That is to say, if the law of 1913 had been in effect both at the date of the deed and of the death of the testatrix, the gift of $850,300 and the legacy of $146,773.57 should be assessed as an entity. The gift is assessed as of the date of the gift, if a fee is conveyed, or, if a remainder only is conveyed, as of the date of death, and the legacy as of the date of death.

The fact that part of the property received by the beneficiary is by conveyance does not alter the fundamental rule that succession or inheritance taxes relate to the death of the donor, and are a tax upon the right of succession. If I am correct in the conclusion that the law of 1913 permits and requires that property thereafter conveyed should be taxed as a part of the estate received by the donee at death, it would follow that, had the grant to the son been made after the passage of the law, he would have been taxed thereon at the rate of 12 per cent. on all over $500,000. The law of 1913 does not expressly except from its terms conveyances made before its passage, nor expressly deal with that subject, except that in repealing previous inheritance tax laws there is a clause saving the right of the state to taxes under the provisions of the acts so repealed.

If the transfer by deed in the case at bar was not taxable at all at the time it was made, as was the case in Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961, it might be said that the Inheritance Tax Law should not be given a retroactive effect, and therefore should not be construed as effecting such a transfer, even if there were no constitutional objection to such a retroactive law. But in the case at bar the provisions of the law requiring the taxation of such transfers have been in existence since 1905, and the provisions of the law of 1913 are mere continuations of the law then in existence, notwithstanding that the form of amendment was by a new enactment. After the law of 1905, transfers before death, if taxable, were a part of the estate to be appraised at death for taxation purposes.

I am not for the moment considering the tax rate to be applied to the property transferred before death, but am considering only the system or scheme provided by the law of 1913 for the appraisement of transfers and bequests, for the purpose of calling attention to the fact that neither the language of the act construed according to its natural import, nor the principle of law that the tax is one upon the right of succession, either justifies or requires taxation of the transfer as a separate entity, but, on the other hand, clearly requires the taxation of both as a single entity.

Another consideration also leads to the conclusion that the Legislature intended that transfers and bequests made after the passage of the act should be considered together as a taxable unit, that is to say, the matter of exemptions, which are provided for in section 7 of the law of 1913. This exemption to a son is $10,000 (section 7, subd. 2), to be deducted from the first $25,000 (section 5, supra). If the transfer and bequest are considered together, the application of the exemption to the first $25,000 of the estate is simple enough, but if the two are regarded as separate entities for taxation purposes, it would hardly be contended that the Legislature intended to allow two exemptions of $10,000 each, where it only provided for one exemption. If we regard a transfer by deed as a separate entity for taxation purposes, fixing the value of each gift as of the date of transfer (Chambers v. Lamb, supra), we would be compelled to allow as many exemptions as there were transfers, for section 5 provides:

> "When the property * * * passed or transferred exceeds in value the exemption hereinafter specified and shall not exceed twenty-five thousand dollars, the tax hereby imposed shall be," etc.

It would follow that, in the case of a son, inheritance taxes could be entirely avoided by splitting the estate into separate parcels, each less than $10,000, and making separate deeds of gift for each. Such a construction is obviously inconsistent with the entire scheme of the law, and leads to an absurd result destructive of the entire purpose of the taxation of transfers in and of a succession tax. In the case at bar there were in fact a number of transfers, all of which we have so far considered as one entity as the parties have stipulated should be done.

So far I have only considered the proper construction of the law of 1913 as applied to transfers and legacies thereafter vesting. I will now turn to the question of the effect of the Constitution and our decisions thereunder upon the appraisal and taxation of estates where a part of the property passes before the law of 1913 became effective, but after the law of 1905 was in effect. Before taking up that question it should be said that, in our former opinion, we relied upon a clause in section 2 of the act of 1913 as showing an express intent of tax transfers theretofore made under its provisions. This provision of section 2 of the act was thus referred to in the opinion:

> "The Inheritance Tax Act of 1913 (Stats. 1913, p. 1066) provides for a tax upon all transfers, 'whether made before or after the passage of this Act. Section 2.'"

This statement was in accordance with the contention of the respondent as follows:

> "Section 2 of chapter 595 of the Statutes of 1913 provided that where any decedent might die subsequent to the passage of said statute all transfers made by said decedent, 'whether made before or after the passage of this act', should be taxable at the rates in said act provided."

The appellant merely stated in reply:

> "Respondent baldly alleges this (section 2) covers all property transferred, before or after the enactment of the law. The statute clearly shows that it refers only to such cases wherein the property vests after the act, under a transfer made at any time. That the time of 'vesting' is the essential and not the time of making the provision under which the vesting may occur."

These two statements constituted the entire argument upon the subject. The meaning of that clause of section 2 had not been previously passed upon by this court. It was before the court in Hunt v. Wicht, supra. The phrase, "whether made before or after the passage of the act," is considered, and it is there conceded for the purpose of the decision that it was the intention of the Legislature by this clause to tax transfers made before the act took effect, and that case was decided upon that assumption.

An elaborate petition for rehearing on this point called our attention to the judicial and legislative history of this section in this state and in the state of New York, from which it was adopted. A rehearing was granted in order that this point might receive further consideration. The point was extensively briefed and argued, and after such argument I am satisfied that the proper interpretation of this clause is so doubtful that it should not be greatly relied upon in determining the point in issue in this case. It is suggested that it is void and unconstitutional as to vested estates, but valid as to contingent interests conveyed by deed before the passage of the act, but vesting in possession or enjoyment after the passage of the law. This construction of the New York law, from which our statute of 1911 and 1913 is claimed to have been adopted by our Legislature, was said to be untenable in Re Craig, 97 App. Div. 289, 89 N. Y. Supp. 971, cited by this court in Hunt v. Wicht, supra, although the statement was perhaps obiter dicta. The question was directly determined later in Re Smith, 150 App. Div. 805, 135 N. Y. Supp. 240, wherein it was held that the Constitution forbade the taxation of a contingent remainder, granted in a deed executed before the law took effect, where the contingency happened and the estate vested after the law went into effect. In this and other cases it was held by the New York courts that the terms of the statute were broad enough to include all transfers made before the passage of the act, and was only made ineffective because of the constitutional guaranties against the taking of property without compensation and against the impairment of the obligation contracts.

I think that the language of section 2 above quoted is broad enough, if unrestricted by constitutional inhibitions, in its plain import to include all transfers made before the passage of the act, and this seems to have been the view of the New York courts in Re Birdsall's Estate, 22 Misc. Rep. 180, 49 N. Y. Supp. 450, 462, In re Harbeck's Estate, 43 App. Div. 188, 59 N. Y. Supp. 362, In re Pell's Estate, 171 N. Y. 48, as well as of our own court. Hunt v. Wicht, supra. What it has been or will be construed to mean in the light of its legislative and judicial history, and under our Constitution, is a question merely incidentally involved in our consideration of the general scheme of legislation and I refrain from placing a definite construction thereon, leaving that matter for further consideration when it arises.

Assuming, then, that the whole scheme of legislation shows that prior taxable transfers were to be added to subsequent taxable bequests in fixing the rate of taxation, it remains for us to consider the effect of our Constitution upon this whole legislative scheme as it affects a transfer made before its passage, and in that inquiry it is important to bear in mind that the transfer of property is not taxable as a transfer, but because the transfer is made in contemplation of death, and is in lieu of a transfer at death. Such a transfer, if permitted to go untaxed, would open the door for a defeat of all effective taxation upon the right of succession. If the tax were a mere transfer tax it would unquestionably be violative of our constitutional restrictions upon the subject of taxation, but, considered as a part of a scheme for the taxation of the right of succession, it has been uniformly upheld. The appropriate time for fixing of taxes upon the right of succession is at the death of the donor, as our law provides. We have held, however, that the Legislature cannot increase the tax upon a gift, in contemplation of death, after the transfer inter vivos has been fully consummated, and the title entirely vested, for the reason that to do so would be to take property without compensation, because the donee takes the property subject to a lien of the inheritance or transfer tax then fixed by law; and to subsequently increase the amount of that lien would be to that extent a taking away from the donee of that which is already vested in him. Hunt v. Wicht, supra; Estate of Felton, supra.

It has also been held that the right of the state to this tax has so far vested that the law cannot be subsequently repealed, for the reason that to do so would, in effect, be a gift of the property of the estate, in violation of the inhibition of the Constitution. Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788. In short, applying the principle of these cases to the transfer by way of gift in the case at bar, the son thereby became entitled to the estate valued at $850,300, subject to a lien in favor of the state for a succession tax of $22,094, payable upon the death of the grantor, and the value of his vested interest protected by the Constitution represented the difference between these two amounts, $828,206.

The tax resulting from the gift is not in dispute, and the only question in the case at bar is whether the Legislature had the power to include, and intended to include, the value of the gift in estimating the succession tax to be paid by the son upon the property received by him by gift and bequest in order to fix the rate to be paid upon the bequest.

As a transfer made in contemplation of death is only taxable in aid of a succession tax, it would seem that the Legislature, in fixing the rate of taxation upon the property passing at the time of death, has always power to consider all property which has theretofore passed to the legatee by gift in contemplation of death. That it has no power to increase the amount of tax upon the property already vested in the legatee in no way bears upon the question of the power of the Legislature to consider that element in fixing the tax to be paid by the legatee for property transferred at death. The question at issue resolves itself into this:

> "Has the Legislature, in fixing a succession tax, the right to consider in fixing the rate the total amount of property to which the heir succeeds?"

As the taxes are only permissible as succession taxes, and as the Legislature has full power to fix the amount of that tax by any standard or method it chooses, it would follow that the Legislature has power to include previous transfers in contemplation of death, taxable only because, in a sense, they evade the taxation at the time of death, in estimating the percentage that is to be paid on the property which passes at the time of death.

We properly ignore the date of a will in determining the inheritance tax, and hence do not consider whether the rate of taxation has been increased by statute enacted after the execution of a will, because the will is ineffective to pass property until death; but, from a constitutional standpoint, the only essential distinction between a legacy and a gift inter vivos in contemplation of death is that the legacy does not vest in the legatee until the death of the testator, and consequently the right of the legatee is inchoate until the death of the testator, while, in the case of a gift inter vivos, the title passes at once. It is because of the vested right of the donee, and not because of the date when the intent of the donor becomes fixed, that the tax on a gift inter vivos cannot be increased by subsequent legislation. But there is no greater constitutional reason for the separation of the two, the transfer and the legacy, in taxing the right of succession on the legacy, than there would be constitutional reason for excluding a bequest in a will in considering a subsequent bequest in a codicil. In the latter case both are to be considered together in fixing the tax on the second bequest, and it would seem equally clear that the previous transfer may also be considered in fixing a tax on a legacy given thereafter.

I conclude that the Legislature had the power to require that taxable gifts inter vivos should be taken into consideration in determining the total tax to be paid by the donee where the donee takes under a will made effective by the death of the testator after the passage of the law. As I have shown, it was the intent of the Legislature that transfers in contemplation of death, or intended to take effect in possession or enjoyment at or after such death, should be added to legacies to ascertain the taxable unit. No distinction is made in the law of 1913 as to the method of taxing transfers made before and after the act, the Legislature leaving the taxation officers and courts to apply the constitutional restrictions to their general scheme of taxation. The Constitution requires that the tax, in this instance, should not exceed $22,094 on the gift of $850,300, while the total tax upon an estate of $850,000, plus $146,773.57, that is of $997,073.57, under the law of 1913, would be $99,298.83, being a total of $81,686 on the first $850,300, and of $17,552.83 on the last $146,773.57. Under the law of 1905, applicable to the gift, the tax thereon cannot exceed $22,094, that being the total tax at the time title vested; hence the tax under the law of 1913 on the first $850,300, when fixed in the manner required by that act, is too much by the difference between the amount figured on the basis of the law of 1913 ($81,686) and figured on the basis of the law of 1905 ($22,094), and that difference is $59,592. By subtracting this amount to make the total tax conform to the Constitution, we have as the total tax $99,298.83, minus $59,592, and this is $39,646.83. Hunt v. Wicht, supra. In other words, the act fixes the tax to be paid by appellant at $99,298.83, but the Constitution requires a deduction from that amount of $59,592, for the reason that to the extent of $59,592 the tax interferes with a vested right.

In support of appellant's contention certain decisions by the New York courts are cited. Matter of Hodges, 215 N. Y. 447, 109 N. E. 559; Matter of Thompson, 167 App. Div. 356, 153 N. Y. Supp. 164; Matter of Meserole, 98 Misc. Rep. 105, 162 N. Y. Supp. 414; Matter of Garcia, 183 App. Div. 712, 170 N. Y. Supp. 980. By the New York statute all taxes imposed upon transfers are made due and payable at the time of the transfer, while in this state they are due and payable at the death of the decedent. In Estate of Hodges, supra, it is said:

> "Where the transfers are thus distinct in character, one being a gift inter vivos taxable when made, and the other a legacy taxable only upon the death of the testator, there appears to be no warrant in law for adding them together and considering them as one transfer."

Thus it appears that the decisions of the New York courts are based upon the distinction between their statute and ours. If any aid on the question under discussion is to be derived from the legislation of other states on the subject not on all fours with ours, the case of In re Stephenson Estate, 171 Wis. 452, 177 N. W. 579, decided May 4, 1920, by the Supreme Court of Wisconsin, would seem to be as helpful as any case on the subject. It was held by that court that the gift inter vivos was to be added to the legacy to determine the amount of the tax on the latter. In that connection the court said:

> "The statute contemplates but one estate for each decedent, else there would be but little object in graduating the tax according to amount, for the estate could easily be split up into a number of gifts, trusts, or wills and intestate property, and thus the graduated feature of the statute could be entirely defeated. The law provides for transfer by will, by intestate law, and by gift in contemplation of death. These all connote testamentary or intestate disposition of an estate. Gifts made in contemplation of death for taxing purposes under the statute become a part of the estate of the decedent. A deceased person can leave but one estate. All property owned by him at the time of his death is a part of his estate, and gifts previously made in contemplation of death for taxing purposes merge in the estate. Such is the obvious scope and purpose of the law, such has been the administration under it, and such has been the construction given it by this court. * * *
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> "Language could not very well be more clear and explicit to the effect that for taxing purposes the tax accrues and the transfer takes place as of the time of the death of the transferor. In Estate of Bullen, 143 Wis. 512, 128 N. W. 109, transfer of property made in contemplation of death was treated as part of the estate. So, also, in State v. Thompson, 154 Wis. 320, 142 N. W. 647 [46 L. R. A. (N. S.) 790, Ann. Cas. 1915B, 1084]; in Estate of Ebeling, 169 Wis. 432, 172 N. W. 734 [4 A. L. R. 1519]; and in Estate of Week, 169 Wis. 316, 172 N. W. 732. In the latter case it is said: 'The transfer contemplated occurs at the instant of death.' [169 Wis. 318, 172 N. W. 733.] * * * Our conclusion is the county court properly added the value of the property passing under the trust to the value of the property passing under the will and applied the correct rate to the sum thereof."

The appellant points out, however, that this case cannot be followed in this state, for it holds that the increased tax rate in a law passed after the transfer could be applied to such transfer and is therefore contrary to our decisions (Hunt v. Wicht, supra; Estate of Felton, supra; Nickel v. State, 179 Cal. 126, 175 Pac. 641; Estate of Brix, 181 Cal. 667, 186 Pac. 135), but these cases were decided upon the proposition that the constitution compelled such a construction. The Wisconsin case is authority upon the proposition that the language of our state contemplates a single unit of assessment, and hence that such language should control in the absence of constitutional objection, and as far as permissible by the Constitution.

In considering the constitutional question involved, the fact that the son's exemption under the law of 1905 is upon the first $4,000, estimated at 1 per cent. (Estate of Timken, 158 Cal. 51, 109 Pac. 608), or $40 tax, and under the law of 1913 is $10,000 at the same rate, or $100 tax, is discussed. The point presents some difficulty, but, if two matters are borne in mind, the difficulty is capable of a simple solution. First, there is no vested right in an exemption in effect at the time of the transfer, or in the mode or manner of fixing the tax. Second, in fixing the tax under the law of 1913 upon a unit basis the exemption is allowed. Thus, the amount of $99,298.83 above stated as the total tax under the law of 1913 is the amount fixed after allowance of the exemption of $10,000, while the amount of the exemption under the law of 1905 ($4,000) is allowed in figuring the tax of $22,094 upon the gift of $850,300, and hence the amount to be deducted, $59,592, from the tax estimated under the 1913 basis, $99,298.83, is to that extent increased, that is, by $40, being 1 per cent. upon $4,000. The fact that there is no vested interest in an exemption existing at the time of a transfer is clearly shown by assuming a case where the exemption exceeds the gift. It would hardly be contended that such surplus exemption could be carried over and deducted from a subsequent legacy, where the exemption then in effect was also deducted therefrom. The matter of exemption is of relatively little importance except as it bears upon the question as to whether the estate is to be taxed as one or as two units. As the matter of exemptions is involved and is discussed by counsel I will proceed with the discussion on that subject before fully disposing of the constitutional question involved, as the consideration of that subject is germane to the constitutional question. In this discussion I adopt the following from the majority opinion vacated by rehearing:

"The appellant suggests rather than argues that an exemption of $10,000 should have been allowed in taxing the legacy. The amount of this exemption, as contended for by the appellant, would be $1,200. That is to say, 12 per cent. upon a $10,000 exemption. Unless we hold that the bequest is to be considered alone, as the appellant contends it should be, it is obvious that the position of the appellant with reference to the exemption cannot be maintained. By both the law of 1905 and the law of 1913, the amount of the exemption is deducted from the first $25,000. As the tax upon the first $25,000 under both laws is 1 per cent., it follows that the exemption under the law of 1913 cannot, in any event, decrease the total tax by more than $100. Under the law of 1905 the exemption of $4,000 could not decrease the tax by more than $40. In other words, the difference between an exemption of $4,000, allowed under the law of 1905, and the $10,000 allowed under the law of 1915, would be, in terms of the tax, $60. It is obvious, therefore, that, if we decrease the total tax on the transfer and the legacy by $100, we have given to the appellant the total exemption allowed by the law of 1913. This is exactly what was done by the trial court. The parties had stipulated that the proper tax upon the gift inter vivos was $22,094. This result was arrived at by computing the tax as follows: $4,000 was allowed as exempt, the balance of the first $25,000, to wit, $21,000, was taxed at 1 per cent., the next $25,000 at 1½ per cent., the next $50,000 at 2 per cent., the next $400,000 at 2½ per cent., and the balance, $350,000, at 3 per cent. The court disregarded the stipulation of the parties as to the amount of the tax upon the transfer and fixed the tax as follows: $10,000 was allowed as exempt, the next $15,000 was taxed at 1 per cent., the next $25,000 at 1½ per cent., the next $50,000 at 2 per cent., the next $400,000 at 2½ per cent., the balance of $350,300 at 3 per cent. The amount of the tax thus obtained was $22,034. The difference between the two amounts of the tax ($60) represents the allowance of the $6,000 exemption. That is to say, it represents 1 per cent. on $6,000. No exemption was allowed upon the legacy, which was taxed at 12 per cent. In fixing the tax upon the transfer, as we have already seen, the tax is to be computed under the law of 1905 in force at the time of the transfer. Consequently, the amount of the principal exempt from taxation is $4,000. This exemption could not constitutionally be increased by subsequent legislation. Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788. The result arrived at by the court in disregard of the stipulation of the parties was erroneous, as the total tax upon the transfer should have been $22,094, as stipulated. We have then to consider what is the result from the fact that the law of 1913 permits an exemption of $10,000, or of a total diminution of the tax of 1 per cent. on that amount, namely, $100. This is an increase of $6,000 over and above the exemption allowed by the law of 1905. If we deduct the tax upon this $6,000 exemption, which, under the law of 1913, amounts to $60, from the total tax figured under the law of 1913 upon the legacy, it will decrease the total tax thereon as estimated by the court by the amount of $60, so that the total tax thereon will amount to $17,552.83 instead of $17,612.83. But the total tax will amount to the same as that fixed by the court. That is to say, the court, in fixing the tax upon the transfer, estimated it $60 too little, and in fixing the tax upon the legacy estimated it at $60 too much. There was therefore no error in the gross amount of the tax fixed, to wit, $39,646.83.

"In the stipulation filed by the parties, after stating the issue between the state and the appellant was whether the tax on the legacy should be $5,924.14, or should be $17,612.83, it is agreed that the court is 'to adjudge and determine as the only issue unsettled in this matter, the method of the determination of the amount of said tax payable on the legacy provided to said Jesse Sheldon Lux Potter and the clear market value of the residue of said estate to which he is shown in said report to be entitled.' It is also stated in the stipulation and in the findings that the appellant had already paid into the county treasury the sum of $28,194.67. It thus appears that the appellant has paid the entire amount of the stipulated tax upon the transfer to him made in contemplation of death, to wit, $22,094, and also the tax upon the legacy computed upon the basis upon which he contends that tax should be computed, to wit, $5,924.14, and that the only question involved before the court was as to the amount of tax to be fixed upon the legacy. The court correctly fixed the total tax payable and the balance due."

Upon the question of the propriety of a unit estate for purposes of taxation, appellant argues the injustice of such a rule, and offers the following hypothetical case:

> "If, on the day Mrs. Potter died, another mother had also died, leaving her entire estate of $146,773.57 to her son (and he had not been the transferee of any taxable transfers made by her in life), the tax assessed against him would be $5,924.14, whereas for the same inheritance, in the same form, and under the same statute, the tax imposed upon the appellant is $17,612.83, which has been assessed against him on account of a past transfer which might have been untaxed at the time of its occurrence (as in Hunt v. Wicht), or taxable at the time of its occurrence at a lower rate (as in this case). If the computation of the court below were upheld, these two sons, receiving identical amounts at death, would be put in different classifications for a purely arbitrary reason, namely, because of an event which had taken place in an era either of no taxation or of lower taxation. Such a classification is invalid under Mordecai v. Board, 183 Cal. 434, 192 Pac. 40.
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> "If the statute of 1905 had provided that all transfers after that date between the same donor and donee should be added together in computing the tax, we have no doubt that the provision would have been valid. But, as we have seen, it did not do so."

Such illustrations are not very helpful in construing the law, because so many different conditions may exist. For instance, we might assume that Mrs. Potter had an estate of $2,000,000, which she wishes to divide equally between her two sons. One was a minor and the other an adult. For that reason in 1908 she conveys to the adult son an estate valued at $850,000, retaining the income during her life. She retains the title to $850,000 intended for the minor son, and bequeaths to him this amount plus his half interest in the $300,000 which she divides equally between the two brothers in her will. Under our decision the younger brother would not only be required to pay a tax of $81,650 upon the $850,000 he received by will, as against $22,085 paid by his brother upon the property of the same value deeded to him, but he is also required to pay a tax of $18,000 upon his $150,000 received by will, while his brother would have to pay $6,150 only on his legacy of $150,000. Thus the total tax paid by the younger son would be $99,650, while the older son would pay $30,945. The amount paid by the younger brother would thus exceed that paid by the older brother $68,705, this difference resulting from the application of the constitutional inhibition to the legislative action. If the Legislature attempted to place the brothers on an equality with relation to the last $150,000 received by the older brother, which is as far as the Legislature could go in view of the Constitution, I do not think we could say that such legislative action would work an injustice to the older brother, but on the contrary, that it would indicate an intention to place both brothers on an equality so far as they had the power so to do. Or, assume that both the gift and the will became effective under the law of 1913, and that the mother died the day after the transfer, would any one contend that justice required that the younger son should be taxed $81,650 and the older brother taxed upon two entities, the gift and bequest, which would reduce his tax $11,850 below the younger brother?

We do not think it can be said that any inherent injustice can be worked upon a beneficiary by treating the property received by way of gift and by way of will or succession as an entity for the purposes of taxation, and, where the constitutional provision against taking a property without due process of law operates to relieve a beneficiary of any higher rate upon his gift than that in force at the time of the vesting of the gift, his rights are fully protected.

There is another line of reasoning which would tend to support the conclusion that the Constitution permitted and the Legislature intended that the rate upon the bequest to the son should be fixed by including both gift and legacy in the entity tax for the purpose of fixing the rate upon the bequest. This reasoning was elaborated upon by Mr. Justice OLNEY in his concurring opinion, set forth, post, page 844. This reasoning may be summarized as follows: The law of 1905 in force at the time of the gift to the son not only fixed the rates of taxation to be applied to the gift, but also provided that, if the donor subsequently bequeathed or devised property to her son, the gift should be included in the entity taxable for the purpose of fixing the amount of the tax on the legacy. In other words, the law of 1905 provided that the tax upon the $146,773.57, if she should subsequently bequeath so much, would be 3 per cent. instead of 1 per cent. upon the first $25,000 (less a deduction of $4,000 exemption), 1½ per cent. upon the next $25,000, 2 per cent. upon the next $50,000, and 2½ per cent. upon the $46,773.57. The Legislature had no power to increase the rate of taxes upon the gift, but it retained power to increase the rate of tax upon the legacy. The law of 1913 is virtually a re-enactment of the law of 1905 so far as the matters under consideration are concerned except as to the rates of taxation and amounts of exemption, and also contemplates the including of the gift and the bequest as a single entity. The situation, then, is, as suggested by Justice OLNEY, as if the Legislature had entered into an agreement with Mrs. Potter, providing, first, that the gift should be taxed at a certain amount; second, that the tax upon future legacies should be computed by adding those legacies to that gift; and, third, that the rate of tax upon such legacies should be 3 per cent. in the event that such legacies did not exceed $150,000. Subsequently the Legislature enacts a law which provides, first, for an increased rate of tax upon the gift without expressly providing for the case of a gift made under the law of 1905, the new law also providing that the gift and legacy should be considered together as an entity for the purpose of fixing the rate of tax to be paid upon the entity; third, providing that the rate paid upon the bequest should be 12 per cent. instead of 3 per cent. There is no question as to the right of the Legislature to increase the tax upon the legacy. If, at the time the gift was made, there was no obligation to pay a tax thereon, as was the case in Hunt v. Wicht, supra, it should no doubt be said that the attempt to increase the tax to the son upon a legacy under a law subsequently executed would be an invalid attempt to penalize the son because he had received a nontaxable gift. Where, however, at the time of the gift it is not only taxable, but also is a part of the taxation scheme, it was provided that it should be included in the entire estate received by the donee for the purpose of fixing the tax payable by him, the increase of the rate of tax upon the legacy resulting from this system of estimating the tax would amount to no more than an increase of the rate upon the legacy. I think this is a legitimate argument, tending to show the purpose and to illustrate the power of the Legislature, and particularly as indicating that there is no injustice in including in the entity to be taxed all of the estate received by the person taxed which is subject to the tax.

I have thus endeavored to ascertain the intention of the Legislature in enacting the law of 1913 with reference to gifts, and have concluded that, taking the act by its four corners, it was the intention of the Legislature to include such gifts in the taxable unit at death where other property is left by will or inheritance. I find no recognition by the Legislature in the law of 1913 of the difference between transfers made before and those made after the passage of the law, and hence must refer the distinction in classification to the Constitution which protects vested right instead of to the inheritance tax laws which apparently ignore them.

It is suggested that rules of constructiion aid in the proper interpretation of the law of 1913: First, that laws, if possible, should be interpreted so as to conform to constitutional restrictions, even if it requires a strained construction of the language of the statute rather than to impute to the Legislature an attempt to violate the Constitution; second, that tax laws should be construed strictly in favor of the property holder. A brief consideration of these propositions is desirable.

With reference to the first rule, it should be observed that the case of Hunt v. Wicht, supra, holding that the Legislature was powerless to impose a tax upon conveyances that were not taxable when made, was rendered in January, 1917, and even then it was conceded in that case, for the purpose of the decision, that section 2 of the law of 1905 applied ex vi termini to transfers made and title vested before the passage of the act. Immediately after that decision the Legislature then in session passed a new inheritance tax law (Stats. 1917, c. 589, p. 880) expressly providing for the taxation of the entire estate passing to a single person as a unit. The provision is as follows:

> "(9) When more than one transfer within the meaning of any of the preceding subdivisions of this section has been made, either before or after the passage of this act, by a decedent to one person, the tax shall be imposed upon the aggregate market value of all of the property so transferred to such person in the same manner and to the same extent as if all of the property so transferred were actually transferred by one transfer."

The decision in Estate of Felton, supra, wherein it was held that the tax rate to be applied to a gift was that in force at the time of the gift, was not decided until December 12, 1917, after the Legislature of 1917 adjourned, although pending for decision during the legislative session. Thus the question of the right to tax a gift made at a time when there was no tax, or at a new rate when there was a provision for a tax on the transfer in force at the time the transfer was made, was not decided until long after the statute of 1913 was enacted. Under these circumstances it seems to be the rational method of construction to take the legislation under consideration at its face value to determine its meaning from its context and then apply the constitutional restrictions necessary to protect the property owner in his vested rights. The law of 1913 was passed at a time when the constitutional questions involved in inheritance tax matters were in grave doubt, and in actual litigation between the officers of the state and those from whom it was sought to collect such taxes. The Legislature, under these circumstances, made the following declaration in section 25 of the law of 1913:

> "Sec. 25. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional."

If this declaration has any value at all in construing the statute it certainly amounts to this much:

> "If the courts declare this act unconstitutional as applied to gifts made before its passage, either as to taxability or rate, we nevertheless declare that our plan of taxation of the

estate as an entity, a single unit, shall still be applied in fixing the rates upon property passing after the passage of this law."

However, I do not particularly rely upon this clause in construing the statute, although it is apparent that this was exactly what the Legislature was willing to do if the statute of 1917 (section 2, subd. 9) is any criterion. Although I do not rely upon either the subsequent act of 1917 or section 25, supra, in arriving at any conclusion, they show the difficulties of applying general considerations of justice or policy or strict construction in determining the intent of the Legislature as to the method of taxing bequests, or the rate thereon, where there is a previous gift. I conclude on this branch of the subject that there is no room for the application of the rule of strict construction to the plain language of the statute, for there is no doubt as to its meaning, and that the appellant must rely on the Constitution for his protection rather than this rule of statutory construction.

I conclude, then, that the entire estate going to the beneficiary subject to an inheritance tax should be treated as an entity under the law of 1913, regardless of the fact that $850,300 worth of such estate was conveyed to the beneficiary while the law of 1905 was in effect; that the constitutional rights of the defendant, as determined in Hunt v. Wicht, supra, and Estate of Felton, supra, are fully protected by deducting from the total tax so determined the difference between the taxes estimated on the first $850,300 under the law of 1913 and the tax upon that amount estimated under the law of 1905, and that with this deduction the appellant should be required to pay the balance of the tax so estimated. In view of the tax already paid by the appellant, and of the stipulation of the parties with relation to the taxes, the judgment should be affirmed.

The majority opinion states that to construe the law as I contend it should be construed, namely, as requiring that taxable gifts made before the passage of the law should be included in the taxable unit at death, would convict the Legislature of acting upon motives of revenge or disappointment. And this is advanced as a reason for an opposite conclusion. With all due respect to my Associates, it seems to me that the above quoted provision from the law of 1917, enacted at the earliest opportunity after the decision of this court in Hunt v. Wicht, supra, is a sufficient answer to that line of reasoning, for in that act the Legislature expressly did what the majority think it was inconceivable the Legislature would do under such circumstances and what I think it clear they intended to do in the act of 1913. My own view is that the Legislature of 1913 felt that it was acting in a legislative field of great difficulty, and upon questions then pending for decision in this court which might with good reason be decided for either contestant, and that in these circumstances it left to the courts the application of the very general constitutional principles protecting vested rights. That these principles are difficult of application is evident from the fact that in the first opinion of this court the majority of the justices were of the view now presented in this dissent, and that the majority, after further argument, investigation, and reflection, are now of the opposite opinion. (Two of the justices concurring in the majority opinion on the former opinion have left the court.)

Section 25 of the act above quoted makes this very clear, as it attempts to make provision for the possibility of a part of the law being "held to be unconstitutional." I concede the force of the reasoning of the Chief Justice, but the conclusion arrived at, namely, that the Legislature contemplated the assessment of two distinct entities at death, with two complete exemptions to the son, and with application of the basis rate to both estates is, in my judgment, a conclusion that does violence to the legislative intent as expressed in plain and unambiguous language, and that such a conclusion is to be arrived at, if at all, only because of and only so far as required by the Constitution. In other words, it is a question of the legislative power, and not the legislative intent. That the Legislature had power to require the property received by the appellant to be treated as an entity for inheritance tax purposes where both the gift and legacy are liable to succession taxation is not doubted. That they so intended I think is clear.

I concur: SLOANE, J.

OLNEY, J. (concurring in opinion of WILBUR, J., handed down February 21, 1921, on original hearing). I concur with Justice WILBUR, but, in view of the difference in opinion of the court, I would state with more particularity my reasons for agreeing with him upon the important point in the case, viz. that, to ascertain the rate of tax upon the bequest, the value of the prior taxable gift inter vivos should be taken into account.

When the transfer inter vivos, but in contemplation of death, was made by the decedent to her son, the Inheritance Tax Act of 1905 (St. 1905, p. 341) was in effect. When the decedent died and her son took a further gift from her by will, the act of 1913 (St. 1913, p. 1066) was in effect. The latter act, while formally repealing the former, was in substitution for it, and re-enacted many of its provisions. It therefore came directly within the established principle applied in the Estate of Martin, 153 Cal. 225, 94 Pac. 1053, to the effect that in such a situation the later act is to be considered as merely an amendment of the prior one, and the provisions common to both are to be considered as being continuously in effect. In other words, the present case is to be viewed exactly as if the act of 1905 were in effect both at the time of the transfer inter vivos and at the time of the decedent's death, but had been amended intermediate the two dates in the respects in which the act of 1913 differs from that of 1905.

Now, the act of 1905 prescribes a scale of rates increasing step by step with the value of the property transferred, and also prescribes in effect that, where separate taxable transfers are made by the same decedent to the same beneficiary, the rates applicable according to the prescribed scale shall be determined by the value of all the properties so transferred taken together, and not as to each transfer by the value of the property included in it alone. This is true whether the separate transfers be different gifts by the same will to the same beneficiary or be a transfer inter vivos but taxable, and a later transfer to the same beneficiary by death. The provisions of the act of 1913 are the same except that the scale of rates prescribed is higher. Applying to this state of affairs the rule referred to of Estate of Martin, the present case must be viewed as one wherein the statute in effect at the time the transfer inter vivos was made provided that the value of the property so transferred should be added to the value of any property which the son might later receive from his mother by death, in order to apply the schedule of rates, and that after the transfer, but before the death of the mother, the statute was amended, not by changing this rule, but merely by increasing the rates of tax prescribed. I can see no escape from the conclusion that this is the case before the court, and nothing but this.

With the case so stated, the answer to the question which it presents would seem to be plain. The tax must be computed on the value of the property transferred inter vivos according to the original scale in effect when the transfer was made, and on the property transferred by death according to the higher scale then prescribed by the statute as amended, and that, in applying the scale to the latter property the rule prescribed by the statute, both originally and as amended, viz. that the value of the property previously received be taken into consideration, must be followed. Not to follow this rule is simply to nullify the statute in this particular. Why the adoption of an amendment raising the schedule of rates should have the effect of nullifying another and distinct provision of the statute with which the amendment is not in conflict I am unable to see. In fact, it is not claimed that the amendment raising rates operated to amend or change the rule that all taxable gifts to the same beneficiary should be considered together for the purpose of ascertaining the rates applicable under the schedule. That rule admittedly stands as the rule of the statute, both before and after the amendment. The contention is merely that this rule of the statute is nullified when one transfer was made before the amendment and another afterwards. But why should it be nullified?

The principal reason advanced by counsel for the son would seem to be the contention that to apply the rule in such a case would be in effect to increase the tax upon the first transfer by a subsequent amendment to the statute raising rates. This contention, as I understand it, is not concurred in by the dissenting opinion, and in any case it proceeds upon a fundamental misconception of the effect of applying the rule. The rule does not change or affect in the slightest the tax, or the portion of the tax, attributable to the first transfer. That is still computed according to the rates in force at the time the transfer was made, and is exactly the same as it would have been if the statute had not been amended. The only effect is upon the tax upon the bequest, and the only effect upon it is that, in applying to the bequest the increased schedule of rates, to which admittedly the bequest is subject, the previous gift to the beneficiary is taken into consideration to ascertain the particular rate or rates applicable. It is always the rate and the rate only, and the rate upon the bequest and the bequest only, that is affected by taking into consideration the value of the previous gift. This is exactly what the law requires shall be done. The matter may be put in another way. The effect of the amendment raising the rates was to make the bequest subject to those increased rates in force when the bequest took effect by the death of the decedent. This admittedly was a proper effect. But it was also the only effect of the amendment. It did not cause a higher rate to be applied to the previous gift, nor did it require a higher rate to be applied to the bequest because of the previous gift. The application of a rate to the bequest, higher because of the previous gift than would otherwise be applicable under the amendment, is not due to the amendment, but is due to the fact that there was a previous gift and to the rule in effect both before and after the amendment that such previous gifts should be taken into account in determining the rate of tax.

A simple illustration will make it plain that the only effect is upon the rate upon the bequest, and that this effect is just what the statute contempates shall be the effect of a previous taxable gift. Suppose a mother in her lifetime, but in contemplation of death, transfers to her son $1,000,000, and upon her death leaves him an additional $100. Between the time of transfer and the time of death the rates are increased from those of 1905 to those of 1913. Whether the two gifts are or are not considered together, the tax on the $1,000,000 by gift inter vivos is computed in accordance with the 1905 rates, and upon the amount of $1,000,000. In other words, the tax is the same. The only effect is on the tax on the bequest. If the two gifts are not considered together, the tax on it, omitting any question of exemption, is 1 per cent. by the rates of 1913, or $1. If the two gifts are considered together, the tax as prescribed by the 1913 rates is 10 per cent., or $10. The only difference is in the rate and consequent amount of the tax on the bequest. These figures may be varied ad libitum, but the result will always be the same: it will be the rate upon the bequest only that is affected. That rate is increased by the amendment prescribing a higher rate, which is admittedly proper, and is also higher than it otherwise would be because of the previous gift. But the statute contemplates that it should be higher because of such a gift, and in making it higher because of it there is no element of taxing the previous gift itself. The higher rate because of the gift is solely upon the bequest.

It is also contended (and this is the theory upon which the dissenting opinion proceeds) that the general rule is that, in the matter of imposing taxes, all laws are to be construed strictly in favor of the individual and against the state, and that, applying this rule, the act of 1913 should not be construed as imposing a higher tax on the bequest subject to it because of the previous transfer which was not subject to it. It is not necessary to question the general rule so stated. It is admittedly but one of construction, and must give way where the legislative intent is plain. It may be freely conceded also that, if the act of 1913 had been a totally new law, it would require very strong evidence of legislative intent to warrant the conclusion that it was intended to fix the tax upon any transfer subject to the act by reference in any respect to another transfer made before the act, and that such evidence of intent would not be found in the act. In other words, we may concede freely that, if the act of 1913 were a totally new law, the rule should be that a gift made before the passage of the act, and for that reason not subject to it, should not be considered in ascertaining the rate on a subsequent gift which was subject to the act. The point of difference between my own view, at least, and that of the dissenting opinion arises from the fact that the act of 1913 was not a totally new law. The dissenting opinion would construe it as if it were. I would construe it as, what it can hardly be gainsaid it really is, not a new law but one in substitution for a theretofore existing law, having the same general purpose, and continuing in force many of the rules of the old law and changing others. The rule of construction applicable to such a statute is thoroughly well established, and was laid down by this court in Estate of Martin referred to at the outset of this opinion, and there applied as between the Inheritance Tax Act of 1905 and the preceding act of 1893 (St. 1893, p. 193). If it applied as between those two acts, why not as between the act of 1913 and that of 1905? That rule is that the act of 1913 is to be construed as an amendment merely of the act of 1905, changing the latter in the respects in which it differs from it, but not affecting the operation of those provisions or rules which are common to both. The rule that two or more taxable transfers by the same decedent to the same beneficiary should be considered together to ascertain the rate applicable is common to both. Both gifts here involved were made when this rule was in effect. The case, therefore, is not, in my judgment, what the dissenting opinion would consider it to be, a case of one transfer made before the passage of the statute, and not subject to it, and another transfer made after the passage of the statute, and therefore subject to it. It is a case where at the time the first as well as the second transfer was made, the act imposing a tax was in effect, and provided that both should be considered together to ascertain the rate or rates applicable, and where the only change material to the present discussion which took place intermediate the two transfers was an amendment of the statute increasing the scale of rates. With the case so viewed, the conclusion would seem clear that the only effect of the amendment was to increase the rate applicable to the second transfer, and that the rule remained unchanged that, in ascertaining such rate, the earlier gift, likewise subject to the statute and to the rule, should be considered.

The correctness or incorrectness of a contention may often be tested by the reasonableness or absurdity of the results to which it leads. The contention in this case that, in ascertaining the rate applicable to the bequest, the previous gift to the son should not be considered because of the amendment of the statute intermediate the two increasing the rates, leads to the very remarkable result that in many cases the effect of the amendment increasing rates will be to lower the tax. This may likewise be made plain by a simple illustration. A mother makes a gift of $25,000 to her son in 1905, after the going into effect of the statute of that year. In 1913 the statute is amended by increasing the rates, as was done in that year. The mother then dies leaving the son $25,000 more. Now, if the amendment had not been made, the two gifts of course, would have to be considered together in computing the tax, and the tax would be according to the 1905 rates on both. In this situation the tax payable by the son would be $210 on the gift inter vivos and $375 on the transfer by death, or $585 in all. But, because the statute has been amended by increasing the rates, the two gifts are not to be considered together. The result is that the tax payable by the son is $210 on the gift inter vivos (the same as before, since the 1905 rate is applied to it) and (omitting any deduction by way of exemption) is $250 on the transfer by death, applying the 1913 rates to it, or a total of $460. In other words, by a simple amendment to the statute increasing rates, the tax has been actually lowered $125. This is just absurd. There is assuredly a fallacy in a contention which leads to such a result. The fallacy plainly lies in (a) the failure to appreciate the fact that considering the two gifts together for the purpose of applying an increased schedule to the later gift does not involve applying that schedule to the first gift, or change in the slightest the tax or the portion of the tax attributable to it, and (b) the failure to appreciate, or at least to give effect to, the fact that at the time both transfers were made, the first as well as the second, the statute imposing a tax was in effect and provided that both should be considered together to ascertain the rate or rates applicable, and that the act of 1913 was in reality but an amendment of this statute increasing the rates but leaving unchanged the rule that the two gifts should be considered together.

To avoid any misapprehension, I would add that I am aware of the fact that, while I have discussed the case as if the act of 1913 was in substitution for that of 1905, it was in reality in substitution for that of 1911, which, in turn, was in substitution for that of 1905. The case was so discussed for the sake of simplicity, for the interposition of the act of 1911 does not affect the principles applicable in the slightest. It continued in force the rule that the two gifts should be considered together, and, so far as any features material here are concerned, was like the act of 1913, but an amendment increasing the rates prescribed by the existing schedule. In other words, while the case has been discussed as if there were but one such amendment intermediate the two gifts, that of the act of 1913, there were in fact two, first that of the act of 1911, and then that of the act of 1913. But it is evident that the fact that there were two such amendments instead of one does not change the essential character of the case in the slightest.

As to the matter of exemptions, the same principles are applicable. Both the act of 1905 and that of 1913 provide for exemptions, and both likewise provide in effect that there shall be but one exemption, no matter how many taxable gifts there may be by the same decedent to the same beneficiary. In other words, the rule under both statutes is that, to the extent to which a beneficiary has received an exemption on one gift, he is not entitled to an exemption on any other, but, if he has not exhausted on one gift the total exemption to which he is entitled, he is entitled to the balance of the exemption on another. While this rule was not changed by the act of 1913, the amount of the exemption was. In the case of a son, it was increased from $4,000 allowed by the act of 1905 to $10,000. The case here, then, is a case of two transfers, both made under a law providing for an exemption, and that but one exemption alone shall be allowed, no matter how many separate taxable gifts there may be, but amended intermediate the two gifts by an increase in the amount of the exemption. In this situation, clearly the beneficiary is entitled on the first gift to an exemption of $4,000. He is entitled to that because the law in effect at the time of the gift so provided. He is not entitled to a greater exemption because of the subsequent amendment of the statute, for the reason that, so far as the tax on that gift is concerned, the right of the state in the tax which has been incurred cannot be impaired by subsequent legislation any more than the rights of the beneficiary under the transfer can be impaired. Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788. The rights of both the beneficiary and of the state are fixed finally and beyond the power of interference by the Legislature by the law in force at the time of the transfer.

When we come to the second gift the law has been changed and the beneficiary is now entitled to an exemption of $10,000. But the rule in force throughout, and subject to which both gifts were made, is that he is entitled to but one exemption, and, as a corollary, that to the extent to which his exemption has been used on one gift it cannot be used on another. The result is that while the son in this case is entitled to a further exemption so far as the second gift is concerned, because of the increased exemption now allowed, he is entitled in all to an exemption of but $10,000, and, since he has already received the benefit of the exemption to the extent of $4,000 in connection with the first gift, he is now entitled, in connection with the second, to an exemption for the balance only of $6,000.

In the present case, while the lower court did not follow the method above outlined in computing the tax, but allowed the entire exemption of $10,000 on the first gift, the result on the total tax, as Justice WILBUR points out, was the same. This is due to the fact that it happens that in this case the rate of what would be the tax on the amount of the exemption, if it were not exempted, is the same (1 per cent.) under both the 1905 and 1913 statutes, so that it made no difference whether the full amount of exemption to which the beneficiary was entitled was allowed on the one gift or was divided between the two.

The point is made in the dissenting opinion that even by the above method the amount allowed in this case by way of exemption on the second gift is not properly computed. It is contended that the $6,000 should be deducted from the value of the gift, and the tax computed on the balance only. Since the rate applicable to the gift is 12 per cent., this would mean a deduction in tax of $720. Instead of this a deduction in tax of but 1 per cent. on $6,000 is held to be allowable, or but $60. The explanation lies in the peculiar provision of the statute as to how an exemption shall be allowed. It is not to be allowed by simply deducting the amount of the exemption from the value of the gift, as might be supposed, and as would be the case if the exemption provided for were truly a full exemption. If that were done the effect of the exemption upon the tax would be to lessen it by $720, as is said in the dissenting opinion. But the provision of the statute is that the exemption shall be allowed in connection with the first $25,000 of value only, and that on all values above $25,000 the schedule of rates shall be applied without any deduction for exemption whatever. The exemption so allowed is not, in reality, a true exemption of property of a certain value, but is merely an exemption of a tax on that amount of value computed at the rate applicable to the first $25,000. Such amount of tax in the present case is as to the second gift $60, as Justice WILBUR says.

That the exemption allowed by the statute is not really an exemption of property of a certain value, but is an exemption allowed only in connection with the first $25,000 of value, is settled by Estate of Timken, 158 Cal. 51, 109 Pac. 608.

188 Cal. 304

BOLES v. STILES. (Sac. 3300.)

(Supreme Court of California. Feb. 25, 1922.)

1. Replevin 🔑8(4)—Plaintiff must have right to immediate and exclusive possession.

In order to sustain an action in claim and delivery, a plaintiff must have the right to immediate and exclusive possession of the property at the time of the commencement of the action, but it is not necessary that he be the owner thereof; some special property in the chattel being sufficient.

2. Records 🔑9½, New, vol. 12A Key-No. Series—Partner surrendering automobile to copartner in no position to claim legal title did not pass under registration law.

Where defendant and plaintiff, partners, dissolved the partnership and divided the property betwen them, and plaintiff was given an automobile, defendant, in an action by plaintiff to recover the car, was in no position to invoke the provision of St. 1919, p. 191, § 8, which provided that title to an automobile shall not be deemed to have passed in absence of change in registration.

In Bank.

Appeal from Superior Court, Colusa County; H. D. Gregory, Judge.

Action by John N. Boles against L. C. Stiles. Judgment for plaintiff, and defendant appeals. Affirmed.

Seth Millington, Jr., of Colusa, for appellant.

Charles K. Atran, of Colusa, for respondent.

WASTE, J. Plaintiff brought this action against the defendant to recover the possession of an automobile, or its value in case delivery could not be had. Judgment was entered in his favor, and the defendant has appealed.

Plaintiff and defendant were engaged in business as partners. By mutual agreement, evidenced by a writing to that effect, the partnership was dissolved, and the parties divided the partnership property between them. As part of the division it was agreed that the plaintiff should take and keep as his own an automobile which had been purchased by the firm from a third party under a contract of conditional sale. The agreement between the plaintiff and defendant at the time of the dissolution of the partnership was that the plaintiff should pay all of the unpaid installments on the purchase price of the machine and, in addition, pay the defendant $135 for his interest in the same. Upon such dissolution of the partnership and division of the property the plaintiff took possession of the machine as his own separate property and used it exclusively for more than six months for his own private purposes and in conducting his own private affairs. He continued the payment of the installments for its purchase. All this was with the knowledge and at the instance of the defendant.

A controversy having arisen between the parties as to the amount due from the plaintiff to the defendant by reason of the settlement of their partnership affairs, the defendant, finding the automobile unattended in front of the plaintiff's office, took possession of it and drove it to his own garage, where he kept it and refused to return it to the possession of the plaintiff, although the latter made repeated demands for its possession.

The foregoing facts appear from the testimony of the plaintiff. The defendant admitted there was a dissolution of the partnership and a division of certain articles of personal property between the parties. He claims, however, that it was not his understanding that the plaintiff should take into his exclusive possession the automobile and the other property until certain adjustments in the affairs of the firm had been finally made. The only effect of this testimony was to raise a conflict in the evidence, which was resolved by the trial court in favor of the plaintiff's contention. Its findings in that behalf are amply supported by the record and sufficiently support its conclusion that the plaintiff had such right to the exclusive possession of the automobile as to enable him to maintain the action for the recovery of the same. On this appeal the defendant apparently does not rely for a reversal as much upon the point that the findings of fact as to the transaction above referred to are not supported, as he does upon the contention that under certain provisions of the state Motor Vehicle Act (Stats. 1919, p. 191) there was no legal vesting of sole title of the automobile in dispute in the plaintiff by defendant, and, consequently, the plaintiff is not in position to maintain this action. The appellant relies upon that portion of section 8 of the act, which relates to the transfer and registration of ownership of any registered motor vehicle; the express provision reading:

> "Upon such registration the department shall issue and forward to the applicant without further charge than as provided in section seven of this act, a new registration certificate in the manner and form as hereinabove provided for original registration. Until said transferee has received said certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

[1, 2] It appears at the time of its purchase the automobile was registered in the partnership name. No change in the registration was attempted. Assuming, but not now deciding, that the above provision has the effect appellant seeks to give it, and that whatever title the defendant may have had in the automobile has not passed to the plaintiff, we are of the opinion that the defendant is not in position to raise that question in this action. It has long been the settled rule in this state, as in other jurisdictions, that in order to sustain an action in claim and delivery a plaintiff must have the right to immediate and exclusive possession of the property at the time of the commencement of the action (People's Sav. Bank v. Jones, 114 Cal. 422, 426, 46 Pac. 278), and one who has the right to the use of property at will may replevy it (Garcia v. Gunn, 119 Cal. 315, 322, 51 Pac. 684; Tandler v. Saunders, 56 Mich. 142, 22 N. W. 271). One who is the owner of, or has some special property in, a chattel, coupled with a right to the immediate possession thereof, may maintain the action. Fredericks v. Tracy, 98 Cal. 658, 660, 33 Pac. 750. The appellant by his own act and agreement having placed the plaintiff in the immediate and exclusive possession of the automobile is not in position to invoke the provision of the statute referred to.

The judgment is affirmed.

We concur: SHAW, C. J.; SHURTLEFF, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

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188 Cal. 292

SUTTER COUNTY v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SACRAMENTO COUNTY. (Sac. 3326.)

(Supreme Court of California. Feb. 25, 1922.)

1. Prohibition 🔑10(1)—Purpose of writ.

Writ of prohibition is issued out of a District Court of Appeal or the Supreme Court only to arrest proceedings of a superior court which "are without or in excess of" its jurisdiction, under Code Civ. Proc. § 1102.

2. Prohibition 🔑3(3)—Held to lie for erroneously directing party to be brought in.

That court erroneously directs that a new party be brought in is not an excess of jurisdiction, but is an erroneous exercise thereof which may be corrected on appeal, and prohibition cannot be invoked, and a county was not entitled to the writ where the superior court of another county erroneously brought it in as a party in an action by a materialman on a bond executed to secure performance of a contract for public work, assuming that county was not a proper party.

3. Prohibition 🔑3(1)—Not invoked as to order made as incidental in progress of case.

Even if an order made as an incident of a case involves the question of jurisdiction, prohibition cannot be invoked to annul the order or stop proceedings under it.

4. Prohibition 🔑10(2)—Pendency of other cases in other courts does not warrant issuance of writ.

Prohibition cannot be invoked by a county to prevent its being made a party to a case in the superior court of another county by materialman on bond of contractor, executed to secure performance of contract for public work, because other cases were pending in the county involving a division of the balance of the contract price in the hands of the county; such matter not going to the jurisdiction of the court.

In Bank.

Application by the County of Sutter for writ of prohibition to be directed to the Superior Court of the State of California in and for the County of Sacramento. Writ denied.

Arthur Coats and A. H. Hewitt, both of Yuba City, for petitioner.

Thomas B. Leeper and Robt. H. Schwab, both of Sacramento, for respondent.

SHAW, C. J. This is a proceeding in prohibition begun originally in the District Court of Appeal for the Third District and which, after decision by that court, was transferred to the Supreme Court for rehearing.

The object of the petition is to prohibit the superior court of Sacramento county from proceeding to the trial of an issue arising in an action pending in that court wherein D. J. Murphy is plaintiff and D. C. Howard, W. H. McMorry, and E. M. Kaster are defendants, to recover money on a bond executed by the defendants to secure the performance of a contract for certain public work and payment by the contractor for materials and labor furnished for and used in said work, which bond was required by the act of May 10, 1919 (Stats. 1919, p. 487). The claim is that the superior court of Sacramento county had no jurisdiction to try the particular issue set forth in the petition.

In the year 1920 the board of supervisors of the county of Sutter executed a contract with Howard for the construction of a highway in said county. In pursuance of the act of 1919, aforesaid, Howard executed the bond required by that act, with McMorry and Kaster as sureties thereon. This act requires the contractor upon such work to give a bond with sureties for the payment by the contractor of money due from him for any materials, provisions, provender, or other supplies or teams, used in the performance of the work, and for any labor done thereon. It further provides that any person furnishing such material or performing such labor may file with the board of supervisors "a verified statement of such claims, together with a statement that the same have not been paid"; that such statement may be filed any time prior to the expiration of 30 days from the completion of the work; and that, after filing such statement, such person may, within 90 days after the expiration of the first period of 30 days, begin an action on the bond for the recovery of the amount due him. The act contains some details concerning the time of filing the verified statement which we have not given, but we have stated its effect so far as the questions involved herein are concerned.

The action of D. J. Murphy is an action upon the bond so given, for money alleged to be due to Murphy and certain persons who assigned their claims to him, for material and labor used in the construction of said highway. It is a simple action for money due upon contract, and the only relief that can be given therein is a judgment for the recovery of the money due.

The action was begun in the county of Sutter, but by regular proceedings it was thereafter transferred for trial to the superior court of the county of Sacramento. Thereupon, in the county of Sacramento, the defendants applied to that court for leave to have the county of Sutter made a party to the action, upon the ground that there was money due and owing from the county of Sutter, on the highway construction, to be applied pro rata upon the claims of all persons who had furnished material or had performed labor on the construction of the highway in question, and that the said defendants desired to have said moneys so applied and the portion thereof due to the plaintiff, Murphy, credited upon his claims for their benefit. The court granted the application and made an order that the county of Sutter be made a party thereto for that purpose.

The petition herein seeks to have said court prohibited from proceeding to try any issue concerning the money alleged to be in the hands of the county of Sutter and remaining unpaid upon the contract price for the construction of said highway. It contends that the county of Sutter was improperly made a party and that the court has no jurisdiction, in an action for money against the contractor and his sureties, to consider or determine a controversy existing between the county of Sutter and the contractor with respect to money due from said county upon the contract price.

In so far as the motion for leave to bring in Sutter county as a party is based on the theory that the materialmen and laborers have acquired some sort of a lien on or equitable attachment against the unpaid balance of the contract price for the highway construction, under and by virtue of stop notices given as provided in section 1184 of the Code of Civil Procedure, the entire fabric would seem to have been destroyed by the decision in Slayden v. O'Dea, 182 Cal. 500, 189 Pac. 1066, holding that section 1184 does not apply to contracts for the construction of public highways.

Since the action of Murphy was to recover money due upon a bond, and involved nothing more than his right to a money judgment against the defendants, he not being, as to that action, in any wise concerned with or interested in the rights or equities of the several obligors on the bond, as between themselves, it may well be doubted if the superior court of Sacramento county did not manifestly err in making the order bringing in the county of Sutter as a party to such an action for the purpose stated.

[1-3] But we do not think these questions can be raised by a proceeding in prohibition. Such writ is issued only to arrest proceed-

ings of a superior court which "are without or in excess of" its jurisdiction. Code Civ. Proc. § 1102. That court is a court of general jurisdiction, and its jurisdiction in all cases to recover money due on contract in which the demand exceeds $300 is full and complete. Const. art. 6, § 5. Its power extends to the bringing in of new parties to an action (Code Civ. Proc. § 389) and to the dismissal of the action as against any person improperly joined or brought in as a party. These matters are incidental to its exercise of jurisdiction in any cause pending before it. If it erroneously directs that a new party be brought in, such erroneous action is not an excess of jurisdiction, but is an erroneous exercise thereof which may be corrected on appeal. Even if an order made as an incident in the progress of a case involves the question of jurisdiction, prohibition cannot be invoked to annul the order or stop proceedings under it.

> "If that were so, then in every ordinary civil action, whenever a defendant chose to raise a point of jurisdiction, either of the person or of the subject-matter, he could by prohibition stop the ordinary progress of the action toward a judgment until this court had passed upon the intermediate question; and thus this tribunal would, in innumerable cases, be converted from an appellate to a nisi prius court." Agassiz v. Superior Court, 90 Cal. 103, 27 Pac. 50.

[4] With respect to the point that the question concerning the division of the balance of the contract price upon the highway contract between the respective claimants thereto is involved in cases pending in Sutter county, begun before the present action was begun, we think this point "is not one that goes to the jurisdiction of the superior court. At most, that court would be bound, upon being informed by proper pleading and proof that a tribunal of concurrent jurisdiction had first taken cognizance of the controversy, to stay a trial and decision until the proceedings first instituted should be disposed of. The plea in such case would be analogous to that of 'another action pending.' A failure to recognize the effect of such plea would be mere error, to be corrected on appeal." McGregor v. Board of Trustees, 159 Cal. 447, 114 Pac. 569.

The result is that, regardless of the question whether the superior court of Sacramento county is proceeding regularly or not, its acts are not in excess of its jurisdiction, and cannot be made the subject of a writ of prohibition.

The application for a writ of prohibition is denied.

We concur: LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.; WASTE, J.; SLOANE, J.

(56 Cal. App. 145)

NORTH CONFIDENCE MINING & DEVELOPMENT CO. v. MORRICE et al.

(Civ. 2381.)

(District Court of Appeal, Third District, California. Jan. 11, 1922.)

1. Action 🔑38(2)—Counts for cancellation of option for want of consideration and for fraud not joinder of causes of action.

Where an action was brought to cancel an option to purchase land, under Civ. Code, § 3412, and not Code Civ. Proc. § 738, as to quieting title, joining a count based on want of consideration with one based on fraud was not a joinder of causes of action, though the effect of judgment thereon would be to quiet title.

2. Appeal and error 🔑1040(11)—Where court found for defendant on an issue, overruling demurrer to that count of complaint harmless.

Where the court found in favor of defendant on an issue, any possible error from overruling a demurrer to that ground set up in the complaint was without prejudice.

3. Trial 🔑395(2)—Finding of rescission of option, referring to grounds of rescission attached to complaint, not indefinite.

In an action to cancel an option for sale of a mine, the notice of rescission was attached to the complaint, in which the grounds for canceling were stated, and where the court found that plaintiff rescinded the option by serving on defendant a written notice of such rescission, the finding was not open to the objection of indefiniteness.

4. Contracts 🔑10(5)—Contract held unilateral and subject to revocation before acceptance.

Where, under an option contract for the sale of mining property, the purchaser was not obligated to do anything, paid no consideration, and neither developed nor worked the properties, the contract was unilateral, and subject to revocation before acceptance by the purchaser.

5. Contracts 🔑10(1)—Unilateral at first, sustained on execution of optional consideration.

Contracts, even unilateral at first, are sustained on execution of the optional consideration.

6. Escrows 🔑8(1)—Placing deed in escrow not unconditional delivery.

Placing of a deed in escrow is not a conveyance in a legal sense, because it is not unconditional and unqualified delivery.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the North Confidence Mining & Development Company against George Morrice and others. From judgment for plaintiff, defendant named appeals. Affirmed.

J. C. Webster, of Sonora, for appellant.

Frank M. Street and Horace M. Street, both of San Francisco, for respondent.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

BURNETT, J. The action was brought to cancel a certain option or agreement for the sale of real property, and plaintiff had judgment from which the appeal is taken upon the judgment roll. The instrument which the court ordered canceled, as far as necessary to quote, is in the following form:

"This agreement made and entered into this 3d day of June, 1919, by and between North Confidence Mining & Development Company, a corporation, the party of the first part, and George Morrice, of the county of Tuolumne, state of California, the party of the second part, witnesseth: That, for and in consideration of the premises, the party of the first part hereby gives and grants unto the said party of the second part, his heirs, executors, administrators, and assigns, an option to purchase all that certain mining property situate, lying and being in the county of Tuolumne, state of California, and more particularly described as follows, to wit: All of those certain lots, pieces, and parcels of land situate, lying, and being in the county of Tuolumne, state of California, and bounded and particularly described as follows, to wit: [describing it]. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof, for and at the agreed price and sum of thirty thousand and no/100 dollars ($30,000.00), gold coin of the United States, payment therefor to be made as follows: First payment June 30, 1920, $5,000.00; second payment June 30, 1921, $5,000.00; third payment June 30, 1922, $5,000.00; fourth payment December 30, 1922, $5,000.00; fifth payment June 30, 1923, $5,000.00; sixth payment December 30, 1923, $5,000.00.

"The purchase price of said property shall be and the same is hereby fixed at thirty thousand and no/100 dollars ($30,000.00), no part of the said purchase price is to draw any interest, and no installment is to draw interest until after the maturity of that particular installment, after which time said installment shall bear interest at the rate of 7 per cent. per annum until paid."

Then follow other terms as to possession, the use of the growing timber, the payment of royalty for all quartz and gravel mined during the term, the disposition of any buildings that might be erected by the party of the second part, and that "this option to purchase is subject to the surface rights granted as a right of way" for a certain railroad. Among the court's findings are the following:

"(6) That the plaintiff received no consideration for the said option or agreement mentioned herein; that defendant, George Morrice, has not entered into possession of the said lands and premises in said option or agreement described, nor has he performed or caused to be performed any work thereon, nor has he made any payment on account of the purchase price thereof. * * *

"(11) That by the terms of said option or agreement the said defendant, George Morrice, was given the option of purchasing the real property in said option or agreement and hereinabove described at the price and sum of $30,000 payable in installments as specified in the said option agreement. That defendant, George Morrice, has not paid to plaintiff any part of the said purchase price of said property provided for in said option or agreement and that plaintiff, prior to the commencement of this action, revoked said option or agreement; * * * that he had at said time expended no time or money whatsoever in complying with the terms and conditions of the said option or agreement; that he had not at said time accepted said option or agreement and that he was not then acting thereon or thereunder."

[1] Appellant claims that his demurrer to the complaint on the ground that two causes of action, to wit, one to cancel a written instrument, and the other to quiet title, were improperly joined in the first and third counts thereof. He has, however, misconstrued the complaint, as each count is directed to the cancellation of the option or agreement, the first on the ground of the want of consideration, and the second by reason of fraud. The action was brought under the provisions of section 3412 of the Civil Code and not section 738 of the Code of Civil Procedure. The effect of the judgment is, of course, to quiet plaintiff's title as against a certain claim of defendant, Morrice; but the action was primarily "aimed at a particular piece of evidence" rather than "the pretensions of an individual." Castro v. Barry, 79 Cal. 443, 21 Pac. 946.

[2] Manifestly the two counts are not inconsistent, as fraud and want of consideration might characterize the same transaction. But, if they were inconsistent, the pleading would not thereby be vitiated. Tanforan v. Tanforan, 173 Cal. 270, 159 Pac. 709. Moreover, since the court found in favor of appellant as to the issue of fraud, any possible error in overruling the demurrer was obviously without prejudice.

[3] As to the findings, appellant makes the claim that it nowhere appears upon what ground the rescission was made. This objection would not go to the sufficiency of the findings to support the judgment, but, at most, would present a mere question of indefiniteness. However, when the findings are considered in connection with the pleadings there can be no doubt upon this subject. The notice of rescission was attached to the complaint and made a part thereof, in which the grounds are fully stated. It is clear enough that the court referred to this notice when it found that—

"The plaintiff by its president rescinded and revoked said option or agreement * * * by serving upon said defendant, George Morrice, a written notice of the rescission and revocation of said option or agreement."

It is to be observed that the rescission was effected by the action of the plaintiff in giving said notice, but this was subject to an adjudication by the court as to whether it was justified; in other words, whether any of the grounds, upon which the rescission was based, in fact existed. The court tried that issue, and found that there was no consideration for said option, but determined the other grounds in favor of appellant. There is nothing lacking or uncertain as to these findings.

[4-6] The only other contention worthy of mention is that the court erred in construing said contract as constituting a mere option. We are satisfied that the learned trial judge, in his opinion filed in the case, presented as follows the proper view of the character of the instrument:

> "The agreement involved in this action is a unilateral contract and was subject to revocation before acceptance. Under this contract the party of the second part (George Morrice) is not obligated to do anything whatever. He has certain privileges and rights under its terms, but no obligations. It appears that he paid no consideration for the contract, and he has done nothing whatever under the contract toward either developing or working of the properties, nor has he made any payment on the purchase price. 'Up to the time of acceptance, a contract such as this, where no consideration has been parted with, no binding obligation of any kind entered into, is mere nudum pactum.' Brown v. San Francisco Savings Union, 134 Cal. 448, 452, 66 Pac. 592. In the case of McCowen v. Pew, 18 Cal. App. 302, 123 Pac. 191, the law is thus stated: 'An option agreement, although in its nature unilateral, is as binding upon the part of the optioner as is a bilateral agreement upon the parties thereto. So long as it is supported by a consideration, the optioner can no more capriciously withdraw or rescind it than one of the parties could arbitrarily or without the consent of the other party rescind a bilateral contract. * * * If, as a matter of fact, it was unsupported by a consideration, * * * it was, of course, then a mere nudum pactum, and the plaintiffs could, therefore, have withdrawn it at any time before its acceptance.' See, also, Mitchel v. Gray, 8 Cal. App. 423, 429, 97 Pac. 160. It was held by the Supreme Court in Levy v. Lyon, 153 Cal. 213, 94 Pac. 881, that 'an option for the purchase of land, which by its terms contains a promise by the owner to sell on certain conditions, without any obligation to buy on the part of the person to whom the option is given, is a unilateral contract, and becomes mutual only in the event that the latter should, within a reasonable time and before a withdrawal of the offer, make tender of performance on his part. * * * In such a contract, performance upon the part of him to whom the option runs consists of a valid tender of the amount due under the contract, coupled with a demand for the deed.'
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> "As before stated, the defendant, George Morrice, did nothing whatever under the contract towards either developing or working of the properties. If he had begun work upon the property before plaintiff rescinded, then the contract would have been supported by a consideration, and not revocable and could have been enforced, for the rule is that 'even contracts unilateral at first are sustained upon execution of the optional consideration.' Marin Water, etc., Co. v. Town of Sausalito, 168 Cal. 587, 600, 143 Pac. 767. The placing of a deed in escrow did not change the situation in any particular. It was not a conveyance in the legal sense of the word, because it was not an unconditional and unqualified delivery. It was not intended to pass title in præsenti, but only to pass title upon the contingency of the defendant paying over for the use of the plaintiff the amount of money designated as the purchase price of the property. The rights acquired by the defendant were the rights designated in the contract, and not by reason of the execution and placing of a deed in escrow"—citing Fitch v. Bunch, 30 Cal. 208; Holland v. McCarthy, 173 Cal. 602, 160 Pac. 1069; Thomas v. Birch, 178 Cal. 483, 173 Pac. 1102.

We may refer also to Clarno v. Grayson, 30 Or. 111, 46 Pac. 426, wherein the Supreme Court of Oregon clearly points out the distinction between such instrument granting the privilege of acquiring upon certain terms a vested equitable right and one granting the vested equitable right itself to the property. Herein the privilege was revoked before its acceptance and it therefore never became a vested right or interest. If appellant had begun work upon the property, or had paid a part of the price, a different question would be presented.

The cases cited by appellant involved actual contracts imposing and conveying reciprocal rights and obligations, and are clearly distinguishable from the situation herein. Acme Oil Co. v. Williams, 140 Cal. 681, 74 Pac. 296, may be taken as an example of these citations. That was an action in ejectment brought by the lessee against the lessor of certain oil lands, who had entered into possession, claiming the lease was forfeited by reason of the failure of the lessee diligently to operate wells on the property. Therein was no contention made that a mere option was granted. Indeed, the lessee agreed to pay certain royalties and "to begin operations on said land, and the development of the deposits contained therein, after receiving possession thereof, and to complete the sinking of two wells within 90 days from the date thereof," etc. The lessee also entered into possession under the lease and sunk the two wells as agreed, but did not operate them diligently. Appellant insisted that he had broken no covenant of the lease, but the Supreme Court in affirming the judgment held that there was an implied covenant that, if oil was produced in paying quantities, the wells would be diligently operated, since the payment of royalties was the sole consideration for the lease, and that it was this implied covenant which the lessee had violated.

It is no doubt true that covenants are often implied in contracts and they may constitute a sufficient consideration to support the agreement, but we are not dealing with a completed contract but the grant of a privilege which was subsequently withdrawn.

We think the judgment should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

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56 Cal. App. 107

FOWLER v. ENRIQUEZ. (Civ. 3564.)

(District Court of Appeal, Second District, Division 2, California. Jan. 11, 1922.)

1. Appeal and error 🔑193(1)—Where complaint is not totally devoid of allegation upon point objected to, it is sufficient as against objection first made on appeal.

When a complaint is not totally devoid of allegation upon a particular point, and the objection that it is insufficient in that regard is first made on appeal, the trial having been conducted by the objecting party upon the theory that it was sufficient, it will be upheld.

2. Deeds 🔑196(3)—Facts held to create presumption that grantee unduly influenced grantor to execute deed.

Where grantee for a long time prior to the execution of the deed had been the confidential adviser of his mother, the grantor, who was aged and infirm and could read and write no language and spoke only Spanish, *held* that the circumstances created a presumption that the grantee unduly influenced the grantor to execute the deed.

3. Appeal and error 🔑1011(1)—Finding on conflicting evidence conclusive.

Finding as to undue influence procuring execution of deed predicated on conflicting evidence will not be disturbed on appeal.

4. Deeds 🔑211(4)—Showing that grantor had independent advice not conclusive against undue influence.

Where a deed is claimed to be invalidated by grantee's undue influence upon the grantor, for whom grantee had been confidential adviser and business agent, the deed is not validated by the mere fact that grantor had independent advice, but this is a circumstance to be considered with other facts.

5. Cancellation of instruments 🔑37(4)—Objection to complaint for not offering to return consideration is futile, where no consideration shown.

In a suit to cancel a deed for grantee's undue influence over grantor, his mother, for whom he had been confidential adviser and business agent, a contention that the complaint is insufficient because it contains no offer to return to defendant the consideration paid for the execution of the deed is not well taken, where there is no showing that any consideration was paid.

6. Deeds 🔑211(4)—Evidence held to show undue influence.

Evidence *held* to show that a deed was void because of undue influence; the grantee being the son, confidential adviser, and business agent of the grantor.

7. Cancellation of instruments 🔑59—Trial court should have provided for reimbursement of defendant grantee upon cancellation of deed.

In an action to cancel a deed for grantee's undue influence on grantor, his mother, for whom he was confidential adviser and business agent, the trial court finding for plaintiff should have ascertained the amount paid by the grantee as consideration, and the decree should have provided for his reimbursement as a condition upon which the cancellation might follow.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Robert W. Fowler, guardian of the estate of Manuela R. Fowler, an incompetent person, against Manuel Enriquez, to cancel a deed. Decree for plaintiff, and the defendant appeals. Reversed and remanded, with directions.

Ernest P. Wellman and George W. McDill, both of Los Angeles, for appellant.

John T. Curtin and J. Edward McCurdy, both of Los Angeles, for respondent.

WORKS, J. This is an action to cancel a deed. Manuela R. Fowler, the real party in interest, although the action was brought in the name of her guardian, as plaintiff, is a surviving daughter of Juana E. Enriquez, the maker of the deed in question, now deceased. Defendant is a surviving son of that deceased person. Decree was rendered for plaintiff, and defendant appeals.

[1] The complaint in the action is grounded upon undue influence and fraud, but appellant contends that it does not state facts sufficient to constitute a cause of action. It is true that plaintiff's pleading sets up the facts going to substantiate the claim of fraud and undue influence in somewhat general terms. Still, we are not prepared to assert that they are alleged in such a manner as to render the complaint insufficient even if the question had been presented and argued on demurrer in the trial court. Certainly the pleading is far from barren of averment on the question, and when a complaint is not totally devoid of allegation upon a particular point and the objection that it is insufficient in that regard is first made on appeal, the trial having been conducted by the objecting party upon the theory that it was sufficient, all of which is the case here, it will be upheld. Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; Noakes v. City of Los Angeles, 179 Cal. 38, 175 Pac. 409; Meer v. Cerati (Cal. App.) 200 Pac. 501.

[2, 3] At the time of the execution of the deed appellant for a long time had been the confidential adviser and business agent of his mother, the grantor, who was aged and

infirm, who could read and write no language, and who spoke only Spanish. Under these circumstances there is a presumption that appellant unduly influenced his mother to execute the deed to him (Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190; Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808), and this presumption is relied upon by respondent. It is contended by appellant, however, that the presumption was overcome by testimony introduced by him. There was considerable testimony presented by appellant on the subject, it is true, but we cannot say that it was sufficient to outweigh the presumption. The solution of that question was within the peculiar and final province of the trial court, for the presumption on the one hand and the testimony opposed to it on the other presented but a conflict of evidence. The finding of the trial court on the subject is final. French Bank v. Beard, 54 Cal. 480.

[4] Counsel argue the question whether the grantor of the deed had "independent advice" as to the nature and effect of the instrument, respondent contending that certain evidence contained in the record does not show that independent advice was given her, and appellant contending that it does. If we grant for the sake of argument that a deed executed under such conditions as those existing here cannot be valid without a showing that the grantor had independent advice concerning the execution of it (but see Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289; Broaddus v. James, 13 Cal. App. 464, 110 Pac. 158), it cannot be said that such a deed is validated by the mere fact that independent advice was given. We may agree with appellant that the evidence introduced by him showed the reception by the grantor of independent advice without affecting the case by the concession. Necessarily, a trial court is not bound by such a showing. It is but a circumstance to be considered in company with the other facts of a case.

[5] Appellant contends that the complaint fails to state a cause of action because it contains no allegation that plaintiff offers to return to defendant a consideration paid by him for the execution of the deed sought to be canceled. As to this point it is enough to say that the complaint does not show that defendant paid any consideration for the deed. In fact, a proper construction of the allegations of the pleading would seem to indicate a contrary state of facts.

[6, 7] A different question is presented by the evidence. The answer alleges that, as a part consideration for the deed, appellant and his mother at the time of its execution entered into an agreement in writing, a copy of which is attached to the pleading. This paper recites that the deed "was made for the nominal consideration," and that a further consideration is expressed in the agreement. Then follow promises on the part of appellant to care for and maintain his mother during her natural life, providing for her a proper home; to pay all her reasonable bills, including doctor's bills and household expenses; to pay at her death "all funeral expenses and charges and also cemetery charges and provide a proper and decent burial"; to pay a certain cemetery "up to date for keeping the bodies" of the deceased husband of the mother and of certain other of her relatives and for the removal of the bodies from the receiving vault of the cemetery to a vault "belonging to family"; to pay a certain undertaker's bill and a certain doctor's bill; and to pay a certain note owing by the mother, amounting to nearly $500. The answer also alleges that appellant has fully complied with the terms of the agreement, has paid all the obligations mentioned in it, and has maintained his mother up to the time of her death. Evidence was received by the trial court upon the question as to whether these payments were made, some of the testimony tending to show that appellant expended considerable amounts under his obligation to meet them; but the court failed to find on the subject, and by its decree canceled, not only the deed, but the agreement as well.

Appellant contends that the trial court should have ascertained the amount paid by him as a consideration for the deed, referred to in the agreement as a nominal consideration, and the amounts paid by him pursuant to his promises made in the agreement, and that the decree should have provided in some manner for his reimbursement, as a condition upon which a cancellation of the deed might follow. The contention of appellant must be sustained. The trial court found that the deed was executed as a result of the undue influence of appellant over his mother and through fraud practiced by him upon her, and this finding is sustained by the evidence, even granting that a consideration for the instrument passed between them. Such payments as appellant made to his mother, or to others under the terms of the agreement above mentioned, appear by the evidence to have been grossly inadequate as a consideration for the execution of the deed, for it is alleged in the complaint, and not denied by the answer, that the property conveyed was of the appraised value of $51,000, and produced a monthly income of $150. Therefore the trial court was correct in canceling the deed because of the undue influence and fraud which figured in its execution. The consideration paid by appellant is an immaterial circumstance when the situation is viewed from the standpoint of the binding effect of the deed. That, however, is far from saying that appellant is not entitled to a return of such sums of money as may have been paid by him to his mother for the deed, or to third parties under the agreement. The general rule is that one seeking to rescind a deed or agreement must show by his complaint a willingness to return such consideration or benefit as may have passed in the transaction from the person against whom the rescission is sought. That rule has no application here, for the reasons we have already stated, but, under the allegations of the answer and the evidence produced in support of them, it became the duty of the trial court to ascertain what amounts, if any, had been paid out by appellant. If, upon a solution of that question it had appeared that some amount had been expended by him, it would then have been the duty of the court to provide a means whereby to reimburse him, as a condition upon which cancellation might be ordered. Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872. This not having been done, the cause must be remanded for a new trial, the sole purpose of which will be to take an accounting of appellant's expenditures by way of consideration for the execution of the deed and under his covenants contained in the agreement, making due allowance for any offsets that are legally chargeable against him. If, after such accounting, it shall be found that any sum is due appellant, the trial court will render judgment accordingly, securing appellant's right to reimbursement by the imposition of a lien on the real property covered by the deed, or in any other manner consistent with the principles of equity.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

We concur: FINLAYSON, P. J.; CRAIG, J.

56 Cal. App. 160

ARMOCK et al. v. UNITED RAILROADS OF SAN FRANCISCO et al. (Civ. 4013.)

(District Court of Appeal, First District, Division 1, California. Jan. 11, 1922. Hearing Denied by Supreme Court March 9, 1922.)

1. Municipal corporations 🔑706(6)—Overruling of motion for nonsuit on ground that defendant was not negligent held not error.

In an action for injuries sustained by a pedestrian from the collision of defendant's motortruck and a street car, where the truck was approaching the street car track at a speed variously estimated at from 10 to 25 miles an hour, and the driver did not look up and down the track, though he signaled by blowing a horn, the question of his negligence was one for the jury, and refusal of a motion for a nonsuit was proper.

2. Appeal and error 🔑997(2)—Order denying motion for nonsuit not disturbed, where there is evidence on material issues to go to the jury.

An order denying a motion for a nonsuit will not be disturbed, though the evidence supporting plaintiff's case is so weak that it might be granted, if, upon the conclusion of the whole case, there is evidence upon material issues warranting the submission of the case to the jury.

3. Trial 🔑295(6)—Instructions that a street car has the right of way on the part of the street on which it can travel held not error when considered as a whole.

In an action by a pedestrian for injuries received in a collision between a motortruck and a street car, instructions that a street car has the right of way on that portion of the street on which it can travel, and that if the driver of the motortruck was using due care, no negligence should be imputed to its owner, and that in operating its cars along its tracks the street car company was obliged to use ordinary care to avoid coming into contact with vehicles driven across the tracks, considered as a whole, were not erroneous as being misleading.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Frank Armock and another against the United Railroads of San Francisco and another. From judgment for plaintiffs, defendant Stringer Storage Company appeals. Affirmed.

Hearing denied by the Supreme Court: SHURTLEFF and SLOANE, JJ., dissenting; LENNON, J., absent; RICHARDS, Justice pro tem., not acting.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant.

William A. Kelly and Richard O'Connor, both of San Francisco, for respondents.

KERRIGAN, J. [1, 2] Action for damages for personal injuries. Plaintiffs, who are husband and wife, sued the United Railroads of San Francisco and the Stringer Storage Company, both corporations, alleging that Dora Armock received serious bodily injuries through the concurring negligence of the two companies. Each defendant denied the negligence charged against it, and the railroad company pleaded affirmatively contributory negligence on the part of plaintiffs. Trial was had by jury, and a verdict in favor of plaintiffs and against defendant Stringer Storage Company was rendered in the sum of $2,500. The appeal is from such judgment. As ground for reversal it is first claimed that a motion for a nonsuit made by this defendant was improperly denied, and should have been granted, for the claimed reason that the evidence showed no actionable negligence against this defendant, but did show a clear case of gross negligence on the part of its codefendant, the United Railroads. In support of their allegations of negligence plaintiffs herein relied solely upon their own testimony. Their evidence in substance shows that on the afternoon of the day of the accident plaintiffs, accompanied by their child, a little girl four years of age, were on their way home. They were proceeding along Eddy street in an easterly direction toward Webster, and, upon arriving at the intersection of these streets, they were about to cross when they noticed the approach of appellant's truck being driven on Webster street, traveling in a southerly direction, and also a street car on Eddy street belonging to defendant railroad company, proceeding on said street in a westerly direction. The car, according to their testimony, was traveling about twice the speed of the truck, which was going at about 10 or 12 miles an hour. The truck driver, approaching the intersection of the two streets, sounded his horn, but did not notice the approach of the car until he had reached the track, when he speeded up his vehicle in an attempt to clear the same. A collision occurred, and the truck was thrown some distance from the track to the place where the plaintiffs and their child were standing, striking them all, killing the little child, and inflicting upon Dora Armock the injuries here complained of. Both the plaintiffs testified that no warning was given by the car of its approach. Under these circumstances it is claimed that the driver of appellant company was not negligent and discharged his duty to the Armocks whose pathway crossed his, and that these facts not only failed to show negligence on the part of appellant storage company, but, on the contrary, did show that plaintiffs were in no manner guilty of contributory negligence, and that the sole responsible cause of the accident was the reckless negligence of the motorman of the defendant railroad company, for which reason it is claimed the motion of appellant storage company for a nonsuit was improperly denied. We cannot agree with counsel in their contention. After the order denying the motion for nonsuit, further evidence was had which tended to show that the accident was proximately caused through the negligence of the driver of appellant company. The order denying a motion for a nonsuit will not be disturbed, although the evidence supporting plaintiff's case is so weak that it might have been granted if upon the conclusion of the whole case there is evidence upon material issues warranting the submission of the case to the jury. Peters v. Southern Pacific Co., 160 Cal. 48, 116 Pac. 400; County of Los Angeles v. Rindge Co., 200 Pac. 27.

The driver of the truck, who was appellant's chief witness, testified in substance that, as he approached the crossing where the accident occurred, he could have seen up and down the track had he looked, and that his reason for not seeing the approaching car was that he did not look to see whether one was approaching or not; his attention being otherwise directed. He further testified that had he seen the car he could have stopped his vehicle within a foot and a half of the track. Other testimony showed that the truck was traveling 20 miles an hour, and that the driver thereof tried to beat the car across the track. The motorman of the defendant Railroad Company testified that he approached Webster street at or about 10 or 12 miles per hour, and that the truck was approaching the crossing at about 25 miles an hour, and that he slugged his car as soon as he saw the truck. In the face of this testimony we are of the opinion that there is little merit in appellant's contention. The question as to whether or not the driver of the truck was negligent in crossing the track in the manner he himself testified to was, to say the least, a question of fact for the jury to determine. The motion for a nonsuit was therefore properly refused. Hamlin v. Pacific Electric Railway Co., 150 Cal. 776, 89 Pac. 1109.

[3] It is further urged that the court erred in its charge to the jury on the subject of the relative rights of the defendants. One of the instructions was as follows:

> "A street car has the right of way on that portion of the street upon which it can travel."

Standing alone, this instruction no doubt would be misleading, but it was followed by other instructions as to the relative rights of street cars and others in the use of the highway occupied by its tracks at crossing. What was meant by the complained of instruction was that the fact that cars are designed only to run on a railroad track gives them a better right to that space, to which the public must give way when necessary. That it was not intended by the instruction to charge the jury that the company's rights were in any other respect superior to that of the public is evidenced by the further instructions which fully informed the jury on this question. The jury was instructed that, if the driver of defendant storage company was using due care and caution at the time of the accident, no negligence could be imputed to it. It also instructed the jury that, while defendant railway had the right to run and operate its cars along and upon its tracks, in so doing it was obliged to exercise ordinary care and caution to avoid coming in contact with vehicles being driven across the tracks. Under these circumstances we do not think that the jury was misled as to the law upon the subject. If more specific instructions were desired concerning the relative rights of the parties, appellant should have asked for them. Appellant did ask for and was refused an instruction to the effect that appellant's driver had the right of way at the crossing when the collision occurred. This instruction was based upon the assumption that the Motor Vehicle Act applied, and that under its provisions appellant had the right of way. It is here conceded that the instruction was properly refused, as that act excludes from its operation street railway cars. We are of the opinion that the jury was fully and fairly instructed upon all the issues of the case.

For the reasons given the judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

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56 Cal. App. 168

BELLOWS v. LOS ANGELES DOCK & TERMINAL CO. (Civ. 3567.)

(District Court of Appeal, Second District, Division 2, California. Jan. 13, 1922.)

1. Trial 🔑395(2)—Finding held to refer to other suit set up as a bar with sufficient particularity.

In action to foreclose a mortgage, defended on the ground of the pendency of a condemnation proceeding, in which mortgagee had prayed for judgment for amount of mortgage debt, with interest to maturity, a finding "that the award of this court in action B73318 constitutes an adjudication on the rights of the parties herein, as to that portion of property covered by the mortgage," *held* a finding on such defense, though it did not specifically refer to condemnation suit nor state the title of the cause referred to as "B73318," it being apparent from the finding taken in connection with the pleadings that the condemnation suit was referred to.

2. Mortgages 🔑301—Mortgagee not required to accept mortgagor's offer of principal and interest on proceeding to condemn a part of the land prior to maturity of debt.

Where a proceeding to condemn a portion of the mortgaged land had been instituted two years before maturity of mortgage indebtedness, mortgagee was not required to accept mortgagor's offer of the principal with accrued interest.

3. Mortgages 🔑398—Pendency of proceeding to condemn part of land held not to have relieved mortgagor of making interest payments at specified times.

Pendency of proceeding to condemn a portion of the mortgaged land before maturity of mortgage indebtedness, in which mortgagee had filed answer claiming the principal with interest to date of maturity, did not relieve mortgagor of obligation to make interest payments at times specified in mortgage.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by E. C. Bellows against the Los Angeles Dock & Terminal Company. Judgment for plaintiff, and defendant appeals. Affirmed as modified.

Walter M. Campbell, of Los Angeles, for appellant.

Joe Crail, of Los Angeles, for respondent.

WORKS, J. This is an action for the foreclosure of a mortgage, in which defendant appeals from a judgment for plaintiff.

The amount of the original mortgage debt was $30,000. A part of the real property covered by the mortgage lay within the range of a contemplated public improvement, and the public convenience required that the portion mentioned be taken for public use in connection with the improvement. The prospective condemnor, in an endeavor to avoid actual condemnation by means of an action, offered to appellant to purchase the land required at a certain sum. Thereupon appellant offered to pay to respondent the principal of the mortgage debt, with interest accrued to the time of the offer. This proposition was declined, the mortgage having yet nearly two years to run, and respondent insisting upon his right to interest up to the maturity of the obligation, he finally offering, however, to accept the interest for about half of that period. This proposal being in turn rejected, the public agency brought suit to condemn respondent's mortgage interest in the part of the land required for the improvement. On the trial of that action it was determined that the land to be taken amounted to two-thirds of the entire body of real property, subject to the mortgage, and the condemnor was required to pay to respondent two-thirds of the principal of the mortgage debt, or $20,000, with interest on that amount to the date of the taking, and the payment was made. Before the date upon which the mortgage was to fall due by lapse of time, and also before the trial of the condemnation suit, appellant defaulted in a payment of interest when it became due. The mortgage contained a provision to the effect that the entire principal and interest should become due upon such a default, at the option of the holder of the note secured by it, and respondent elected to, and did thereupon, commence this action, demanding decree of foreclosure upon all of the land described in the obligation and demanding judgment for the entire mortgage debt. The decree in the condemnation suit had been rendered and had become final before decree in the present suit, and the condemnor had paid to respondent the sum of $20,000 and interest as above stated. The foreclosure decree went only against the land not embraced within the condemnation proceeding, and directed sale of that part of the land for the purpose of paying the $10,000 principal remaining unpaid, with interest.

Appellant's first point is that the trial court failed to find upon the issue presented by the first separate defense of the answer.

This defense alleges the pendency of the condemnation suit; that respondent had set up his mortgage in his answer filed in that suit; that he had therein prayed judgment for $30,000, with interest to the maturity of the obligation; that appellant had therein filed a complaint in intervention alleging that prior to the appearance of appellant in the condemnation suit respondent had repeatedly offered to pay him the principal of the mortgage with accrued interest and that the same offer was repeated in the complaint in intervention, but had uniformly been refused; that the condemnation suit was partially heard and undetermined and "is a bar to the prosecution of this action."

[1, 2] While the trial court did not in the present suit refer in its findings to the condemnation suit with the particularity which the allegations of the answer, when considerd in exact terms, required, it did find as follows:

> "That the award of this court in action B73318 constitutes an adjudication on the rights of the parties herein, as to that portion of property covered by the mortgage and included in the flood control district, taken by said proceeding No. B73318 of the files of this court. The plaintiff herein having failed to take any further proceedings looking towards a vacation, modification or reversal of the decree of condemnation and the time for appeal having expired, by accepting the award of this court in said proceeding, and in receiving moneys awarded thereby, the plaintiff has acquiesced in such adjudication and is now estopped in this suit to deny the force of the award in B73318; and the mortgage herein sought to be foreclosed having been by said former proceeding extinguished and cut off as to its validity and enforceability upon or against the property taken in said proceeding, plaintiff is not entitled to foreclose this mortgage as against any property included within said condemnation decree."

Although this finding does not state the title of the cause referred to as B73318, there can be no question as to what cause was contemplated by the finding when it is examined in connection with the allegations of the answer, for that pleading, after alleging the title of the condemnation suit, follows the allegation with a statement of the number, B73318, mentioned in the finding. It is true that the finding does not cover all the allegations of the first separate defense, but it need not have done so, for the reason that the unnoticed matters stated no defense. The allegations concerning the offers made to respondent and his refusal of them were immaterial. He was entitled to refuse them without affecting in the slightest degree his rights under the mortgage. If an offer had been made to pay interest to the maturity of the obligation, the situation might have been different, at least as to the right to recover attorney's fees and costs. The averment that the condemnation suit was a bar to the present suit was sufficiently found upon, for the trial court stated correctly the bearing that the pendency of the one had upon the other. The pendency of the condemnation suit possibly might have operated to abate the present action if an attempt had been made to try the latter first, but that attempt was not made. As found by the trial court in the finding set forth above, the judgment in the condemnation suit had been rendered and had become final before the trial of the present action. To say that the condemnation suit operated to bar the present action would be to say that respondent could not foreclose as to one-third of the mortgage debt, although no previous foreclosure suit had been commenced by him. The only possible effect of the condemnation suit, it having been tried before this action, was, first, to remove a part of the land from the scope of this suit, and, second, to operate as a basis for a showing that a part of the mortgage debt had been paid through the condemnation proceeding. The first of these points is covered by the finding which we have quoted. Disposition is made of the second, that concerning part payment, by a finding to which we shall presently refer. Part payment could not have been alleged at the time the answer was filed, for part payment had not then been made. It did follow later, however, through the culmination of the condemnation suit, and it was shown by the evidence in this suit. Upon that question the court found—and this is the finding we mentioned a moment ago—that $20,000 had been paid on the principal, together with interest to a certain date, and that there remained due $10,000 principal, with interest from a certain date. We conclude that the court did not fail to find upon the issue presented by the first separate defense of the answer.

It is also contended by appellant that the trial court failed to find upon the issues presented by the second separate defense of the answer. This contention is answered by our observations upon the question just now under consideration, for the second defense is but an amplification and expansion of the matters included in the first defense. We may add, however, that counsel's argument of the present question, like that addressed to the point last considered by us, is confused and distorted by references to the alleged fact that appellant offered, immediately before the commencement of the condemnation suit, and in its pleading in that action, to pay off the mortgage in full. No such offer was made at any time. Appellant never offered more than the principal, and the interest accrued to a time nearly two years earlier than the maturity of the obligation.

[3] Another point made by appellant is that it was not in default in a payment of interest when this action was commenced. This point is not presented on the ground

that an installment of interest was not actually unpaid at the time, but on the ground that the condemnation suit was pending when the installment fell due, and that by his answer in that suit respondent had demanded the payment of the entire mortgage debt as compensation for the taking of his mortgage interest in the land sought to be condemned. These circumstances, according to appellant, relieved it of the necessity of making the payment in time, and relieved it of the possibility of being in default for a failure to make it. We are not impressed by the question appellant presents, and no authority is cited which supports the position taken. Appellant had contracted to pay installments of interest at stated times, and had agreed what the consequences should be of a failure to pay. We are unable to perceive that this contract was abrogated by the intervention of a third party through the institution of the condemnation suit. Suppose that suit had been dismissed, or that for some reason it had resulted unfavorably to the desires of the condemnor. Under such circumstances, could appellant have justified its failure to pay the interest? It surely could not, and, as it could not have done so upon such a hypothesis, it seems that the entire question is answered, for, if that argument be correct, it could not justify a nonpayment because of the mere pendency of the suit. It is to be observed, also, in considering this point, that the condemnor never intended to take all of the land covered by the mortgage. The complaint in the condemnation suit clearly showed that fact. It was not determined until the condemnation decree just what proportion of the entire body of land was to be taken, and it was probably owing to the uncertainty existing on that question that respondent prayed for the payment of the entire mortgage debt as compensation for the taking of his mortgage interest. Not knowing what proportion to ask for, out of an abundance of caution he asked for all. But, at any rate, these questions were between the condemnor and respondent, at least until condemnation decree and the payment of the award, and they did not nullify or postpone appellant's agreement to pay interest in time.

The trial court found that respondent had expended $17.50 for a title search preparatory to commencing suit and rendered judgment in his favor for that amount. Appellant contends that the finding is not supported by the evidence, and the point is good. No evidence was introduced upon the subject.

A point is made by appellant concerning the allowance of attorney's fees to respondent, but, after what we have said above as to the nature of appellant's offers to pay to respondent principal and accrued interest only, nothing further need be said as to the point.

The judgment is modified by striking therefrom the allowance of $17.50 for searching title and by deducting that sum from the total judgment for $10,693.02, and as so modified it is affirmed. Respondent to have judgment for his costs on the appeal.

We concur: FINLAYSON, P. J.; CRAIG, J.

56 Cal. App. 164

VAN ZANDT v. SWEET. (Civ. 3569.)

(District Court of Appeal, Second District, Division 2, California. Jan. 13, 1922.)

1. Master and servant 🔑354—Right of action against wrongdoer not defeated by compensation.

An injured employee has a right of action under Workmen's Compensation Law, § 26, as amended in 1919, against a third party causing injury, though he has received compensation from his employer's insurance carrier.

2. Master and servant 🔑398—Notice to compensation insurer not condition precedent to employee's action against wrongdoer.

The notice of action to the employer or to his insurance carrier required of the employee by Workmen's Compensation Law, § 26, is not an essential ingredient of the employee's cause of action against a negligent third person, nor a condition precedent to the employee's right to bring the action, and though failure to give notice to the employer or to his insurance carrier, subrogated to the employer's rights by section 30, subd. "f," may be ground for continuance, it is not ground for nonsuit or a verdict for defendant, if a nonsuit is the proper procedure.

3. Costs 🔑260(4)—Appeal held vexatious justifying damages.

An appeal by defendant, wrongdoer, attacking injured employee's judgment on ground of want of notice of action to employer's insurance carrier, required of employee by Workmen's Compensation Law, § 26, *held* vexatious, justifying damages on affirmance on record failing to show want of notice.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by John I. Van Zandt against E. W. Sweet. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Chas. J. Kelly, of Los Angeles, D. A. Stuart, I. B. Benjamin, A. L. Abrahams, and P. B. D'Orr, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action for damages for personal injuries sustained by plaintiff in a collision with an automobile driven by defendant. The jury returned a verdict in plaintiff's favor, and from a judgment entered thereon the defendant appeals.

At the time of the accident, August 28, 1919, plaintiff was in the service of an employer who had been insured by the state compensation insurance fund against liability for compensation to an employee. During plaintiff's cross-examination the fact was brought out that he had made application to the Industrial Accident Commission for compensation under the Workmen's Compensation Law (St. 1917, p. 831), and that he had been paid such compensation by his employer's insurance carrier, the state compensation insurance fund. Thereupon defendant moved the court for a nonsuit on the ground that plaintiff had received compensation under the Workmen's Compensation Law. The motion was denied. Later, and after both parties had introduced their evidence and rested, defendant requested the court to peremptorily instruct the jury to return a verdict for defendant. The requested instruction was denied. This request for a peremptory instruction was made for the same reason that the motion for a nonsuit was made, namely, for the reason that, on his own showing plaintiff had received compensation under the Workmen's Compensation Law. The sole point made on this appeal is that the trial court erred in denying defendant's motion for a nonsuit, and likewise in denying his request for such peremptory instruction.

[1] Without doubt, plaintiff, under the Workmen's Compensation Law in force at the time of the accident—the act of 1917, as amended by the act of 1919 (St. 1919, p. 910)—had a right of action against this defendant for damages arising out of his injuries, notwithstanding the receipt of compensation from his employer's insurance carrier. Such right of action is expressly recognized by section 26 of the act, which, so far as it is applicable to this particular point, reads:

> "The claim of an employee for compensation [under the Workmen's Compensation Law] shall not affect his right of action for damages arising out of injury * * * against any person other than the employer."

Such right of action against a third party causing the injury was possessed by the injured employee under the original Workmen's Compensation Law, the act of 1913 (St. 1913, p. 279). Stackpole v. Pacific Gas & Electric Co., 181 Cal. 700, 186 Pac. 354; Bassot v. United Railroads of San Francisco, 39 Cal. App. 60, 177 Pac. 884; Hall v. Southern Pacific Co., 40 Cal. App. 39, 180 Pac. 20. If such right existed under the act of 1913, there is much stronger reason for holding that it exists under the present act, the act in force when this accident occurred; for, as we have shown, the right is expressly recognized by the latter act.

[2] The gravamen of appellant's argument in this court appears to be grounded upon the assumption that plaintiff did not comply with that provision of the act which requires the employee to give notice of the action to his employer or to the latter's insurance carrier. Section 26 of the present act, after stating that the claim of an employee for compensation under the act shall not affect his right of action for damages against a person other than his employer, and after providing that if the employer has paid or become obligated to pay compensation under the act he likewise may bring an action against such third person to recover the damages, proceeds as follows:

> "If either such employee or such employer shall bring such action against such third person, he shall forthwith notify the other in writing, by personal service or registered mail, of such fact and of the name of the court in which such suit is brought, filing proof thereof in such action, and, if the action be brought by either, the other may, at any time before trial on the facts, join as party plaintiff or must consolidate his action, if brought independently."

The act also provides (section 30, subd. "f") that if an insurance carrier shall have paid any compensation for which the employer is liable, such insurance carrier shall be subrogated to all the rights of the employer, and may enforce any such rights in its own name.

In no part of the record to which our attention has been called by the briefs on file does it appear that plaintiff, the employee, failed to give to his employer, or to the latter's insurance carrier, the notice required of plaintiff by the above-quoted provision of the act. We do not concede that a failure so to notify the employer or his insurance carrier would constitute a ground for a nonsuit or justify a peremptory instruction to the jury to return a verdict for the defendant. On the contrary, it would seem that, while a failure to give the prescribed notice would be ground for a continuance of the case until such time as the notice should be given, a nonsuit or a verdict for the defendant would not be warranted by such failure to notify the employer or his insurance carrier. The notice to the employer, or to his insurance carrier, is not an essential ingredient of the employee's cause of action against the negligent third party. It is not something to be done as a condition precedent to the employee's right to bring the action. However, without deciding whether a nonsuit or a peremptory instruction to find for the defendant is the proper procedure where the plaintiff has failed to give the prescribed notice, suffice it to say that, since every intendment is in favor of the regularity of the proceedings in the court below, we must assume, in the absence of some affirmative showing to the contrary, that plaintiff did notify his employer's insurance carrier, in writing, by personal service or by registered mail, of the fact that he had brought the action in the superior court for Los Angeles county.

[3] The appeal is so manifestly destitute of merit that we are unable to perceive any reason for it, other than a desire for vexation and delay. It is therefore a proper case for the imposition of a penalty.

The judgment is affirmed, and it is ordered that respondent recover of appellant the sum of $100 as damages on account of the appeal and his costs.

We concur: WORKS, J.; CRAIG, J.

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55 Cal. App. 709

HUDSON v. UKIAH WATER & IMPROVEMENT CO. (Civ. 4000.)

(District Court of Appeal, First District, Division 1, California. Dec. 19, 1921. Rehearing Denied Jan. 18, 1922. Hearing Denied by Supreme Court Feb. 17, 1922.)

1. Waters and water courses 🔑188(5)—Company taking over property of water company held burdened with easement of water right.

Where president and stockholders of a water company became owners of the entire capital stock of another water company, and the waterworks and franchises were conveyed to such president, and, under color of the equitable ownership by the stockholders and the conveyance to the president the company took possession of the waterworks and franchises and proceeded to act with regard to them as if it had acquired the full legal title thereto, it took the franchises, waterworks, and mains burdened with an easement of a water right by a landowner as long as it continued to enjoy the water supply of the old company, though it abandoned the greater part of the reservoirs, mains, and pipes and obtained the greater part of its water from other sources.

2. Waters and water courses 🔑182—Easement of water right created before 1879 held valid.

Where a landowner was conveyed an easement and right to use all the water that would run through a half-inch pipe prior to the adoption of the Constitution of 1879, and his successor belonged to one of the class having the right to be supplied with water and had no preference in the matter of quantity, a contention that the conveyance to the original landowner was void for the reason that it purported to convey or establish a preferential right to the use of water appropriated to public use was without merit.

3. Appeal and error 🔑1195(1)—Decision on appeal law of case on retrial.

A decision on appeal is the law of the case on retrial.

4. Judgment 🔑505—Adjudication of preferential water right held not subject to collateral attack.

Where court had jurisdiction of the parties and of the subject-matter, and the judgment roll discloses no irregularity or departure in the pursuit of that jurisdiction, its judgment, giving a preferential right to use of water appropriated to public use may have been erroneous, but was not void and subject to collateral attack.

5. Evidence 🔑318(1, 8)—Pleading and judgment held not inadmissible as hearsay.

Where a water company was bound by a judgment against its predecessor and privy in estate, such judgment and undenied allegations of complaint in the action wherein it was rendered were admissible against it, as against objection that they were hearsay.

On Hearing in Supreme Court.

6. Waters and water courses 🔑197—Judgment concerning easement in water should fix the amount to which landowner was entitled.

Where under an old conveyance from a water company a landowner was entitled to the water which would flow through a half-inch pipe for use on a certain tract of land, and sued to enjoin a new and larger water company, taking over the property of the old company and obtaining water from additional sources, from interfering with the water right. the court should determine the amount of water to which the landowner was entitled; it appearing that the landowner was using the water for lands other than that entitled to it under the conveyance.

7. Waters and water courses 🔑197—Judgment giving easement to use water sufficient for domestic uses held indefinite.

A judgment adjudicating to landowner water sufficient "for domestic use in and about the dwelling house and other buildings on the premises" was indefinite and uncertain, as the court should have ascertained and found the quantity of water that would be sufficient for that purpose, and stated that amount in the judgment as the maximum to which the party was entitled.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Grace Hudson against the Ukiah Water & Improvement Company. Judgment for plaintiff, and defendant appeals. Reversed in the District Court of Appeal, and hearing denied in Supreme Court.

Robert Duncan, of San Francisco, for appellant.

M. H. Iversen, of Ukiah, for respondent.

KERRIGAN, J. This action was brought to enjoin the defendant from interfering with an easement in the nature of a right to take water from the water mains of the defendant by attaching thereto a half-inch pipe and conducting it to the real property described in the complaint, consisting of two separate lots of land. There are two counts in the complaint, the first of which describes said water right as being appurtenant to said two lots of land, and the second of which describes it as real property belonging to the plaintiff in which the defendant claims an adverse right asserted to be unjust and without right. The judgment of the court awarded to plaintiff and declared to be appurtenant to said two lots of land "so much of the water of the defendant corporation as may now or hereafter at any time flow in or through their aqueducts, reservoirs, or pipes as may or can be conveyed in, through, or by a pipe or aqueduct one-half inch in diameter in the amount of 7,500 gallons per day of 24 hours from the 1st day of May to the 1st day of November of each year, and in addition thereto a sufficient quantity for domestic use in and about the dwelling house and other buildings on the premises set forth in paragraph 4 of the findings herein," with the right to attach such a pipe to its mains. The premises described in said paragraph 4 consisted of one of the lots to which said water right was declared to be appurtenant, and is referred to in the proceedings as the Lamar or Fox property, the other of said lots being known as the Bennett property. The judgment also enjoined the defendant from interfering with plaintiff's enjoyment of said water right. Defendant appeals from the judgment.

The facts of the case, which are practically undisputed—the controversy between the parties being as to the legal consequences of those facts and the admissibility of the evidence admitted in proof of them—may be summarized as follows: On and prior to October 2, 1871, George W. Gibson, Richard Harrison, and J. B. Lamar were copartners doing business under the name of Ukiah Water Company. They owned and operated a small water system at and near Ukiah, Cal., taking their water from Gibson creek at a point about one mile west of the city. On said date the copartnership, in consideration of the payment of $500, sold and conveyed to J. B. Lamar, one of said copartners, so much of their water as could be conveyed in a half-inch pipe, with the right to attach to their water mains a pipe of the size designated, the instrument of conveyance giving to Lamar the right "to use said water herein granted for any and all purposes for which the party of the second part may desire, provided, however, that the right to use said water for purposes of irrigation shall be and is hereby limited and restricted to water that may be used for sprinkling by means of a hose, or collected in tank or reservoir, and provided also the said party shall be and he is hereby restricted in the use of such water to the place of residence and shall not use it for purposes of speculation." Lamar at this time was the owner of the lot of land, consisting of about four acres, hereinbefore referred to as the Lamar or Fox property, and resided thereon. He attached to the mains of his grantors a half-inch pipe, and conducted water to said lot and used it thereon.

In January, 1872, the business and property of the copartnership were transferred to a corporation named Ukiah Water Company, organized by the members of such copartnership for the purpose of supplying the inhabitants of Ukiah and its vicinity with water for domestic purposes and irrigation; and this corporation in July of that year conveyed to Lamar a water right in the same terms as Lamar's previous conveyance from the copartnership, the only difference being that by this latter conveyance the use of the water was not restricted to his place of residence. This instrument recited that it was made in consideration of the payment of $500, but we think it evident that it was made merely in confirmation of the water right already conveyed to Lamar, and for the purpose of removing the restriction as to the place of use of the water.

In 1879 one E. T. Farmer had succeeded to the ownership of the Lamar lot with its appurtenances, and in virtue thereof claimed this water right as an appurtenance to said lot. His right was disputed by the Ukiah Water Company, and Farmer brought suit against it for an injunction to prevent interference with the water right so claimed, and in his verified complaint in said action set up the foregoing facts. The defendant answered, but in said answer made no denial of said allegations, contenting itself with denying that the plaintiff was the owner of the water right, and claimed that it had itself acquired such right by purchase in good faith and for a valuable consideration. A trial was had, and the defendant obtained judgment, but upon appeal the judgment was reversed, and the cause remanded for a new trial. Thereupon the defendant through its attorneys stipulated that the plaintiff might take judgment as prayed in his complaint, and on December 6, 1880, such judgment was accordingly entered, in which Farmer was declared to be the owner of said water right, describing it in the terms of the second of the above-mentioned conveyances, and perpetually enjoining the defendant in that action from interfering therewith.

Thereafter, on July 15, 1892, the defendant in the present action—the Ukiah Water & Improvement Company—was organized under the laws of this state for the purpose of supplying water for domestic purposes and for irrigation to the inhabitants of Ukiah and vicinity. It established its water system, laid its mains, and for several years conducted its business in competition with the Ukiah Water Company. In or about December, 1895, certain stockholders of the defendant acquired the whole of the capital stock of the Ukiah Water Company, and one of them, J. H. Brush (who was at that time the president of this defendant) received a conveyance from J. A. Cooper and J. F. Redemeyer, purporting to act as the agents of the Ukiah Water Company, of certain land and also "all Ukiah Waterworks and all pipes, rights of way, easments, franchises, reservoirs and personal property of every kind and nature pertaining thereto." These stockholders, being thus the equitable though not the legal owners of the Ukiah Water Company's property, and being in complete control of that corporation, permitted the defendant in this action to take possession of its property and franchises. The defendant, who theretofore had procured part of its water supply from Gibson creek—the sole source of supply of the Ukiah Water Company—now took the whole of the water of that stream. It, however, constituted but a small, if not insignificant, part of the defendant's source of supply; and having already a system of reservoirs and mains of greater capacity than those of its now moribund rival, it set its workmen to the task of removing from the streets the latter's mains and pipes. These were in a dilapidated and worn-out condition, and a small part only capable of further use, and were availed of only to an insignificant extent. The supply pipe of the plaintiff's predecessor was now attached to the system of the defendant, who for a period of 20 years permitted said attachment to remain with only spasmodic and feeble objections, and without collecting, though occasionally demanding, compensation for the water thus supplied to the plaintiff and her predecessors. In the year 1913 the plaintiff, who at that time had become the owner of the Lamar lot and was also the owner of a lot adjoining known as the Bennett property, extended her supply pipe from the Lamar to the Bennett lot, and used on the latter the water conducted thereby. In June, 1914, the defendant, denying the validity of the plaintiff's claim to receive water from its system without payment therefor, cut off her supply; such action resulting in the bringing of the present suit. The suit came to trial, resulting in a judgment in favor of the plaintiff, which, however, upon appeal was reversed by the Supreme Court. Hudson v. Ukiah Water & Improvement Co., 177 Cal. 498, 171 Pac. 93.

[1] One of the main contentions of the appellant, and which goes to the root of the controversy between the parties, is that the finding of the trial court that the defendant acquired the property and franchises of the Ukiah Water Company is not supported by the evidence. It is true that the facts and circumstances above set forth show no transfer of the legal title in said company's property and franchises to the defendant; but, in our opinion, they are amply sufficient to show that under color of the equitable ownership by certain of its own stockholders of the entire capital stock of the Ukiah Water Company, and of the conveyance to one of them (he being also the president of the defendant) of the waterworks and franchises of that concern, it took possession of them and proceeded to act with regard to them as if it had acquired the full legal title thereto. In doing so it could only take what that company owned; and in thus voluntarily entering into the possession of the franchises, waterworks, and mains of the Ukiah Water Company it took them burdened with the easement of the water right of the plaintiff's predecessor. That it abandoned the greater part of the reservoirs, mains, and pipes of its old rival would not affect the plaintiff's right, since the defendant took possession and continued to enjoy the water supply of the old company. So long as it takes water from Gibson creek by virtue of the rights acquired, however irregularly, from the Ukiah Water Company and turns it into its mains, this water so running in its mains is burdened with the servitude fastened upon it at the time of such acquisition.

[2, 3] It is next urged by the appellant that the conveyances to J. B. Lamar, first by the copartnership and then by the Ukiah Water Company, and also the judgment in the suit of Farmer against that company (56 Cal. 11), are void for the alleged reason that they purported to convey or to establish a preferential right to the use of water appropriated to public use.

There are several reasons why we think this contention unsound: For example, the rights of the plaintiff were initiated prior to the adoption of the Constitution of 1879 declaring the appropriation of water for purposes of sale and distribution to be a public use; the plaintiff is one of the class having the right to be supplied with water by the defendant; she has no preference in the matter of quantity, and any deficiency in the supply pipes of the defendant would affect her supply in the same manner as it would that of all other consumers; and in the matter of payment there is nothing in the record to show that the advance payment of $500 is contrary to any rule as to rates of compensation established by any public governing body; and as to the adequacy of such compensation this sum would produce at the legal rate of interest $35 annually—approximately $3 a month—a not inconsiderable water rate to be paid by the inhabitants of a small community. We are relieved, however, from the necessity of determining this point, for the reason that this same contention was presented in the former appeal (Hudson v. Ukiah Water & Imp. Co., supra), and we may appropriately quote from the decision of the Supreme Court in disposing of it. It was there said:

"Appellant claims that the conveyance, if any, to the plaintiff or her predecessors gives her such a preferential right in waters devoted to public use as is void under the law, citing such cases as Leavitt v. Lassen Irr. Co., supra; People v. Kerber, 152 Cal. 732, 125 Am. St. Rep. 93, 93 Pac. 878; City of South Pasadena v. Pasadena Water Co., 152 Cal. 579, 93 Pac. 490; Byington v. Sacramento Valley, etc., Co., 170 Cal. 124, 148 Pac. 791, arising under article 11, section 19, of the Constitution, and Price v. Riverside Land & Irr. Co., 56 Cal. 432, under the law and the Constitution previous to the Constitution of 1879. But this principle does not apply in this case except with reference to the statute of limitations, which will be hereafter discussed, for, as was held in San Francisco v. Itsell, 80 Cal. 57, 22 Pac. 74, even though there is no power in the first instance to make such conveyance, a judgment establishing a private right, although erroneous in law, is nevertheless binding upon the company and its successors, so that in so far as the defendant here is bound by the decree in Farmer v. Ukiah Water Co., it is, to that extent, barred from claiming that the right therein confirmed is violative of the law against creating preferential rights in water appropriated to public use."

If we are correct in our conclusion that the defendant in so far as the water right under consideration is concerned is to be considered the legal successor in interest of the Ukiah Water Company, the rule thus laid down by the Supreme Court must be regarded as the law of the case, which the trial court was bound to follow and apply.

It is urged by the appellant that the judgment in the case of Farmer v. Ukiah Water Company was not only erroneous but void. The only ground upon which this contention is based is the alleged preferential character of the water right decreed by it.

[4] The court had jurisdiction of the parties and of the subject-matter, and the judgment roll (which is included in the bill of exceptions) discloses no irregularity or departure in the pursuit of that jurisdiction. It was therefore not void, and, if merely erroneous, it is not subject to this collateral attack. Hudson v. Ukiah Water & Improvement Co., supra.

[5] The admission in evidence of the judgment roll in the case of Farmer v. Ukiah Water Co. was objected to as incompetent, immaterial, irrelevant and hearsay, and the overruling of these objections by the trial court is among the assignments of error urged here. The defendant being, as we have seen, bound by it, neither the adjudication itself nor the undenied allegations of the complaint therein were hearsay. The latter were admissions against interest of the plaintiff's predecessor, privy in estate, and therefore admissible in evidence against it. Jones on Ev., §§ 272, 273.

This case upon the former appeal was reversed, and in its opinion the court held that the plaintiff's water right was one appurtenant to the Fox property, and did not extend to the Bennett lot; that the quantity of water that might be taken by the plaintiff's half-inch pipe was controlled by the conditions existing in the water system at the time of the grant of the right to the plaintiff's predecessor, by the source from which the water was obtained prior to the acquisition by the defendant of the water system of the Ukiah Water Company namely, Gibson creek, and also, as to the quantity to be used for irrigation, was restricted to "water that may be used in sprinkling by means of a hose," and which had been taken and applied to a beneficial use upon the land to which the right was appurtenant during the time when the Ukiah Water Company was furnishing the water; and finally, that the plaintiff's right could not be extended by prescription.

The trial court in its present judgment seems not to have taken into account these limitations. It has extended the water right to the Bennett lot, apparently by the application of the statute of limitations; it has fixed a maximum amount that may be taken for irrigation which, according to the finding upon that subject, is based upon water used on both lots; nor has it restricted the plaintiff's right by the other conditions above enumerated. For these reasons the judgment is erroneous and must be reversed.

The judgment decrees the plaintiff to be entitled to take from the water system of the defendant 7,500 gallons per day from the 1st day of May to the 1st day of November of each year, "and in addition thereto a sufficient quantity for domestic use in and about the dwelling house and other buildings on the premises," etc.; and it is urged by the appellant that as to this provision for water for domestic use the judgment is too indefinite. We think the point not well taken. The main burden upon defendant is the water that may be taken for irrigation, the amount of which is limited specifically. In addition water "for domestic use in and about the dwelling house and other buildings" may be taken. While the specific amount of water for this second purpose is not fixed in gallons, it is, we think, made sufficiently definite by the extremely limited use to which it may be applied.

For the reasons given, the judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [6, 7] The petition for a rehearing of this cause in this court is denied. For the purpose of a new trial we think it is necessary to say in addition to what is said by the District Court of Appeal that, if upon such new trial the court shall find for the plaintiff, it would be necessary to determine also the amount of water to which the plaintiff is entitled, as was done in the judgment reversed by the District Court of Appeal with respect to the water used for irrigation. With respect "to the sufficient quantity for domestic use in and about the dwelling house and other buildings on the premises" the judgment heretofore rendered was uncertain. The court should have ascertained and found the quantity of water that would be sufficient for that purpose in the particular case, and stated that amount in the judgment as the maximum to which the plaintiff was entitled for that purpose, and upon any new judgment therefor it should be so stated.

SHAW, C. J., RICHARDS, Justice pro tem., SHURTLEFF, J., WILBUR, J., LAWLOR, J., WASTE, J., and SLOANE, J., concur.

(56 Cal. App. 244)

FUGAZI v. KELLY et al. (Civ. 411.)

(District Court of Appeal, First District, Division 2, California. Jan. 20, 1922.)

Appeal and error 🔑**714(1)—Erroneous minute entry of amount of judgment held not to require reversal.**

A minute entry by the clerk of the court, reciting the amount of the judgment as only one-tenth of the amount for which it was rendered, which is no part of the judgment roll under Code Civ. Proc. § 670, does not require reversal of the judgment for the full amount, where the appeal must be deemed to be one on the judgment roll alone, because no bill of exceptions was presented.

Appeal from Superior Court, City and County of San Francisco; H. M. Owens, Judge.

Action by the Banca Popolare Fugazi against John F. Kelly, Joseph Slye, and others to foreclose a mortgage. Judgment for the plaintiff, and defendant Slye appeals. Affirmed.

Joseph Slye, of San Francisco, in pro. per. Harding & Monroe and Robert H. Borland, all of San Francisco, for respondent.

NOURSE, J. Defendant Slye appeals from a judgment foreclosing a mortgage securing payment of a note for $25,000. The complaint asked for judgment for $25,000, with accrued interest, counsel fees and costs. The clerk of the court after trial made an entry in his minutes, reciting that judgment had been ordered in the sum of $3,107.37 with counsel fees and costs. A few days thereafter findings of fact and conclusions of law were filed, with a decree awarding judgment in the sum of $31,447.24, with counsel fees and costs. Appellant insists that the trial court was bound by the minute entry made by the clerk.

No bill of exceptions is presented, so the appeal must be deemed to be one on the judgment roll alone. The minute entry of judgment is no part of the judgment roll. Section 670, Code Civ. Proc. In examining the judgment roll we find no error.

The appeal is without merit, as the amount noted in the entry of the clerk was manifestly a mere clerical error.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(56 Cal. App. 192)

BENNING v. NEVIS et al. (Civ. 2388.)

(District Court of Appeal, Third District, California. Jan. 13, 1922. Rehearing Denied Feb. 11, 1922. Hearing Denied by Supreme Court March 13, 1922.)

1. Evidence 🔑**82—In absence of contrary showing presumption arises that notice of final settlement was given.**

In a suit against the distributees of an estate and the administrator for failure to notify plaintiff, who had a claim against the estate of the date of final settlement, in the absence of any showing to the contrary, it is presumed that notice was given as required by statute.

2. Executors and administrators 🔑**471—Administrator has no legal duty to give notice of final settlement other than required by law.**

One who has a claim against an estate is charged with constructive notice of the time set for hearing the final account and petition for distribution as required by statute, and no legal duty rests upon an administrator to give any other notice.

3. Executors and administrators 🔑**513(11)—Claimant suing administrator after final settlement must plead and prove extrinsic fraud.**

In a suit by a claimant against distributees and an administrator of an estate, brought after order settling the final account and the decree of distribution became final, extrinsic fraud must be alleged and proved.

4. Executors and administrators 🔑**513(11)—Failure of administrator to give creditor of estate special notice of final settlement according to agreement is not "extrinsic fraud."**

Where an administrator and his attorney agreed to give plaintiff, a claimant, special notice of final settlement, failure to keep the promise does not make it fraudulent, within Civ. Code, § 1572, unless the promise was made without intention to perform, and hence such failure does not give claimant an action against the administrator and distributees, based on "extrinsic fraud," such fraud being actual fraud, such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Extrinsic or Collateral Fraud.]

5. Executors and administrators ⟹513(11)—Claimant knowing of death of administrator could not rely on personal promises made by him and his attorney to give notice of final settlement.

Where plaintiff, who had a claim against an estate, was promised by N., the administrator, and his attorney that they would give her special notice of the final settlement, her knowledge of the death of N. and the presumed knowledge of the termination of the authority of the attorney prevents her relying on their promises in a suit against a subsequent administrator and distributees for her claim on the ground of fraud in not being notified of the final settlement in time to present her claim.

6. Attorney and client ⟹76(2)—Death of client terminates authority.

The death of a party terminates the authority of his attorney.

7. Executors and administrators ⟹513(11)—Failure of administrator to include claim of party in final account held not extrinsic fraud.

Failure by an administrator to include plaintiff's claim in a final account, and representation to the court that all claims had been paid, was not such extrinsic fraud as to afford ground for an action against a subsequent administrator and the distributees to impress a lien on the property distributed.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Anna Benning against Emma Nevis and others. From judgment for plaintiff, defendants appeal. Reversed.

Faulkner & Faulkner, of San Francisco, for appellants.

Thomas B. Leeper, of Sacramento, for respondent.

FINCH, P. J. Plaintiff recovered judgment for the balance due upon her claim allowed against the estate of the above-named decedent. The judgment declared the amount of such claim to be a lien upon the real property of the estate which had been distributed to the heirs, that the heirs held such property "in trust for the purpose of paying the amount" found due the plaintiff, and ordered the sheriff to sell such property to satisfy the judgment.

Plaintiff's claim was duly allowed for $992, and December 26, 1908, she was paid all but $331.13 thereof. The complaint alleges and the court found that at the time of such payment Joseph M. Nevis, the then administrator of the estate, and A. C. Hinkson, his attorney, told plaintiff that the estate could not be settled until the youngest heir became of age in September, 1916, and that the balance of her claim would be paid at the time of such settlement and would be included in the final account and an order of court procured for the payment thereof; that plaintiff agreed to await payment until the time stated and informed them "that she desired to go to Napa * * * for her future residence," and that they told her "that they would write to said plaintiff should anything transpire; that no such notice or letter was ever written"; that the plaintiff relied on said promises and on the promise of the defendant "Emma Nevis to inform plaintiff of the time said estate would be settled, and by reason of said reliance on said promises she did not watch said estate to keep herself informed as to the time the same was settled and distributed, and was misled and prevented from having any knowledge of the purported final account or decree of distribution in said estate, and was prevented from objection to the settlement or distribution of said estate." There is no allegation or finding, however, that Emma Nevis had made any such promise.

It was further alleged and found that the administrator, Joseph M. Nevis, died June 22, 1909, and that the plaintiff "read an account" of his death; that Joseph Miller was appointed administrator to succeed said Nevis and that A. C. Hinkson acted as attorney for Miller; "that thereafter and before the filing of the final account * * * said A. C. Hinkson died, and C. A. Elliott was retained as attorney for Joseph Miller, said administrator;" that on or about October 15, 1913, Miller as such administrator filed his final account and petition for distribution; that neither the final account nor any other account included plaintiff's claim, and that the balance due thereon has not been paid; that said administrator "carelessly and negligently, and in fraud of plaintiff's rights therein, failed to exhibit the balance due on plaintiff's claim to the court * * * in said final account or in any account filed in said estate, and did therein and thereby represent to the court that said account was correct, and that all claims in said estate had been paid, and * * * proceeded to have settled and distributed said estate, without calling the court's attention to said claim"; that at all times mentioned the plaintiff was a resident of Napa and had no knowledge of the filing of the final account and petition for distribution and was not present at the hearing thereof, and that she "learned, for the first time, during the month of July, 1916, that said purported final account had been settled and allowed and that said estate had been distributed"; that said estate was distributed to the heirs; and that at the time this action was commenced, December 24, 1917, the legal title to the real property of the estate was in the appellants who were heirs of the deceased.

[1-3] In the absence of any showing or contention to the contrary, it must be presumed that notice of the time set for hearing the final account and petition for distribution was given as required by the statute. The plaintiff was charged with constructive knowledge thereof. Tynan v. Kerns, 119 Cal. 450, 51 Pac. 693. No legal duty rested upon the administrator to give any other notice. Monk v. Morgan, 192 Pac. 1042. It was his duty, of course, to report plaintiff's claim to the court and to pay the same. Since the order settling the final account and the decree of distribution became final before the action was commenced, it devolved upon the plaintiff to allege and prove extrinsic fraud.

[4-6] The respondent contends that failure to notify her personally of the time set for hearing the final account and petition for distribution as promised by the administrator Nevis and his attorney constituted extrinsic fraud; that "this amounted to keeping plaintiff away from court and preventing her from fully exhibiting her case." The giving of such personal notice was no part of the official duty of the administrator, and his promise must be regarded as personal rather than representative. Failure to keep a promise does not make the promise fraudulent unless it was made without intention to perform. Section 1572, Civ. Code. Extrinsic or collateral fraud "is defined to be 'actual fraud, such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the puropse of actually and knowingly defrauding him.' Patch v. Ward, L. R. 3 Ch. App. 207." Flood v. Templeton, 152 Cal. 155, 92 Pac. 81, 13 L. R. A. (N. S.) 579; Heller v. Dyerville Mfg. Co., 116 Cal. 133, 47 Pac. 1016; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565. There is no allegation or finding that the promise alleged was made other than in good faith. The plaintiff knew of the death of Nevis. She is presumed to know the law. The death of a party terminates the authority of his attorney. Estate of Turner, 139 Cal. 85, 72 Pac. 718; Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225. Knowing of the death of Nevis and the termination of his attorney's authority, the plaintiff could not thereafter reasonably rely on the personal promise made by them. Her alleged reliance on such promise cannot avail her in this action.

[7] The respondent contends that the failure of the administrator Joseph Miller to include plaintiff's claim in the final account and his representation to the court that all claims had been paid, thereby inducing the court to make an order that all claims had been paid, constituted "extrinsic fraud practiced upon the court and upon the plaintiff." The distinction between intrinsic and extrinsic fraud is well illustrated in the case of Monk v. Morgan, supra. The defendant Morgan, during the whole course of the administration of the estate therein involved, commencing with his petition for letters of administration, falsely represented to the court that he and his sister were the sole heirs of the decedent, Mrs. Cox, and by such false representations procured a decree of distribution to be made on that basis. It was held that such false representations constituted intrinsic fraud from the effect of which a court of equity could not give relief. Morgan, however, during the administration, had sent a remittance to one of the defrauded eastern heirs, under such circumstances as to induce such heirs to believe that Mrs. Cox was then living, with the fraudulent design of concealing the fact of her death and of preventing them from making timely appearance to contest his false representations and prove their interest in the estate. This was held to constitute extrinsic fraud. The alleged false representations made in the final account and petition for distribution in this case in no manner prevented the plaintiff from appearing at the hearing thereof and contesting the same, but related solely to the issues which were before the court for determination in that proceeding and to matters upon which the order and decree were obtained. Appellant's contention that such representations are intrinsic is sustained by a long line of decisions. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Eisenmayer v. Thompson (Cal. Sup.) 199 Pac. 798; People v. Mooney, 178 Cal. 525, 174 Pac. 325; Flood v. Templeton, 152 Cal. 155, 92 Pac. 78, 13 L. R. A. (N. S.) 579; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317; Mulcahey v. Dow, 131 Cal. 75, 63 Pac. 158; Pico v. Cohn, 91 Cal. 133, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Bradford v. Trapp, 193 Pac. 585; Morgan v. Asher, 193 Pac. 293; McGehee v. Curran (Cal. App.) 193 Pac. 284; Huffaker v. Gray, 38 Cal. App. 605, 177 Pac. 183; McGavin v. San Francisco P. O. A. Soc., 34 Cal. App. 171, 167 Pac. 182.

Appellant urges that the alleged cause of action is barred by the statute of limitations. The appeal is on the judgment roll alone, and it cannot be ascertained therefrom when the final account was settled or the decree of distribution made, and therefore it cannot be determined on this appeal whether the action is barred.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

56 Cal. App. 58

McLAIN v. LLEWELLYN IRON WORKS.
(Civ. 3580.)

(District Court of Appeal, Second District, Division 2, California. Jan. 6, 1922. Hearing Denied by Supreme Court March 6, 1922.)

1. Judgment 🔑153(1)—Clerk's entry of default fixes beginning of six months within which application may be made to set aside.

Clerk's entry of default, and not the entry of judgment by the court, fixes the beginning of the six months within which application must be made under Code Civ. Proc. § 473, to have the default set aside by reason of mistake, inadvertence, surprise, or neglect.

2. Courts 🔑91(1)—Decisions of Supreme Court followed by appellate court.

A decision of the Supreme Court that has never been overruled or modified must be followed by a District Court of Appeal.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Agnes McLain against the Llewellyn Iron Works. From an order denying defendant's motion to set aside default and judgment, it appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

L. E. Thompson and Goodwin & Morgrage, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from an order denying defendant's motion to set aside its default and the judgment entered thereon.

The action was brought to recover damages for loss suffered by reason of the death of plaintiff's son through defendant's alleged negligence. Defendant appeared in the action and filed a demurrer, which was overruled. In its order overruling the demurrer the court allowed defendant 10 days to answer. A copy of this order was duly served upon defendant's counsel on March 10, 1920. Defendant failing to answer within the 10 days allowed therefor, the clerk, on March 24, 1920, regularly entered defendant's default. On October 7, 1920, the court, after hearing evidence on the question of damages, ordered judgment for plaintiff in the sum of $15,000. This judgment, signed by the learned judge of the trial court, was regularly entered October 11, 1920. On October 14, 1920, which was 6 months and 27 days after the clerk had entered its default, defendant served and filed its notice of motion to set aside the default and the judgment entered thereon, upon the ground that the same had been taken by reason of accident and through defendant's inadvertence and excusable neglect. The order denying the application to set aside the default recites that it is based solely upon the ground that the court is without jurisdiction to grant the motion, the application having been made more than 6 months after the default was taken.

[1, 2] It is evident that the application to set aside the default came too late. It was made under section 473 of the Code of Civil Procedure, which provides that an application for relief from a judgment, order, or other proceeding, taken against the applicant through his mistake, inadvertence, surprise, or excusable neglect, must be made "within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken." In construing this Code provision, our Supreme Court, in the case of Title Insurance Co. v. King Land, etc., Co., 162 Cal. 44, 120 Pac. 1066, held that the clerk's entry of the default, and not the entry of the judgment by the court, fixes the beginning of the 6 months within which the application must be made. Appellant concedes that the Supreme Court has decided the point adversely to its contention, but undertakes to question the soundness of that court's reasoning. We see no merit in appellant's argument; and, moreover, a decision of the Supreme Court that has never been overruled or modified must be followed by this court.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

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56 Cal. App. 60

McLAIN v. LLEWELLYN IRON WORKS.
(Civ. 3731.)

(District Court of Appeal, Second District, Division 1, California. Jan. 6, 1922. Rehearing Denied Feb. 3, 1922. Hearing Denied by Supreme Court March 6, 1922.)

1. Master and servant 🔑352—Dependent cannot sue for damages for gross negligence under Compensation Act.

A dependent of a servant killed in the course of his employment cannot bring action for damages for gross negligence under Workmen's Compensation Act, § 12 (b), as amended by St. 1915, p. 1079.

2. Death 🔑11—Action not maintainable at common law.

The right to recover damages for wrongful death did not exist at common law.

3. Master and servant 🔑355—Compensation Act controls parent's recovery for death of child.

A mother has no right of action under Code Civ. Proc. § 376, for death of her minor son acting as a servant unless he was employed casually under the Workmen's Compensation Act or in the excepted classes of labor.

4. Death ⚷49(2)—Master and servant ⚷401—Requisites of surviving mother's complaint against employer within Compensation Act stated.

In an action by a mother under Code Civ. Proc. § 376, for death of minor child while acting as a servant, it was necessary for her to allege the death of or abandonment by her husband, and that the child was employed casually under the Workmen's Compensation Act or in the excepted classes of labor.

5. Pleading ⚷63—In statutory actions party must bring himself strictly within requirements.

In statutory actions the party suing must bring himself strictly within the statutory requirements necessary to confer the right, and this must appear in his complaint.

6. Appeal and error ⚷934(3)—Facts not alleged not presumed in support of default judgment.

Statutory requirements not alleged in complaint will not be presumed in support of a default judgment.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Agnes McLain against the Llewellyn Iron Works. Judgment for plaintiff, and defendant appeals. Reversed.

Haas & Dunnigan and J. J. Wilson, all of Los Angeles, for appellant.

Goodwin & Morgrage and L. E. Thompson, all of Los Angeles, for respondent.

PER CURIAM. The sole question involved herein is the sufficiency of the complaint, to which the court overruled a general demurrer interposed by defendant. No answer was filed within the time allowed therefor; whereupon judgment was entered in favor of plaintiff, from which defendant has appealed.

It appears from the amended complaint:

That at all the times mentioned therein the defendant was a corporation owning and operating certain machinery for the construction and manufacture of structural iron and divers other steel and iron products; that on August 24, 1917, plaintiff was the mother of Walter McLain, who was 17 years and 10 months old, and upon whom, by reason of her husband's desertion of his family, she was dependent for her living and support; that on said date "the said Walter McLain was in the employ of the defendant corporation at Torrance, and was then and there actually employed in performing certain work and in rendering certain services allotted to him under the instruction and supervision of a foreman and agent of the said defendant corporation, and while performing said services and work and incidental to his employment he occupied a position and place where he was directed to perform and was performing said services as an employee of the said defendant under an electric crane built of steel and iron, and of great weight, and operated in such a manner and over such a structure and in such an unsafe and dangerous manner and position and in such a negligent and reckless manner that, without any fault on the part of said plaintiff's son, said electric crane left the rails or support upon which it was operated and fell upon said plaintiff's son in such manner that the weight thereof crushed him and injured him, and in consequence of such injury so received by him the said plaintiff's son died;" "that plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that the defendant, its elective officers, its foreman, and all of its employees in charge of the operation of said electric crane, knew the same was placed in an unsafe and dangerous position and was then operated in such a manner that it was liable to leave the structure supporting the same, and was liable to fall therefrom to and upon the body and person of said plaintiff's son at the place where he was directed to perform such services; that said crane fell upon and killed the said son of plaintiff on August 24, 1917, because of the gross negligence of defendant and its officers and agents in the operation of said crane on said day"

—followed by an allegation that, in consequence of the death of her said son, plaintiff has lost his companionship and support, to her damage in the sum of $25,000.

The contention of appellant is that upon the facts alleged plaintiff's sole and exclusive right to recover compensation is under and pursuant to the provisions of Workmen's Compensation Act (St. 1913, p. 283) § 12, as amended in 1915 (Stats. 1915, p. 1079).

The portions of the act pertinent to a consideration of the case as argued by counsel are the following:

Section 12 of the act provides that—

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur.

"(1) Where, at the time of the injury, both the employer and employee are subject to the compensation provisions of this act.

"(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment as such.

"(3) Where the injury is proximately caused by the employment, either with or without negligence, and is not so caused by the intoxication or the willful misconduct of the injured employee.

"(b) Where such conditions of compensation exist, the right to recover such compensation pursuant to the provisions of this act, shall be the exclusive remedy against the employer for the injury or death, except that when the injury was caused by the employer's gross negligence or willful misconduct and such act or failure to act causing such injury was the personal act or failure to act on the part of the employer himself, or if the employer be a partnership on the part of one of the partners, or if a corporation, on the part of an elective officer or officers thereof, and such act or failure to act indicated a willful disregard of the life, limb, or bodily safety of employees, any such injured employee may, at his option, either claim compensation under this act or maintain an action at law for damages."

Section 13 provides that—

"The term 'employer' as used in sections twelve to thirty-five, inclusive, of this act shall be construed to mean," among others, any corporation which "has any person in service under any appointment or contract of hire, or apprenticeship, express or implied, oral or written, and the legal representatives of any deceased employer."

Section 14, as amended by St. 1915, p. 913, provides:

"The term 'employee' as used in sections twelve to thirty-five, inclusive of this act shall be construed to mean: every person in the service of an employer as defined by section thirteen hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, but excluding any person whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer, and also excluding any employee engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising or in household domestic service," and also excluding "any person holding an appointment as deputy clerk, deputy sheriff or deputy constable appointed for the convenience of such appointee and who receives no compensation from the county or municipal corporation or from the citizens thereof for services as such deputy."

[1] It is apparent that the pleader in preparing the complaint sought to allege facts bringing the case within the exception contained in subdivision (b) of section 12, which gives to an employee who survives his injuries the right, at his option, to sue for damages where the injury is the result of gross negligence on the part of a corporation, due to the act or omission of its elective officers, and where such act or failure to act indicates a willful disregard of the life and safety of its employee. The first briefs filed by counsel for the respective parties are devoted entirely to a discussion of the sufficiency of the complaint when measured by the language of the exception embodied in subdivision (b) so referred to. We may concede the allegations of the complaint bring the case within the exception which would have entitled the deceased, had he survived his injuries, to have maintained an action for damages. Plaintiff, however, while the dependent mother of deceased, was clearly not an injured employee, to whom alone is the option given to bring an action for damages in lieu of claiming compensation under the act which in express terms restricts the right of action to "such injured employee."

Assuming this to be true, counsel for respondent, in a second brief filed contends that such authority is found in section 376 of the Code of Civil Procedure, which provides:

"A father, or in case of his death or desertion of his family, the mother may maintain an action for the injury or death of a minor child, * * * when such injury or death is caused by the wrongful act or neglect of another"

—and insists that under this section the complaint states a cause of action in plaintiff.

His argument is that, conceding the complaint shows that the relation of employer and employee existed between defendant and deceased and a concurrence of the conditions of compensation as prescribed in subdivisions 1, 2, and 3 of section 12 of the Workmen's Compensation Act, and conceding that, where such conditions exist, the right to recover compensation pursuant to the provisions of the act shall, as declared in subdivision (b) thereof, be deemed the exclusive remedy against an employer for the death of an employee, and while section 14 provides that the term "employee" shall be construed to mean every person in the service of an employer as defined in section 13, nevertheless it in express terms excepts therefrom those persons whose employment is both casual and not in the ordinary course of the business of the employer and those injured in farm, dairy, and other specified callings; hence it is claimed that, since the contrary is not alleged, we must, in support of the judgment rendered by a court of general jurisdiction, indulge in the presumption that deceased was engaged in labor the nature of which excluded him from the operation of the provisions of the Compensation Act, citing Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888.

[2-5] The argument is ingenious, though not convincing. The right to recover in such cases did not exist at common law. Kramer v. Market St. R. R. Co., 25 Cal. 435. It is purely statutory, and, while counsel for respondent concedes that except for the statute plaintiff has no right to maintain the action, he insists the right is given by section 376, Code of Civil Procedure. This section, however, must be read and construed in the light of subsequent legislation embodied in the Workmen's Compensation Act, section 12 of which provides that recovery pursuant to the provisions of the act shall be the exclusive remedy against an employer for the death of an employee in those cases where the conditions of compensation specified therein exist. In our opinion, the allegations of the complaint are sufficient to show the concurrence of these conditions of compensation, namely, the existence of the relation of employer and employee; that at the time of the injury the deceased was performing service growing out of and incidental to the employ-

ment, and which was the proximate cause of the injury resulting in death. Dominguez v. Pendoia, 188 Pac. 1025. Hence plaintiff's right to recover is under and by virtue of the provisions of the act, which, save as to employees engaged in the excepted classes of labor, superseded the provisions of section 376, Code of Civil Procedure. Therefore the section in so far as applicable to the instant case, must be read as though it restricted the right of action for damages to those cases only in which the deceased employee was engaged casually or in the capacity of a dairyman, horticulturist, et cetera. Unless so engaged, plaintiff's remedy is clearly under and pursuant to the Workmen's Compensation Act. Under section 376, Code of Civil Procedure, no cause of action is vested in the mother, if married, except upon a showing that her husband had abandoned his family. To constitute a cause of action in her favor, such fact must be alleged; it cannot be assumed. And since in the instant case no right of action for the death of her son was vested in the mother, unless he was employed casually or in the excepted classes of labor, such facts, since her right depended thereon, cannot be assumed, but must likewise be alleged. It is a well-settled principle of law that in statutory actions the party suing must bring himself strictly within the statutory requirements necessary to confer the right, and this must appear in his complaint; otherwise no cause of action is stated. Dye v. Dye, 11 Cal. 163; Rhoda v. Alameda County, 52 Cal. 350; Barker v. Railroad Co., 91 Mo. 86, 14 S. W. 280.

[6] Our conclusions are: First, that in no event has plaintiff any right of action under the provisions of the Workmen's Compensation Act for the death of her son; and, second, that where the conditions of compensation prescribed by subdivisions 1, 2, and 3 of section 12 of the act are, as in the instant case, shown to exist, no cause of action is stated by a complaint, in the absence of allegations showing the employment to have been within the excepted classes of labor mentioned in section 14 of the act, and that in the absence of such showing we cannot presume the existence of such facts in support of the judgment. In our opinion, the demurrer should have been sustained.

The judgment is reversed.

56 Cal. App. 790

LLEWELLYN IRON WORKS v. McLAIN.

(Civ. 3785.)

(District Court of Appeal, Second District, Division 1, California. Jan. 6, 1922. Hearing Denied by Supreme Court March 6, 1922.)

Appeal and error 🔑790(2)—Appeal from judgment dismissing action to set aside judgment dismissed where judgment attacked reversed on appeal.

An appeal from a judgment dismissing an action to set aside a judgment presents a moot question only, and will be dismissed where the judgment attacked has been reversed on appeal.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Llewellyn Iron Works against Agnes McLain. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Haas & Dunnigan and J. J. Wilson, all of Los Angeles, for appellant.

Goodwin & Morgrage, of Los Angeles, for respondent.

PER CURIAM. By its complaint filed herein plaintiff sought to have a certain judgment, which was entered in favor of defendant and against plaintiff, set aside and annulled, and execution thereof enjoined upon the grounds of alleged fraud, mistake, and want of jurisdiction. A demurrer interposed to the complaint by defendant was sustained without leave to amend, followed by a judgment dismissing the action, from which plaintiff has appealed.

The judgment attacked and which it is sought to have annulled and set aside is that entered in the case entitled Agnes McLain v. Llewellyn Iron Works, a Corporation (Civil No. 3731) 204 Pac. 869, wherein, on an appeal therefrom by the defendant therein, who is plaintiff in the instant case, an opinion was filed in this court on January 6, 1922, reversing the judgment so appealed from. The effect of the order so made in that case is to set aside and annul the judgment which is made the subject of plaintiff's attack in this action. Hence the record presents a moot question only, and for that reason the appeal is dismissed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

56 Cal. App. 205

PEOPLE ex rel. KNOWLTON v. ORANGE COUNTY FARMERS' & MERCHANTS' ASS'N. (Civ. 4139.)

(District Court of Appeal, First District, Division 1, California. Jan. 16, 1922.)

1. Telegraphs and telephones 🔑2 — Association operating system for members need not comply with "telephone corporation" law.

A nonprofit association, organized under Civ. Code, §§ 653b–653*l*, which maintained a telephone system for the convenience of its members only, was not a telephone corporation required to comply with Civ. Code, § 291 et seq., regulating the incorporation of telegraph and telephone companies.

2. Corporations 🔑373 — Articles of association of nonprofit business association held to authorize operation of telephone system for members.

Articles of association of a nonprofit business association showing an organization to facilitate exchange of information, advices, crop, weather, and financial reports, and other communications between its members, and to buy and own equipment and devices for communication, was authorized to establish and maintain a telephone system for the exclusive use of its members, so that the operation of such a system did not violate Const. art. 12, § 8, prohibiting a corporation from engaging in a business other than that expressly authorized by its charter.

3. Telegraphs and telephones 🔑1 — Association operating telephone for benefit of members need not procure certificate of public necessity; "telephone corporation."

The provision of Public Utilities Act 1919, § 2, subd. (t), defining a telephone corporation as a corporation or person operating or managing any telephone line for compensation within the state, does not extend the supervision of the Public Utilities Commission over a telephone line operated by a nonprofit co-operative association for the exclusive use of its members who paid a sufficient sum therefor to operate the system, so that it was not necessary for such association to procure from the commission the certificate of public necessity and convenience required for telephone corporations by Public Utilities Act 1915, § 50(a).

4. Telegraphs and telephones 🔑26½, New, vol. 17 Key-No. Series—Co-operative association using streets for telephone lines not a public utility.

The fact that a co-operative association maintaining a telephone system for the exclusive benefit of its members used the public highways for its lines does not establish that it is a public utility subject to the jurisdiction of the Utilities Commission.

Appeal from Superior Court, Orange County; H. Y. Williams, Judge.

Proceedings by the People, on the relation of Charles S. Knowlton, against the Orange County Farmers' and Merchants' Association, to set aside a franchise. Judgment for the defendant, and relator appeals. Affirmed.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Marks & Launer, of Fullerton, for appellant.

H. C. Head, A. W. Rutan, and G. K. Scovel, all of Santa Ana, for respondent.

RICHARDS, J. This proceeding was instituted by the Attorney General of the state of California upon the relation of Chas. S. Knowlton, a resident and taxpayer of the county of Orange, for the purpose of having it adjudged that the defendant is unlawfully usurping, holding, and exercising the right to construct, maintain, and operate a telephone system in the said county of Orange, and to use and occupy the public streets of said county for such purposes; and to have said defendant excluded from using the said public streets for such purposes, and from using or enjoying a certain franchise attempted to be granted to said defendant by the board of supervisors of said county giving to it the right and privilege so to do.

The facts of the case are undisputed. The defendant is a nonprofit co-operative association, organized under the provisions of title 20, part 4, division 1, of the Civil Code of the state of California. The purposes for which said association was formed, as stated in its articles of association, are to establish a farmers', fruit growers', merchants', and business men's improvement, information, and publicity bureau and system for the benefit and mutual improvement of the members of the association, and to facilitate the exchange of information, advices, ideas, crops, weather, and financial reports and other communications among its members. The membership of the association was to be made up of such persons, residents of the said county, who were above the age of 18 years, and who upon application might be elected to membership therein by the board of directors thereof. The association, having been duly organized under the foregoing provisions of the Civil Code, applied for and obtained a franchise from the board of supervisors of the county of Orange permitting it to construct, maintain, and operate a telephone system for the use of its members, and for that purpose to erect, and maintain a system of poles and wires along and upon the public streets of said county. It is conceded that the association has not applied for or obtained any certificate of public convenience and necessity from the Railroad Commission of the state of California authorizing it to establish or maintain a telephone system in the said county of Orange or elsewhere, or to use any of the streets of said county for the purpose of installing and operating such telephone system and service. It is also conceded that the members of the association using, and who shall use, said telephone system and service shall pay a sum for the said use thereof sufficient in the aggregate to liquidate the cost of its operation. It is not alleged nor contended that the association in the establishment and operation of said telephone system is actuated by any bad faith or improper motives such as that of evading the provisions of the law relative to public utilities or as that of engaging in competition with another regularly organized telephone system under the disguise of a co-operative and nonprofit organization or of serving the general public under such a guise. Upon the hearing of the cause the only evidence adduced other than that of the records and files of the association itself was the testimony of the relator as to his status as a resident and taxpayer of said county of Orange, and the testimony of the secretary of the association identifying its records and files. Upon submission of the cause the court made the following findings of fact:

> "That at all the times mentioned in plaintiff's complaint on file herein, said defendant was, and now is, a nonprofit, co-operative business association, duly organized and existing under and by virtue of the laws of the state of California and in particular under and by virtue of the provisions of title 20, part 4, division 1, of the Civil Code of the state of California; that in order conveniently, economically and successfully to carry out the objects and purposes of said association, as stated and set forth in its articles of association, it is necessary for the members of said association to have quick and inexpensive means of communication among themselves and in order to afford the members of said association quick and inexpensive means of communication among themselves, it is necessary and convenient for said association to establish and maintain a system for telephonic communication among the members of said association, the said telephone system being established and maintained at cost to the members of said association and its use confined to the members thereof; that, in order to carry out the aforesaid purposes, the said association has purchased and acquired and owns a franchise from the county of Orange, state of California, granted to said association by Ordinance No. 166 of the board of supervisors of said county of Orange, a copy of which is set forth in plaintiff's complaint. That in pursuance to the terms and provisions of said franchise said defendant has during the times mentioned in said complaint, erected, established, maintained and operated and is now erecting, establishing, maintaining and operating in the public streets of said county of Orange, poles with telephone lines thereon and has heretofore established and is now establishing telephone offices with telephone equipment therein for the purposes of transmitting telephone messages and communications over said lines and by means of said wires, instruments and appliances; that by the said organization of said association and in accordance with the provisions of said Ordinance No. 166, said defendant has used at all the times mentioned in said complaint, and is now using and holding and exercising the right to construct, maintain and operate a telephone system within said county of Orange and to construct, maintain and operate telephone lines in, upon, over and along the public streets of said county of Orange, for the use and benefit of the members of said association and, for the purposes hereinbefore stated, and at cost and without profit to said association and its members."

Upon the foregoing findings of fact judgment was ordered and entered in favor of the defendant. The plaintiff appeals from such judgment.

[1] The appellant's first contention is that the defendant association is not entitled to engage in the telephone business for the reason that it has not been organized in accordance with the provisions of section 291 et seq. of the Civil Code, which provide what the articles of incorporation of corporations organized for the purposes of engaging in the telegraph or telephone business must contain and what proportion of the capital stock of such corporation must be subscribed and paid in to the treasury thereof. The answer to this contention is twofold: First, that the respondent does not purport to be organized as a corporation for profit under the Code provisions relating to the organization of stock companies; and, second, that the defendant is not a telegraph or telephone organization within the meaning of section 291 et seq. of the Civil Code. The purposes of this association are those set forth in the articles of association specifically enumerated in the foregoing findings of the trial court. As a mere incident to the carrying into effect of such purposes the defendant has undertaken to install a telephone service for the use of its members only, and not for general public use or service. An analogy to the respondent's position in that regard would be that of a department store installing a telephone system connecting its various departments for the convenient conduct of its business and to be used only by its members or employees. It could not be said that by the installation of such a system as an incident to its diversified business, the owners of the establishment, whether corporate or not, had gone into the telephone business so as to require their compliance with section 291 et seq. of the Civil Code.

[2] The next contention of the appellant is that the installation of a telephone system by the respondent is outside of the express purposes of its organization so as to bring it within the inhibition of article 12, section 9, of the state Constitution, which reads as follows:

> "No corporation shall engage in any business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized."

A cursory reading of the articles of association of the respondent will serve to show that this contention is without merit. The very purpose of its existence, as disclosed by such articles, is to facilitate exchange of information, advices, ideas, crop, weather, and financial reports and other communications between and among said members; and in order to carry out the objects and purposes of the association to buy, sell, rent, lease, own, mortgage, hypothecate, and otherwise deal in real and personal property necessary, convenient or proper for the conduct of its business, including printing equipment and other equipment and devices for communication, publication and dissemination of information among its members. This express language is sufficiently comprehensive to include the utilization of such devices and conveniences as the telephone in order to facilitate intercommunication among the members of the association.

[3] The final contention of the appellant is that the respondent, as a prerequisite to the use of the public streets for its telephone line and to the exercise of the franchise of the board of supervisors granting to it this privilege, must first have obtained from the Railroad Commission the certificate of public convenience and necessity required by the provisions of the Public Utilities Act. In support of this contention we are cited to section 50a of the Public Utilities Act (Stats. 1915, p. 115), which reads as follows:

> "Sec. 50(a). No street railroad corporation, gas corporation, electrical corporation, telephone corporation or water corporation shall henceforth begin the construction of a street railroad, or of a line, plant or system, or of any extension of such street railroad, or line, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction."

We are also cited to subdivision (t) of section 2 of the said Public Utilities Act, as amended May 11, 1919 (Stats. 1919, p. 489), which provides:

> "(t) The term 'telephone corporation,' when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any telephone line for compensation within this state."

[4] These provisions of the Public Utilities Act have evident reference to such public service corporations, companies, or persons as from the nature of their organization, purpose and service come within the meaning of the term "public utilities." They have no reference to organizations or associations which are engaged in delivering a commodity as a mere incident to their main objects and purposes and at cost to their members only. It has been so ruled by the Railroad Commission, which has declined to extend the provisions of the Public Utilities Act to such organizations. Steele v. Sierra Verdugo Water Co., Public Utilities Reports, 1920C, 140. We approve this ruling as in harmony with reason and with the rulings of the courts of other jurisdictions construing the provisions of public utilities acts similar to our own. In the case of State Public Utilities Com. ex rel. v. Bethany Mutual Tel. Ass'n, 270 Ill. 183, 110 N. E. 334, Ann. Cas. 1917B, 495, it was held that a mutual telephone association which was limited by its charter to devote its property and service to its members only and at cost did not come within the terms and provisions of the Public Utilities Act of Illinois (Hurd's Rev. St. 1919, c. 111a), which had for its object the bringing under public control for the common good property applied to a public use. In that case as here it was argued that the fact that the association had obtained a franchise from the municipality to maintain and operate telephone poles, wires, and fixtures in the streets thereof was to be taken to indicate that the property of the association was to be devoted to a public use; but the court aptly said:

> "If poles or wires should be placed on streets and highways it would no more * * * prove that the use is public than the fact of farmers driving upon the public highways with their own products would tend to prove they are common carriers." State Public Utilities Com. ex rel. v. Bethany Mutual Tel. Ass'n, supra.

See, also, People v. Ricketts, 248 Ill. 428, 94 N. E. 71; State P. U. Com. v. Monarch, etc., Co., 267 Ill. 528, 108 N. E. 716, Ann. Cas. 1916A, 528; Wehr v. Seneca, etc., Tel. Co., P. U. R. (Ohio) 1916E, 479.

For the foregoing reasons and on the strength of the above authorities we are of the opinion that the trial court was not in error in ruling that the plaintiff was not entitled to the relief prayed for in its complaint.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

(188 Cal. 265)

MIDLAND OIL FIELDS CO., Limited, v. RUDNECK et al. (L. A. 7031.)

(Supreme Court of California. Feb. 23, 1922.)

1. Evidence ⚷20(1)—It is a matter of common knowledge that drilling rigs are moved from place to place.

It is a matter of common knowledge that rigs for the drilling of oil or water wells are moved about by the owner from place to place as wells are completed and other wells begun, or as the purpose of placing them in the particular place is accomplished or terminated.

2. Fixtures ⚷27(1)—Drilling rig held not fixtures as between contractor and owner of mining claim.

Drilling rig, placed upon land by drilling contractor under contract with owner of mining claim entitling contractor to abandon the work upon written notice to owner and remove all personal property placed by him on the land, *held* personalty, and not fixtures as between contractor and owner of mining claim.

3. Fixtures ⚷9—Drilling rig held not fixtures as between contractor and homestead entryman.

Drilling rig, placed upon land by drilling contractor under contract with owner of placer mining claim after location notice was posted, as required by Civ. Code, § 1426d, *held* personalty and not fixtures as between contractor and owner of land who made homestead entry thereon, under Act. Cong. July 17, 1914 (U. S. Comp. St. §§ 4640a–4640c), reserving to the United States deposits of oil or gas, with the right to prospect for, mine, and remove such deposits, regardless of whether the mining claim was valid under Act Cong. June 25, 1910, § 2 (U. S. Comp. St. § 4524) as against the government or a subsequent mining claimant.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Midland Oil Fields Company, Limited, a corporation, against M. Rudneck, etc., and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Kaye & Siemon, of Bakersfield, for appellants.

Geo. E. Whitaker, of Bakersfield, for respondent.

SHAW, C. J. The defendants appeal from the judgment. The complaint states a cause of action to recover damages for the taking and conversion of plaintiff's personal property by the defendants. It consisted of boilers and other machinery and tools comprising an oil well drilling "rig," together with the timber and other materials of a derrick belonging thereto. The defendants claim that at the time of the taking and conversion they, and not the plaintiff, were the owners of the property. The court found that the plaintiff was the owner of the property; that the defendants, in February, 1918, wrongfully took the same and converted it to their own use, to the damage of the plaintiff in the sum of $1,800, for which sum it gave judgment for the plaintiff.

The main controversy arises upon the question whether the boilers and derrick were fixtures and as such a part of the realty at the time one Enwright, from whom the defendants bought the property, made his entry upon the land as a homesteader under the laws for the disposal of public lands of the United States, or was personal property.

Enwright entered upon the land on October 25, 1915, and on June 24, 1916, he duly made his application for a homestead entry thereof. He has occupied the land ever since his entry. At that time the property in question was on the land. On February 15, 1918, claiming it all as his own, he sold it to the defendants, who immediately took down the timbers of the derrick, removed them and the boilers, tools, and other materials comprising the rig from the land, and converted them to their own use. The right of the defendants to take the property depends on the question whether the title thereto passed to Enwright as a part of the land when he entered it as a homestead, and that, in turn, depends on certain facts which we will now relate.

On and prior to September 5, 1909, the land was vacant public land of the United States. On that day R. E. Graham and others lawfully located a placer mining claim on the land. The location notice was posted on that day, and was duly recorded in the office of the county recorder of the county on September 28, 1909, which was within the 30 days allowed by the Code. Civ. Code, § 1426d. The other locators thereafter conveyed their respective interests in the claim to said Graham. The location was made in good faith in the belief that the land contained deposits of oil. There had been no previous discovery, and the design was to put down a well for that purpose as soon as convenient, and thereupon to take out the oil, if any was found. To accomplish that purpose, Graham, on January 6, 1910, made a contract in writing with one McCray, whereby McCray was to begin drilling a well on the land within 90 days and continue the work to a depth of 2,500 feet, if necessary. The contract provided that, upon written notice to Graham, McCray might at any time abandon the work; that if he ceased work for 30 days continuously Graham might, upon written notice, terminate the agreement, and that in either case McCray should have the right to remove all personal property by him placed on the land, except the casing in the wells, if any there was. In pursuance of this contract the oil-drilling rig and other property was placed on the land by an assignee of McCray in March, 1910. Drilling was then begun and continued at intervals until some time in the year 1915. No oil was ever discovered.

[1] The derrick was 84 feet high on a 20-foot framed base of heavy timbers set on the surface of the ground. The boilers were set on the ground and a part thereof, known as the fire box, was incased with brick to conserve the heat. The engine was placed upon timbers laid on the ground, but as it was taken away before the entry of Enwright its character is not of any importance. There was evidence to the effect that boilers and derricks for the drilling of oil wells are not permanently fastened to the ground; that they are not intended to be permanent unless oil is found, and then only for such time as the well continues to yield oil. It is a matter of common knowledge that rigs of this character for the drilling of wells, either for oil or water, are moved about by the owner from place to place as wells are completed and other wells begun, or as the purpose of placing them in the particular place is accomplished or terminated.

[2] From all this evidence and this common knowledge the court below rightfully concluded that the property in controversy was personal property so far as the respective rights thereto of Graham as owner of the mining claim and McCray and his successors in interest, including the plaintiff, are concerned.

The defendants, as successors in interest to Enwright, claim that the title to the property nevertheless passed to Enwright by virtue of his homestead entry.

Enwright's title to the land was obtained from the United States after the passage by Congress of the act of July 17, 1914 (38 U. S. Stats. 509 [U. S. Comp. St. §§ 4640a–4640c]). That act provides that lands which have been withdrawn from entry, whether before or after its passage, on account of supposed deposits of oil or gas therein, shall be subject to homestead entry, but it reserves, and requires the homestead patent to reserve, to the United States all deposits on account of which the lands so patented were withdrawn, "together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law." Also that "any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting the same" (section 4640b) by giving bond for the benefit of the homesteader for any damage to his crops that might be caused by the prospecting for and removal of such deposits.

A presidential order of the kind referred to in said act of 1914, and withdrawing from entry the land in controversy, was made on September 27, 1909. It declared that it was made on account of the petroleum deposits that might be contained in the land, and it provided that—

> "All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

On June 25, 1910, Congress passed an act as follows:

> "The rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant * * * of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant shall continue in diligent prosecution of said work." 36 U. S. Stats. 847 (U. S. Comp. St. § 4524).

[3] The claim of Graham and others located on September 5, 1909, was valid on September 27th, the date of the presidential order of withdrawal. There is no claim that it was not made in good faith, nor that the parties were not at that time prosecuting the work leading to the discovery of oil therein. Many things might require the delay of six months in the actual beginning of drilling operations. But whether valid or not as respects the government, or a subsequent mining claimant, it was good against Enwright, for he was not in privity with the United States with respect to the oil-mining rights in the land, but took subject thereto.

It is evident from the provisions of the act of 1914 that Enwright did not have and can never obtain, under his homestead entry, or by a homestead patent thereunder, any title to the oil deposits in the land. That title was reserved to the United States, and it still remains in the United States, except in so far as those claiming under the location of Graham and others may have some right thereto. Son v. Adamson (L. A. No. 5939, filed February 2, 1922) 204 Pac. 392. It is also clear that the oil-drilling rig placed on the land by the plaintiff and its predecessors in interest was put there for the purpose of discovering said oil and removing the same, under the right gained by the mining location. If we admit for the moment that they were so annexed that they constituted fixtures, the result would be that they were fixtures to that interest in the realty in aid of the use of which they were affixed, that is, they became a part of that interest in the realty which the United States has reserved to itself and which Enwright could not obtain. It may be that the United States, if they were fixtures, could have claimed the property and could have granted it to other locators so as to give them a better title than that of the original claimants. But the title which the United States reserved in the oil deposits, and which would have included all forfeited fixtures appurtenant to such deposits, would not inure to the benefit of Enwright so as to pass the title to the oil-drilling fixtures to him. In any event, therefore, the defendants did not obtain title to the fixtures by their purchase from Enwright, assuming that they may have had that character with respect to the government.

But, as we have seen, they were not fixtures, as between the owners of the mining claim and the plaintiff, who was engaged in operating them to discover oil for the owners, but were personal property. The owners of the mining claim were authorized to remain on the land for the purpose of prosecuting the work of discovering oil therein. They were not trespassers when they put the drilling rig there for that purpose. The government alone had the right to claim a forfeiture. Defendants do not claim under any one having a mining location thereon, and the government has not, so far as appears, declared any forfeiture. Under these circumstances, we are of the opinion that the title to the property, so far as Enwright and the defendants are concerned, remained in the plaintiff. It follows that the defendants had no right thereto, and were guilty of a tort when they took the property and converted it to their own use. Therefore the evidence supports the findings and the judgment for the plaintiff was correct.

The judgment is affirmed.

We concur: LENNON, J.; SHURTLEFF, J.; LAWLOR, J.; WILBUR, J.; WASTE, J.; SLOANE, J.

188 Cal. 184

FIDELITY & CASUALTY CO. OF NEW YORK v. PARAFFINE PAINT CO. et al. (L. A. 5894.)

(Supreme Court of California. Feb. 17, 1922. Rehearing Denied March 16, 1922.)

1. Explosives ⊂⇒9—Evidence held to support instruction denying recovery if sale was made by third party.

In an action against two corporations for death from an explosion of paint, evidence that, when decedent expressed a desire to purchase the paint to one of the defendants, an agent of a third corporation replied, and an order was given to such agent by telephone, supports an instruction that, if the paint was sold through an agent of the third corporation, neither defendant was liable.

2. Trial ⊂⇒191(2)—Instruction held not to assume agency in making sale.

An instruction that, if the jury find the sale was made through a named individual, and that the individual was acting exclusively as agent for a third corporation, defendants would not be liable, did not assume that the sale was made by that individual.

3. Trial 🔑295(5)—Instruction held not erroneous for omitting issues.

An instruction that, if the paint which exploded was sold to decedent by an agent of a third party, no liability could be imputed to defendants, was not erroneous for omitting to refer to the liability of defendants for misrepresentations that the paint was nonexplosive, which was fully covered by other instructions given by the court.

4. Explosives 🔑9 — Instruction as to party making sale held not misleading or involved.

An instruction that, if the check issued by decedent to pay for the paint which exploded was payable to one defendant, but the sale was by a corporation not a party to the action, and it was customary for checks for such third party to be made payable to defendant, and that the paint was in fact sold by defendant to the third party, and by the third party to decedent, and that the check was a form of payment to the third party, the controlling fact would be the character of the transaction as a sale between the third party and the decedent, was not subject to the objection that it was involved or misleading.

5. Trial 🔑253(6)—Instruction directing verdict without requiring necessary facts is erroneous.

An instruction, concluding with the statement that if the jury find the propositions therein recited to have been established, their verdict should be for a particular party, is erroneous, where it does not include all facts necessary to sustain a verdict for that party.

6. Explosives 🔑9—Held dealer did not represent paint as not explosive.

Evidence that decedent in ordering paint by telephone stated he did not want it if it was explosive, without evidence connecting the party to whom he was talking with defendants, is not sufficient to make defendants liable for misrepresenting the paint was not explosive.

7. Appeal and error 🔑1066—Instruction, omitting issue not sustained by evidence, harmless.

An instruction, stating facts on which the jury could find for defendants, but omitting reference to misrepresentations of defendants, was not error prejudicial to plaintiff, where there was no evidence sufficient to sustain any representations.

8. Trial 🔑251(8)—Instruction on hypothesis of directing sale need not cover subject of agency.

An instruction on the liability of the seller of explosives, which was drawn on the hypothesis of transactions directly between the various parties, was not erroneous for omitting any reference to the subject of agency of those representing the various parties.

9. Explosives 🔑9—Instruction held not to exempt as seller party from whom decedent bought.

Where decedent was killed by an explosion of paint, an instruction to find for defendant if the check issued by decedent in payment for the paint was payable to defendant, but the transaction in fact was a purchase from a third party, was not erroneous as permitting the jury to find the third party was the seller, regardless of the decedent's intentions in buying.

10. Trial 🔑295(5)—Instruction as to liability without privity of contract need not include liability for misrepresentations.

An instruction as to liability of defendant for death caused by an explosion of paint without reference to privity of contract between the parties was not erroneous for omitting reference to defendants' liability in the event of misrepresentations as to the character of its paint, which was fully covered by other instructions.

11. Trial 🔑295(5)—Instruction on fraudulent misrepresentations article was not explosive need not refer to negligent misrepresentations.

An instruction as to the liability of defendants for fraudulent misrepresentations that paint sold by it through another was not explosive was not erroneous for omitting reference to representations negligently made, where another instruction fully advised the jury that negligence of any of the defendants' agents was imputable to defendants, and rendered defendants liable.

12. Trial 🔑237(6) — Instruction plaintiff must "satisfy" by preponderance of evidence is not erroneous.

An instruction on the burden of proof, which requires plaintiff to "satisfy your minds" by a preponderance of the evidence, is not erroneous, since the word "satisfy," when used in connection with the phrase "preponderance of the evidence" is equivalent to requirement that the jury find or believe.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Satisfaction; Satisfy.]

13. Appeal and error 🔑1066—Instructions as to representations not within pleadings is not prejudicial to plaintiff.

An instruction as to the liability of defendants for a misrepresentation not alleged or proved, and stating that plaintiff's case must fail in that respect if no such representation was established by a preponderance of the evidence, was not prejudicial to plaintiff, where other instructions correctly stated the law on other issues.

14. Trial 🔑296(2)—Reference in instruction to authorized agent held not to require specific authority to make representation.

An instruction that plaintiff must prove that the misrepresentations were made by an authorized agent in the premises, in connection with another instruction on the subject of actual and ostensible agency, could not have been misconstrued as requiring plaintiff to establish a specific authority to make the misrepresentation.

15. Explosives 🔑9—Instruction on contributory negligence not erroneous because based on finding decedent could have seen warning.

In an action for death resulting from explosion of paint, an instruction that, if decedent could have seen the warning notice and notwithstanding it he applied a lighted match to the paint, and in so doing did something which a reasonable and prudent man would not have done, he was contributorily negligent, was not erroneous for using the word "could" instead of "should" with reference to seeing the label, since the finding as to whether his striking the match under such circumstances was the act of a reasonable man involved the question whether he should have seen the label.

16. Exlosives ⚿9 — Instruction held not to confine liability to actual seller.

In an action for death caused by an explosion of paint, an instruction that if decedent bought the paint from a company not a party to the suit no liability could be imputed to either defendant was not erroneous, as drawing attention from plaintiff's claim and of an apparent sale from defendants to decedent.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Fidelity & Casualty Company of New York against the Paraffine Paint Company and another, to recover damages for death. Judgment for defendants, and plaintiff appeals. Affirmed.

R. P. Jennings, of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, and Morrison, Dunne & Brobeck and R. L. McWilliams, all of San Francisco, for respondents.

LAWLOR, J. This is an appeal by the plaintiff from a judgment in favor of the defendants in an action to recover damages in the sum of $50,000 for the death of one Charles Perry Whitaker. In the early part of 1917 Whitaker was employed by Isaias W. Hellman as manager of the I. W. Hellman building in the city of Los Angeles. Appellant had issued to Hellman a policy of insurance against liability for injuries received by his employees under the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831). The two respondent companies and the E. G. Judah Company at that time had their offices together, although the Judah Company was not actually connected with the other two. The Judah Company, which was subsequently absorbed by the respondent Atlas Factories Company, had a contract with respondent Paraffine Paint Company for the marketing of the latter's products.

Whitaker, as Hellman's agent, purchased several barrels of "Malthoid roof coating," but the evidence is in conflict as to whether it was purchased from the respondent companies, or from the Judah Company. The evidence discloses, however, that Whitaker first telephoned the offices of the Paraffine Paint Company, and asked to speak to some one with regard to roof painting. T. A. Dolph, a salesman employed by the Judah Company, came to his office the following day, and discussed the purchase with him. Later Whitaker, according to the testimony of L. L. White, who was present at the time, called up the office of the Paraffine Paint Company, and asked to speak to the man "who was up here talking to me in regard to this roof paint." In the conversation which followed, Whitaker, according to White, said:

> " 'Are you the man who was up this morning, or yesterday, speaking to me about this roof paint?' Then he says: 'All right, I want a price on that now on barrel lots.' And he says: 'What? Sixty cents!' * * * He says: 'I won't accept it at 60 cents. You quoted me fifty-five, and that is all I will pay for it.' "

The purchase was made and the check in payment for it was drawn by Whitaker to the order of the Paraffine Paint Company. It was shown that the delivery receipts for the roof coating were headed, "Received from E. G. Judah Co., Special Representatives the Paraffine Paint Company." The receipted bills for the purchase price were on the stationery of the "Atlas Factories Company, the Paraffine Paint Company, Owner."

One barrel of the material was put in a room on the sixth floor of the I. W. Hellman Building. On May 15, 1917, about 15 gallons of the roof coating remained in that barrel. Whitaker and C. B. Allison, head janitor of the building, started to drain the contents into a bucket in order to carry it to the paint shop. The barrel was on its side, the ends resting on two boxes, the roof coating being allowed to run out through the bunghole into the bucket. Allison struck a match to see how full the bucket was. The match went out, and he threw it on the cement floor. There is evidence indicating that another match was struck. The roof coating exploded, inflicting the injuries from which Whitaker subsequently died. Allison received injuries of a serious nature.

Compensation was awarded by the Industrial Accident Commission for Whitaker's death. Part of such compensation was paid by appellant, who thereupon instituted this suit under the subrogation provisions of the Workmen's Compensation, Insurance, and Safety Act. The complaint alleged that Whitaker purchased the roof coating from respondents; that respondents carelessly, negligently, recklessly, and wantonly represented that it was nonexplosive, and failed to warn him that it was explosive; that the Malthoid Roof Coating was of an explosive and dangerous character, liable to cause injury to the public, including Whitaker; and that these facts were known to respondents. The answer denied the allegations of the complaint, and by way of separate defense alleged Whitaker's death arose out of his own contributory negligence. The case was tried by jury, which returned a verdict in favor of respondents. Judgment was accordingly entered. Appellant's motion for a new trial was denied, and this appeal is taken.

[1] 1. Appellant relies for a reversal of the judgment upon several alleged erroneous instructions. The first of these is instruction F, which reads:

> "If you should find from the evidence that the roof coating in question was sold to I. W. Hellman, through T. A. Dolph as salesman, and that T. A. Dolph, in the transaction, was acting exclusively as the employee and agent of the E. G. Judah Company, then I instruct you that no liability for the accident can be imputed to any person or company other than the E. G. Judah Company, as matter of law, and therefore it will become your duty in such circumstances to return a verdict for the defendants."

Appellant asserts that since the evidence was uncontradicted that Dolph was employed by the Judah Company, the jury under this instruction would necessarily assume that under no circumstances could liability attach to any person or company other than the Judah Company. It insists that there was no evidence upon which to base the instruction, inasmuch as Dolph testified he did not actually sell the article. Notwithstanding Dolph's testimony, it was for the jury to determine by whom he was employed, and whether in this transaction he acted exclusively as the employee and agent of the Judah Company. Moreover, from the testimony set forth above, the jury could have decided that, while the order for the roof coating might not have been actually placed with Dolph, he at least was the salesman through whom it was sold, and with whom Whitaker negotiated for its purchase. It follows that there was evidence upon which to base the instruction.

[2] Appellant also insists the instruction assumes that Dolph sold the roof coating. It will be noted that the instruction opens with the formula, "if you should find from the evidence," and the jury was plainly told to decide whether or not the sale was made through Dolph, and, if it found the sale was so made, to consider whether or not, in making the sale, Dolph was acting as agent for the Judah Company.

[3] It is also asserted that the instruction, in directing a verdict for respondents if Dolph were found to be the agent of the Judah Company, assumes that no representations as to nonexplosibility were made by any employee of respondents, or by any one other than Dolph. Such a conclusion is not warranted by the terms of this instruction, which relate only to the subject of whether or not there was a contractual relation between Hellman or Whitaker and respondents. In instructions K and R, to which appellant did not object, and in instruction L the subject of the said representations was fully covered. These instructions supplied this element, which appellant claims is omitted from instruction F.

Appellant also claims the instruction assumes the roof coating was sold by the Judah Company, leaving out of consideration any agency which may have existed between the Judah Company and respondents. In instructions R, T, U, W, and X the subject of agency, actual and ostensible, was fully covered, and under them the jury could properly have considered whether or not the Judah Company or its representatives were acting as agents of respondents. Under these instructions taken in conjunction with instruction F, the jury could have determined whether or not the Judah Company were respondents' agent, and, if it concluded such was the case, could have found for appellant even though Dolph himself were acting exclusively as agent for the Judah Company.

[4] 2. The next assignment of error is to instruction G, which is as follows:

> "If you should find from the evidence that the check issued by Whitaker for the payment of the roof coating in question was payable to the Paraffine Paint Company, but that the transaction in fact was between Hellman and the E. G. Judah Company, and that it was a customary thing for checks for such transactions to be made out to the Paraffine Paint Company, and if you should find in point of fact that the roof coating was sold in the first instance by the Paraffine Paint Company to the E. G. Judah Company, and was thereafter sold by the E. G. Judah Company to Hellman, and that the check in question was a form of payment to the E. G. Judah Company, and was so treated by the Paraffine Paint Company and the E. G. Judah Company, then I instruct you that the controlling fact would be the character of the transaction as a sale between Hellman and the E. G. Judah Company, if you find such to be the fact, and in that event it becomes your duty to return a verdict for the defendants."

This instruction is complained of upon the ground that it is involved and misleading; that it leaves out of consideration the matter of representations as to the nonexplosibility of the roof coating by other agents of the respondents; and that it also leaves out of consideration the question of ostensible agency. We do not think that, fairly interpreted, this instruction can be held to be involved or misleading.

[5] With reference to appellant's second contention, it is true that where instructions conclude with the formula that if the jury find the propositions therein recited to have been established, their verdict should be for a particular party, each separate instruction so drawn should in itself show all the circumstances which must concur to war-

rant such a verdict. Killelea v. California Horseshoe Co., 140 Cal. 602, 74 Pac. 157; Pierce v. United Gas & Electric Co., 161 Cal. 176, 184, 118 Pac. 700; Starr v. Los Angeles Railway Corporation (Cal. Sup.) 201 Pac. 599. In the instruction in question the jury were told that if certain facts were found to be true, their verdict should be for respondents. The instruction, however, did not cover the subject of false representations, and was therefore incomplete. It being conceded respondents were liable if any false representations were made by them, the omission of that element from the instruction was erroneous.

[6, 7] However, the failure of the trial court to include this matter could not have prejudiced appellant for the reason that, although that subject was fully covered in other instructions, the evidence does not show that any such representations were made by either of the respondents. The only testimony in that regard, in addition to that already referred to, was to the effect that Whitaker was overheard calling the Paraffine Paint Company on the telephone; that he was overheard conversing with some man who told him the Malthoid roof coating was nonexplosive, but who was in no way connected up with respondents; that Whitaker later called up the Paraffine Paint Company and gave orders to deliver the roof coating, but said that, "If it is explosive I do not want it in the building." On the other hand, it was stipulated that if the telephone operator at the office of respondents were called as a witness she would testify she had no recollection of any conversations such as were testified to by appellant's witnesses. There is no evidence as to the statements made to Whitaker by the parties with whom he talked over the telephone. It may well have been that if any representations were made to Whitaker, they were merely, as respondents now claim, that the paint was nonexplosive, but that it should not be brought into contact with lighted matches. In view of this lack of evidence as to any representations by respondents, the error in omitting the subject from the instruction must be regarded as harmless.

[8] There is no error in the omission from the instruction of any reference to the subject of agency, for the jury were charged solely upon the hypothesis that the transactions consisted of sales directly between the various parties. Under such circumstances the question of agency was not involved.

[9] It is also asserted by appellant that the instruction means the jury must find for the respondents, provided the check given by Whitaker was treated by the Paraffine Paint Company and the E. G. Judah Company as a form of payment to the latter, regardless of the understanding Whitaker had as to whom he was doing business with. The instruction conveyed to the jury the meaning that if the transaction were treated by the respondent companies and the Judah Company as a sale between Hellman and the latter company, then the controlling proposition would be whether or not there was a sale between Hellman and the Judah Company, and, if the jury so decided, it would find for the respondent companies. In deciding the latter question the jury would naturally have considered whether or not Whitaker thought he was dealing with the Judah Company or the Paraffine Paint Company.

[10] 3. Error is assigned to instruction J, which declares:

> "It is true, as matter of law, that cases may arise in which, without privity of contract, breach of duty arising as matter of law may be imputed to a defendant; that is to say, if the defendants, or either of them, as matter of fact, sold the roof coating in question to Hellman through his agent Whitaker, and such roof coating was used by Whitaker in the business of his employer, a cause of action would arise in favor of Whitaker or his representative without reference to privity of contract and upon the basis of a duty imposed by law, if as matter of law this is a case where such breach of duty has been established. But in that connection I instruct you as the law that such breach of duty as between the seller of merchandise and the purchaser will not arise in favor of a third person such as Whitaker would be, unless the accident happened through the character of the substance sold as being imminently dangerous to human life under circumstances where the third person, like Whitaker, was injured because of the imminently dangerous character of the substance, without knowledge on his part of such imminently dangerous character, and where he himself was not guilty of contributory negligence proximately related to the accident in question."

It is asserted that this instruction is erroneous in omitting all reference to the representations alleged to have been made by the respondents, who it was claimed sold the roof coating in question to Whitaker, inasmuch as a cause of action would arise in favor of Whitaker if the negligent representations were made, regardless of whether or not the roof coating was imminently dangerous to human life. This instruction, referring to recovery without privity of contract, immediately follows, and supplements one to the effect that Whitaker could not recover for negligence arising out of contract if the contract were between Hellman and another, in which case there would be no privity of contract between Whitaker and the vendor of the roof coating. It correctly states the rule of recovery in cases where there is no privity of contract, but where the substance is imminently dangerous to life or limb, and there was no error in giving it. It was unnecessary to include the subject of representations, that point, as we have shown, being covered by other instructions.

[11] 4. Instruction L is also complained of. This instruction reads:

> "If you should find from the evidence in this case that there was no deceitful or fraudulent representation by the manufacturer or seller of the roof coating when the same was sold to Hellman through his agent Whitaker, whether as to the explosiveness or inflammability of the article in question, then I instruct you that the explosion of that article and the consequent injury to Whitaker cannot, as matter of law, be imputed as a liability to the manufacturer or seller of the article."

It is claimed that this instruction omits all reference to representations negligently made, and allows recovery only in the event that there were representations made fraudulently. In instruction R, as already pointed out, the jury was fully advised that negligence of respondents' agents and employees was imputable to respondents, and that, if any of them was negligent in the manner alleged in the complaint, then respondents would be liable. The negligence alleged in the complaint was in the making of representations as to the explosibility of the roof coating. It was not necessary, for the court to include this subject in both instructions.

[12] 5. Appellant assigns error to instruction M, which states that—

> "The burden of proof in this case is upon the plaintiff, not upon these defendants. It would be incumbent upon the plaintiff, not upon the defendants, to satisfy your minds by a preponderance of all the evidence in the case, that any deceitful representation touching the explosiveness of the article in question when brought in contact with flame, was made by the manufacturer or seller or by any authorized agent in the premises, and if you should find from the evidence that no such representation has been proved by a preponderance of the evidence, I instruct you, as matter of law, that the case of this plaintiff must fail of proof in respect to such representation, and, so far as any such representation in that event is concerned, you would not be authorized in law to return any verdict in this case except a verdict for the defendants."

Exception is first taken to the language of the court in telling the jury that the evidence must "satisfy your minds." In the case of Boa v. Terminal Rys., 182 Cal. 93, 187 Pac. 2, in discussing an instruction that the defendant must estabish the fact of contributory negligence to "the satisfaction" of the jury, the court said:

> "This court has repeatedly decided that an instruction that in substance informs the jury that a party having the burden of proof as to a certain fact or issue must establish it to the satisfaction of the jury by a fair preponderance of the evidence is not reversible error, where the other instructions in the case clearly define what is meant by a preponderance of the evidence, and distinctly advise them that a preponderance of the evidence will be sufficient to justify a finding in favor of the party having the burden. In such cases it is held that the words, 'to the satisfaction of the jury,' are equivalent to 'find' or 'believe.'"

It will be noted that in the case at bar the phrase "satisfy your minds" was coupled with the language "by a preponderance of the evidence." In addition to this, in instructions N, O, P, and Q, "preponderance of evidence" was clearly defined. This instruction, therefore, comes within the rule of the case last cited, and is not erroneous.

[13] It is also insisted that by this instruction the burden is thrown on appellant of proving a representation that the roof coating was nonexplosive when brought into contact with flame, whereas the only representation claimed was that it was nonexplosive generally. This hypothetical instruction correctly states the law on the subject of the burden of proof, but since there was neither allegation nor proof of any representation that the roof coating was nonexplosive when brought into contact with flame, the instruction was outside the issues. See Robinson v. W. P. R. R. Co., 48 Cal. 409, 425. However, the jury were not charged that such a representation must be proved or a verdict returned for respondents. The instruction merely informed the jury that in so far as any such representation was concerned the burden of proof was on appellant, and that if no such representation was established by a preponderance of evidence appellant's case must fail in that respect. Instructions N, O, P, and Q also related to the burden of proof, and correctly stated the law upon that subject. Instruction R also charged that, if respondents were found to be negligent as alleged in the complaint, that is, in the matter of making representations that the roof coating was nonexplosive, and such representations proximately caused Whitaker's death, respondents were liable. Inasmuch as the jury could only have found that no representations concerning explosibility of the roof coating when brought into contact with flame were made, the instruction in question could not have prejudiced appellant, since it was based upon that proposition only.

[14] Appellant also contends that the words "authorized agent in the premises" mean a specific authorization to make the particular representations. With reference to these words, the subject of actual and ostensible agency was fully covered in another instruction, and in the light of that instruction the words could not have meant the specific authorization to make the particular representations, but merely the authorization, actual or implied, to negotiate for the sale of the roof coating.

[15] 6. Instruction D is claimed to be erroneous. This instruction charged the jury:

> "If you find from the evidence that the barrels of roof coating in question were used and handled by Whitaker, and that in the using and handling of the same he was notified by a label upon the barrels themselves that lighted matches should be kept away from such barrels, or if you find that in the exercise of ordinary care he could have seen and informed himself of such notice and caution, and if, notwithstanding the same, he applied a lighted match to or in the immediate neighborhood of such barrel with the resulting explosion and injuries, and that in so doing he did something which a reasonable and prudent man under all the circumstances would not have done, I instruct you as a matter of law that such conduct upon his part would be negligence, and if such negligence contributed proximately to bring about this explosion and the injury to Whitaker, there can be no recovery for the plaintiff in this case, and your verdict must be for the defendants."

The asserted error lies in the use of the word "could," instead of "should," when defining ordinary care on Whitaker's part in seeing or failing to see the label. We think it is clear there is no error in this instruction. The use of the word "should" would have involved an assumption that the label was on the barrel, whereas the evidence on that point is conflicting. In the form in which it was given the instruction presents two questions: First, whether there was a label on the barrel which Whitaker could have seen in the exercise of ordinary care; second, whether under such circumstances, the striking of the match was the act of a reasonable man. A consideration of the second question necessarily involves the consideration of whether, if the label could have been seen, he should have seen it, acquainted himself with its contents, and acted accordingly. The instruction, in effect, covers the ground contended for by appellant.

[16] 7. Appellant's last assignment of error is to instruction E. This instruction states that—

> "In this case the plaintiff has brought its action against two defendants, namely the Paraffine Paint Company and Atlas Factories Company. I instruct you that your verdict in this case must depend upon the liability of these two companies, or either of them, and it cannot be made to depend upon the liability of any company or person not a party to this case. If, therefore, you should find from the evidence that the transaction in suit, namely the purchase of the roof coating in question, was a transaction between I. W. Hellman, through his employee Whitaker upon the one hand, and some company or person other than the defendants upon the other hand, that is to say, if you should find from the evidence that the real transaction here was the purchase of some roof coating by I. W. Hellman from E. G. Judah Company, then I instruct you, under the facts of this case, that no liability for the accident can be imputed either to the Paraffine Paint Company or to Atlas Factories Company, and in event you so find your verdict should be for the defendants."

It is insisted the instruction is erroneous, in that it draws attention to the real transaction, i. e., a sale from the Judah Company to Hellman, leaving the apparent transaction, i. e., the assumed fact that Whitaker thought he was purchasing the roof coating from respondents; and in that it states that no matter what representations might have been made by respondents' agents, if the sale were actually made from the Judah Company to Hellman, appellant could not recover. As we pointed out in considering the objections to instruction G, the jury, in determining whether or not there was a sale between the Judah Company and either Hellman or Whitaker, would naturally have considered whether or not Whitaker thought he was dealing with the Judah Company. As to the second point, it is sufficient to repeat that the lack of evidence on the subject of representations rendered harmless the omission of that subject from the instruction.

We are of the opinion there was no error in the instructions as a whole.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.

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188 Cal. 261

Ex parte TWING. (Cr. 2391.)

(Supreme Court of California. Feb. 23, 1922.)

1. Master and servant 🔑10—State may regulate relation.

In the exercise of its police power the state may impose such regulations and restrictions upon the relation of master and servant as are conducive to the public welfare, health, and safety.

2. Master and servant 🔑13—Regulation of working hours of drug clerks valid.

St. 1905, p. 28, as amended by St. 1907, p. 273, and St. 1921, p. 1323, regulating the working hours of employees engaged in selling drugs and medicines, is a valid exercise of the police power of the state.

3. Master and servant 🔑13—Working hours of drug clerk held lawful.

A complaint, alleging that a pharmacist "intermittently and according to the run of trade, and in the aggregate for two hours," sold drugs and other medicines, and compounded prescriptions, and for the balance of the ten hours sold stationery, cigars, etc., did not state an offense under St. 1905, p. 28, as amended by St. 1907, p. 273, and St. 1921, p. 1323, regulating the working hours of employees engaged in selling drugs and medicines.

4. Statutes ⚷241(1)—No person can be made subject to penal statutes by implication.

Penal statutes must be construed to reach no further than their words, and no person can be made subject to them by implication.

In Bank. Application by Jesse Twing for a writ of habeas corpus prayed to be directed to Charles Jones, Chief of Police of the City of Los Angeles, to secure his release from custody. Petitioner discharged.

W. J. Carr, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., James M. Oliver, of San Francisco, and Erwin W. Widney, City Pros., and Harry A. Mock, Deputy City Pros., both of Los Angeles, for respondent.

WASTE, J. This is an application for a writ of habeas corpus. The petitioner, an employee of a drug store, was arrested, together with his employer, and charged with violating the provisions of section 2 of an act of the Legislature regulating the working hours of employees engaged in selling, at retail, drugs and medicines, compounding physicians' prescriptions, and providing a penalty for its violation and the acts amendatory thereof. Stats. 1905, p. 28, as amended by Stats. 1907, p. 273; Stats. 1921, p. 1323. His contention on this application is that the police court of the city of Los Angeles, out of which the warrant of his arrest was issued, had no jurisdiction in the matter, in that the complaint does not state facts to constitute a public offense under the statute, and that the act is unconstitutional.

[1, 2] As to the latter contention we think little need be said. It is now generally recognized and held that in the exercise of its police power the state may impose such regulations and restrictions upon the relation of master and servant as are conducive to the public welfare, health, and safety. 26 Cyc. 978, 979; Holden v. Hardy, 169 U. S. 366, 395, 18 Sup. Ct. 383, 42 L. Ed. 780; Ex parte Martin, 157 Cal. 60, 62, 106 Pac. 239. In deciding that the California statute of 1911 (St. 1911, p. 437), as amended in 1913 (St. 1913, p. 713), limiting the hours of labor of women in certain employments, including those in hospitals, to eight hours a day, or a maximum of 48 hours a week, was not unconstitutional, the Supreme Court of the United States had before it this act regulating the hours of labor of drug clerks, as it then stood. Mr. Justice Hughes, speaking for the court, said:

> "It appears that a statute of California limits the hours of labor of pharmacists to ten hours a day and sixty hours a week. Stats. (Cal.) 1905, p. 28. In view of the nature of this work, and the extreme importance to the public that it should not be performed by those who are suffering from overfatigue, there can be no doubt as to the legislative power to reasonably limit the hours of labor in that occupation. * * * The mere question whether in such case a practical exigency exists, that is, whether such a requirement is expedient, must be regarded as a matter for legislative, not judicial, consideration." Bosley v. McLaughlin, 236 U. S. 385, 392, 35 Sup. Ct. 345, 347 (59 L. Ed. 632).

[3] The contention of the petitioner that no public offense is pleaded in the complaint, on which he was arrested, presents the meritorious point in the case. Section 2 of the act, which was passed "as a measure for the protection of public health," provides that—

> "No person employed by any person, firm or corporation, shall for more than nine hours during any one day of twenty-four hours, or fifty-four hours a week of six days a week, perform the work of selling drugs or other medicines, or compounding physicians' prescriptions, in any store, establishment or place of business, where and in which drugs or medicines are sold at retail, and where and in which physicians' prescriptions are compounded."

The answering of and attending to emergency calls shall not be construed as a violation of the act. Violation of the statute is, by its terms, made a misdemeanor.

[4] According to the allegations of the complaint, the petitioner, a duly licensed pharmacist, was employed in a store in which drugs and other medicines were sold, and physicians' prescriptions were compounded, and in which store, stationery, cigars, candies, ice cream, soft drinks, and other articles of general merchandise were regularly kept for sale. His duties were to generally attend the store and wait on customers. On a given day, in the course of his employment, he worked a total of ten hours, during which period it is alleged that—

> "Intermittently and according to the run of trade, and in the aggregate for two hours, * * * the said Jesse Twing was actually engaged in the work of selling drugs and other medicines and of compounding physicians' prescriptions, and during the balance of said ten hours, to wit, for eight hours, the said Jesse Twing was engaged in the work of selling stationery, cigars, candies, ice cream, soft drinks and other articles of general merchandise there regularly kept for sale and of attending said store and waiting on customers."

In other words, it is in effect alleged that, although the petitioner worked ten hours in the store on the day given, only two hours of that time, at intervals during the day as occasion demanded, were actually devoted to the work of selling drugs and medicines and in compounding physicians' prescriptions. The complaint appears to have been drawn for the purpose of squarely presenting the contention of the petitioner, which, concisely stated, is that the limitation of working hours prescribed by the statute applies only to the time the clerk is actually engaged in performing the work of selling drugs or other medicines, or compounding physicians' prescriptions, and that the time spent by him in other duties is not to be taken into account in determining whether or not the law has been violated. From this contention the petitioner argues that, as he is charged with having worked but two hours at the prescribed work, on the day in question, the complaint falls short of alleging a public offense. From a careful consideration of the language of the statute we think this must be so. The act by its terms relates specifically to employees engaged in selling drugs and medicines and compounding physicians' prescriptions. Section 2, already noted, forbids the selling of drugs, or other medicines, and the compounding of physicians' prescriptions by the employee for more than nine hours during any one day, or fifty-four hours a week of six days. It prohibits nothing else. The Legislature might well have provided that the total working hours of any employee engaged in selling drugs and medicines, or compounding physicians' prescriptions, should not exceed a certain number in each day, regardless of whether he was actually and continuously engaged in such work or not. It has not done so, and we are not permitted to read into the act an interpretation that would make it a crime to do something the legislature has not prohibited. We are not unmindful of the weight of the argument of the Attorney General that the employment of a drug clerk at other tasks while waiting to serve purchasers of drugs and medicines may be as fatiguing as any other kind of work, and may impair his efficiency and accuracy to as great a degree, and that it is the possible harmful results arising from the fatigue caused by long hours of continued employment from which the Legislature sought to protect the public, but penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication. People v. Tisdale, 57 Cal. 104, 107; Ex parte Kohler, 74 Cal. 38, 44, 15 Pac. 436; Hackfeld v. United States, 197 U. S. 442, 450, 25 Sup. Ct. 456, 49 L. Ed. 826.

It results that the complaint states no offense, and the petitioner must be discharged. It is so ordered.

We concur: SHAW, C. J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

188 Cal. 797

Ex parte HANKAMMER. (Cr. 2392.)

(Supreme Court of California. Feb. 23, 1922.)

Master and servant ⚷13—**Working hours of drug clerk held lawful.**

Section 3, St. 1905, p. 28, as amended by St. 1907, p. 273, and St. 1921, p. 1323, prohibiting the employment of persons engaged in selling drugs and medicines for more than nine hours during any one day, must be construed together with section 2, and a druggist was not guilty of an offense where he required his pharmacist to work ten hours selling stationery, cigars, etc., and drugs and medicines, where the pharmacist was only actually engaged in selling drugs and medicines an aggregate of two hours.

In Bank.

Application by Walter Hankammer for a writ of habeas corpus prayed to be directed to Charles Jones, Chief of Police of the City of Los Angeles, to secure his release from custody. Petitioner discharged.

W. J. Carr, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., James M. Oliver, of San Francisco, Erwin W. Widney, City Pros., and Harry A. Mock, Deputy City Pros., both of Los Angeles, for respondent.

PER CURIAM. This is an application for a writ of habeas corpus. The petitioner, owner of a drug store, was arrested, and held to answer, together with one of his employees, on a charge of violating the provisions of section 3 of an act of the Legislature, regulating the working hours of employees engaged in selling, at retail, drugs and medicines, compounding physicians' prescriptions, and providing a penalty for its violation and the acts amendatory thereof. Stats. 1905, p. 28, as amended by Stats. 1907, p. 273; Stats. 1921, p. 1323. The material issues made by the petition, and the return, are identical with those presented and considered by the court in the Matter of the Application of Jesse Twing (Crim. No. 2391), this day decided (Cal.) 204 Pac. 1082. Section 2 of the act, for the alleged violation of which Twing was arrested, and section 3, under which this petitioner was charged, relates to the same subject and must be construed together. So considered, what we have said in the former case applies in this. On the authority of that decision it follows that the complaint in this case, as in that, states no offense.

The petitioner must be discharged, and it is so ordered.

SHAW, C. J., and WASTE, WILBUR, LAWLOR, SHURTLEFF, and SLOANE, JJ., and RICHARDS, Justice pro tem., concur.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

188 Cal. 297

ENSELE v. JOLLEY. (Sac. 3146.)

(Supreme Court of California. Feb. 25, 1922.)

1. Mechanics' liens 🔑271(6)—Complaint need not aver in statutory language that materials were actually used.

The complaint, in an action to enforce a materialman's lien, need not aver that the materials were furnished for and were actually used in the buildings, as required by Code Civ. Proc. § 1183, in the precise language of the statute; it being sufficient if such fact is fairly deducible.

2. Mechanics' liens 🔑271(6)—Complaint held to sufficiently allege use of materials in building constructed.

A complaint, in an action to enforce a materialman's lien, *held* sufficient from which to deduce that the materials were actually used in the construction of the buildings.

3. Pleading 🔑406(7) — Uncertainty in complaint waived by failure to specially demur.

Where defendant's answer, in an action to enforce a materialman's lien, did not deny that the materials were furnished and used, but merely denied that plaintiff furnished them, any uncertainty in the complaint in such respects was waived by defendant's failure to specially demur.

4. Pleading 🔑403(5)—Defects in complaint for mechanic's lien as to use of materials cured by answer.

In an action to establish a materialman's lien, defective allegations as to the actual use of the materials furnished *held* cured by defendant's answer, which did not deny that the materials were furnished and used, but alleged that another person furnished them.

5. Appeal and error 🔑544(1)—On appeal on judgment roll, sufficiency of evidence not presented.

On an appeal on the judgment roll alone, no question arises as to the sufficiency of the evidence to sustain the averments and findings.

6. Appeal and error 🔑931(1)—Uncertainties in court's findings resolved to support judgment.

Uncertainties in the court's findings are resolved, if reasonably possible, to support the judgment.

7. Mechanics' liens 🔑290(2)—Court's findings held sufficient.

In an action to enforce a materialman's lien, the court's findings in substantially the wording of the complaint with a general finding that all the allegations thereof were true, *held* sufficient from which to draw the inference that the materials furnished were actually used.

8. Pleading 🔑129(1) — Answer admits averment not denied.

The answer admits an averment it fails to deny.

9. Appeal and error 🔑907(3)—Evidence presumed to support averments of appellee's complaint.

On appeal from the judgment roll alone, the evidence must be presumed to have fully supported the averments of appellee's complaint.

10. Mechanics' liens 🔑291(5) — No error in imposition of materialman's lien on entire premises, in view of pleadings and findings.

In an action to enforce a materialman's lien, where the answer did not deny the averment and the court found that the entire premises were required for the use and occupation of the buildings, the court did not err in imposing the lien on all the land.

In Bank.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by William Ensele, doing business as the Grenada Lumber Company, against Don Jolley. Judgment for plaintiff, and defendant appeals. Affirmed.

Taylor & Tebbe, of Yreka, for appellant.

Collier & McNamara, of Yreka, for respondent.

PER CURIAM. This appeal is by the defendant from a judgment in plaintiff's favor in an action to foreclose a materialman's lien upon certain real estate described in the complaint as the northeast quarter of northwest quarter of section 3, township 43 north, range 6 west, M. D. M.

The plaintiff alleged in his said complaint that he was the owner and proprietor of a certain retail lumber business known as the Grenada Lumber Company, under which name he was doing business; that he had furnished the defendant certain building materials for the erection of a barn and completion of a dwelling house upon said premises, under an oral agreement with the defendant that the plaintiff was to furnish said materials for such purposes, and that the defendant was to pay for the same the reasonable value thereof. The plaintiff further alleged the completion of said buildings; the amount and reasonable value of the materials furnished therefor; the failure of the defendant to pay for the same; the due filing of his lien upon the said lands and premises of the defendant, a copy of which lien was attached to and made a part of the complaint; and finally alleged the fact that the whole of the defendant's lands and premises were required for the convenient use and occupation of the buildings so erected thereon.

The defendant did not demur to the plaintiff's complaint, but filed his answer thereto, and in his said answer, and as his first defense, denied that the plaintiff was the owner or proprietor of the business known as the Grenada Lumber Company, but that one A. L. Harlow was the owner of said business, and was doing business under said name. The defendant followed this averment with specific denials that he had ever entered into any agreement with the plaintiff for the furnishing of any building material whatever for the erection of buildings upon his said premises, or that said plaintiff had ever furnished any such materials, or that he had ever agreed to pay the reasonable or any value thereof. These specific denials ended in the following affirmative statement:

> "And defendant shows that all of the materials furnished or labor furnished defendant for the erection of buildings upon the property described in plaintiff's complaint was furnished by one A. L. Harlow, all of which plaintiff well knows."

The answer of the defendant made no denial of the sufficiency in form or of the due filing of the claim of lien, nor did the defendant deny the plaintiff's averment that the whole of the described premises would be required for the convenient use and occupation of the said buildings erected thereon.

The cause went to trial upon the issues thus presented, at the conclusion of which the trial court made its findings of fact and conclusions of law in the plaintiff's favor, following in its said findings specifically the averments of the plaintiff's complaint, and adding the general finding that all of the allegations of said complaint were true. Judgment was entered upon said findings for the establishment and foreclosure of the plaintiff's lien upon the whole of the premises described in the plaintiff's complaint. From such judgment this appeal has been taken by the defendant upon the judgment roll alone. The following three contentions are urged upon this appeal: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the findings are not sufficient to support the judgment; and, third, that the judgment is against law in the respect that it adjudges that the whole of defendant's premises should be subjected to the plaintiff's lien.

[1, 2] In support of the first of these contentions the appellant alleges that the complaint fails to sufficiently allege that the materials furnished by the defendant were actually used in the construction of the buildings in question, as the statute requires. There can be no question that in order to entitle a materialman to a lien as against the owner of premises upon which a structure has been erected the materials must not only have been furnished to be used in such structure, but must also have been used therein. Code Civ. Proc., sec. 1183; Silvester v. Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217; Roebling Sons Co. v. Bear Valley I. Co., 99 Cal. 488, 34 Pac. 80; Bennett v. Beadle, 142 Cal. 329, 75 Pac. 843. It is also well settled that the complaint whereby a lien for such materials is sought to be established and enforced must contain substantial allegations to the effect that the said materials were furnished for and to be used in, and that they were used in, the buildings in question. Cohn v. Wright, 89 Cal. 87, 26 Pac. 643; Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008. But, while these essential requirements of the statute must be shown to have been complied with in the plaintiff's pleading, it is not necessary that the pleading should aver their existence in the precise terms or language of the statute. It is sufficient if, from a reading of the complaint as a whole, it can be fairly deduced that the plaintiff has conformed to the requirements of the statute in the respect that his materials under his agreement with the defendant were to be furnished for the designated structure, and that such materials were actually used in the construction thereof. Looking to the four corners of the plaintiff's complaint in this action, we think that this deduction may be fairly drawn. He alleges that on or about the 1st day of May, 1919, he "entered into an oral agreement with defendant wherein and whereby the said plaintiff agreed to furnish certain building materials for the erection for the defendant of certain buildings (describing them) upon the lands and premises hereinafter described." He further alleges:

> "That said buildings have been completed under said contract and all the materials agreed to be furnished by plaintiff have been furnished and said contract has upon the part of plaintiff been fully kept and performed."

He then alleges:

> "That the lands upon which said buildings were so erected under said contract are situate," etc. (here follows description); "that at the date of said contract mentioned above and at the date of the furnishing of said materials and the performing of said labor as aforesaid the said defendant Jolley was the owner of the lands hereinabove described; * * * that the said buildings were erected thereon, and defendant knew that plaintiff was furnishing materials as hereinbefore set forth."

Finally he alleges:

> "That plaintiff furnished said materials for said buildings between the 1st day of May, 1919, and the 28th day of July, 1919, and that all of said materials were furnished prior to the completion of said buildings, and that the said buildings were completed on or about the 1st day of August, 1919."

We deem the foregoing allegations sufficient, in the absence of a special demurrer upon the ground of uncertainty, to enable a reasonable inference to be drawn that the materials in question were agreed to be furnished for, and were furnished for and were used in, the construction of the designated structures upon the premises of the defendant sought to be charged with this lien. In addition to the foregoing averments in the body of the complaint, the plaintiff's claim of lien was attached to it as an exhibit and expressly made a part thereof. In such claim of lien it was asserted that the materials for the value of which said lien was sought were furnished by the claimant to the owner of the described premises, under an agreement to supply the same for the purposes of constructing and erecting a building or buildings upon said premises, and that the claimant did furnish such materials "to be used and which were actually used in the construction of said building or buildings."

[3, 4] The answer of the defendant does not deny that the materials in question were furnished or that they were used in the construction of the buildings upon his premises, but merely denies that the plaintiff was the person who furnished the same, and in that behalf the defendant alleges that the owner or proprietor of the Grenada Lumber Company was not the plaintiff, but was one A. L. Harlow, who was doing business under that name, and "that all of the materials furnished defendant for the erection of buildings upon the property described in plaintiff's complaint were furnished by one A. L. Harlow, all of which plaintiff well knows." Such being the form and content of defendant's answer, we think that whatever uncertainty there may have been in the plaintiff's complaint in the respects indicated in the defendant's present contention was waived by the defendant's failure to present a special demurrer upon that ground, and we are further of the opinion that whatever infirmities there may have been in such complaint in that respect were eked out by the form and substance of the defendant's answer.

Turning to the authorities cited by the appellant in support of his contention, we find that in the case of Cohn v. Wright, supra, upon which the defendant chiefly relies, there was a special demurrer to the complaint upon the ground of uncertainty in the precise respect in which the complaint herein is asserted to be insufficient, and that this court based its decision upon the ground that such demurrer should have been sustained. In each of the other cases cited by the appellant upon this point it was the sufficiency of the plaintiff's proof, not of his pleading, which was the subject of review. On the other hand, in the case of Reed v. Norton, 90 Cal. 590, 26 Pac. 767, the complaint alleged that—

> "Said firm sold and delivered to said Norton certain hardware and building material to be used in the erection and construction of said building and affixed and attached thereto."

This allegation was held to be sufficient to show that the materials were used in the building, in the absence of a special demurrer. We conclude that there is no merit in the appellant's first contention.

[5, 6] This conclusion has application, also, in determining the appellant's second contention as to the sufficiency of the findings to support the judgment. This appeal, being upon the judgment roll alone, no question can arise as to the sufficiency of the evidence to sustain the averments of the complaint and to justify the findings of the court. It is a well-established principle that whatever uncertainties may exist in the findings of the court are to be so resolved, if reasonably possible, to support the judgment rather than to defeat it. Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; People v. McCue, 150 Cal. 196, 88 Pac. 899; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672.

[7] The findings in the instant case follow substantially the wording of the complaint, and, in addition to so doing specifically find generally that all of the allegations of said complaint are true. Having determined that the asserted defects in said complaint are at the most mere uncertainties, it follows, under the foregoing authorities, that such uncertainties are to be resolved, if it is fairly reasonable so to do, so as to sustain the judgment. Applying this rule, we think that the inference may be fairly drawn from such findings that the materials furnished by the plaintiff to the defendant under his agreement so to do were used in the construction of the buildings upon the premises upon which the plaintiff claims and is awarded a lien.

[8-10] The appellant's final contention to the effect that the judgment is erroneous in its imposition of said lien upon the whole of said defendant's lands we find to be without merit. The complaint alleged that the whole of the defendant's described premises were required for the convenient use and occupation of said buildings. The answer admitted this averment by failing to deny the same. The evidence must be presumed to have fully supported this averment, even if it had not been admitted to be true. The findings expressly state that the whole of the described premises is required for the use and occupation of the buildings erected thereon. This state of the record leaves no room for the application of the cases of Tunis v. Lakeport, etc., Ass'n, 98 Cal. 285, 33 Pac. 63, 447, and Cowan v. Griffith, 108 Cal. 224, 41 Pac. 42, 49 Am. St. Rep. 82, cited by the appellant to the facts of the case at bar, since in each of those cases the Supreme Court had the evidence before it, and held the same insufficient to support the judgment.

Judgment affirmed.

RICHARDS, Justice pro tem., SHAW, C. J., LAWLOR, J., WILBUR, J., WASTE, J., SHURTLEFF, J., and SLOANE, J., concur.

56 Cal. App. 270

PEOPLE v. MORALES. (Cr. 833.)

(District Court of Appeal, Second District, Division 1, California. Jan. 25, 1922.)

1. Kidnapping 🔑5—Robbery 🔑24(1)—Evidence held to sustain conviction of kidnapping and robbery.

Evidence *held* sufficient to sustain conviction of kidnapping and robbery of the person kidnapped.

2. Indictment and information 🔑129(1)—One information may charge kidnapping and robbery from the person kidnapped.

In view of Pen. Code, § 954, providing that an information may charge two or more different offenses connected together in their commission, an information may charge in two counts kidnapping and robbery from the person kidnapped.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Jose Morales was convicted of kidnapping and robbery, and he appeals. Judgment and order denying new trial affirmed.

Albert D. Trujillo, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CONREY, P. J. By information in two counts the defendant was accused of the crime of kidnapping of the person of one Victoria Analle, and also of the crime of robbery of the sum of $300 taken by the defendant from said Victoria Analle. Having been convicted on both counts, he was sentenced according to law, and it was ordered that two sentences run concurrently.

The defendant has appealed from the judgment. It is doubtful whether the record shows an appeal from the order denying a new trial, but we shall assume that it does.

The points urged are that the evidence is insufficient to sustain the verdict of guilty of either one of the crimes charged, and that the two counts are separate and distinct charges and cannot as such be made parts of one information.

[1] There is ample evidence to show that the defendant is guilty of both of these offenses. The substance of the testimony is to the effect that the complaining witness was an ignorant and superstitious woman; that the defendant by force and threats of violence took her away from her home, and through force, threats, and fear kept her for several months; and that on the very first day of this period he, in like manner, took away from her, without her consent and against her will, the sum of $300, which had been given to her by her husband.

[2] The information may charge two or more different offenses connected together in their commission, or different statements of the same offense. Pen. Code, § 954. The second count of the information in this case charges that the alleged robbery was committed as part of the same transaction set forth in the first count. The evidence shows the truth of this allegation.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

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56 Cal. App. 330

PEOPLE v. GONZALES. (Cr. 854.)

(District Court of Appeal, Second District, Division 1, California. Jan. 30, 1922.)

Witnesses 🔑306—Accused cannot complain that court compelled witness for state to incriminate herself.

In a prosecution for rape, accused cannot complain that the court compelled prosecutrix to testify although she stated that her testimony would incriminate her.

Appeal from Superior Court, Los Angeles County; Rex. B. Goodcell, Judge.

Joe Gonzales was convicted of rape, and appeals. Affirmed.

D. W. Richards, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., for the People.

JAMES, J. Appellant herein was convicted of the crime of rape. He appeals from the judgment of imprisonment. No brief was filed on behalf of appellant, and at the oral argument but one ground was urged in support of the claim that a reversal of the judgment should be ordered. It was charged in the information that the act complained of was consummated with a girl of the age of 14 years. This girl was called as a witness at the trial and, after answering preliminary questions, made objection to being required to narrate further facts. In answer to a question calling for such a recital she responded, "Well, if I say anything, I will criminate myself." Counsel for the defendant interposed with a request to the court that no further questions be asked the witness because of her disinclination to testify. The trial judge, however, refused to concede that the privilege was well claimed and directed the witness to answer, whereupon she completed her statement as to all matters material in support of the charge. Appellant advances the contention that the witness had the right to refuse to testify, and that, if she was compelled against her will, as the record shows, to give evidence, error was committed as to which appellant has the right to complain here.

The point is not well made. Conceding for the purposes of the argument that the court should have allowed the privilege to the young girl and not have compelled her to answer questions, the error was not an error committed as against the defendant, and, therefore, not a matter about which he may complain. The testimony was relevant and competent when given, and, being so, it was proper to be considered by the jury. Had the witness stood upon her refusal to answer and been committed for contempt in consequence, the question as to whether the court had ruled properly would be presented in a proceeding brought to test the validity of the imprisonment. That matter would be a thing wholly outside of any question proper to be considered in defendant's case.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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53 Cal. App. 339

FOSTER v. TRAEGER, Sheriff, et al.
(Civ. 3817.)

(District Court of Appeal, Second District, Division 1. California. Jan. 30, 1922.)

1. Mandamus 🔑4(1)—Writ will not issue where there is an adequate remedy at law.

A writ of mandate will not issue where there is a plain, speedy, and adequate remedy in the ordinary course of law, and, as a general rule, the right of appeal constitutes such remedy.

2. Mandamus 🔑9—Writ will not issue where application has been denied by superior court.

A writ of mandate will not issue out of the Supreme Court or a district court of appeal when an application for such writ has been denied by the superior court.

3. Mandamus 🔑9—Petition for order to show cause held in substance one for writ of mandate.

A proceeding on a petition for an order to show cause in the superior court, while not in the form of an application for a writ of mandate, *held* to be in substance and effect the same as an application for mandamus.

4. Appeal and error 🔑81—Judgment or order to show cause in claim and delivery held a "final judgment" for the purposes of appeal.

Although an order denying the relief demanded upon a petition for an order to show cause in a proceeding of claim and delivery against the sheriff and another was not one of orders mentioned by Code of Civ. Proc. § 963, it was a "final judgment" within subdivision 1 of that section, and was in effect a final judgment against the petitioner "in a collateral proceeding growing out of the action," and "is so far independent of the suit itself as to be substantially a final decree for the purposes of an appeal, although there has been no final decree in the suit."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

5. Mandamus 🔑4(5) — In a mandamus proceeding held that order was a final appealable judgment.

In a proceeding for writ of mandamus against a county sheriff, although the sheriff was not a party defendant in the replevin action in which he came into possession of the goods, he was a party to the record so far as the collateral proceeding on an order to show cause was concerned, since he had been brought in as such a party by such order, and it follows that the order, being in effect a final judgment, was entirely subject to remedy by appeal, and mandamus will not lie.

Petition by Louise Foster for writ of mandate against William I. Traeger, Sheriff of Los Angeles County, and another, requiring respondents to deliver up certain personal property. Proceeding dismissed.

Kemp & Clewett, of Los Angeles, and E. L. Foster, of Bakersfield, for petitioner.

Abrahams & D'Orr, for respondents.

CONREY, P. J. On verified petition filed herein, an alternative writ of mandate was issued, requiring that the respondents deliver to the petitioner certain personal property, to wit, a ring set with diamonds, which had been taken into possession by the sheriff by reason of claim and delivery proceedings in an action of replevin, or that respondents appear and show cause why a peremptory writ should not be granted. The respondents, together with the answer contained in their return to the alternative writ, have demurred to the petition on the ground that said petition does not state facts sufficient to entitle the petitioner to the relief demanded; and on the further ground that it appears from the petition that a proceeding was commenced and determined in the superior court between the parties hereto for the same cause, and that judgment was made and rendered by the superior court in that proceeding on the 2d day of December, 1921.

The petition shows that upon the same state of facts relied upon by petitioner to show her right to possession of said personal property the petitioner did, in said action of replevin, apply to the superior court for an order directing the sheriff to retake possession of the property which theretofore he had redelivered to the defendant, and deliver possession thereof to the plaintiff. An order to show cause was issued, and return made thereon by the sheriff and the defendant Abrahams. At a hearing by the court of the said matter, the court "dismissed the same, holding that it was unnecessary for the defendant to justify the surety or sureties upon a redelivery bond, as required by sections

514 and 515 of the Code of Civil Procedure." The redelivery bond was an undertaking executed by a surety corporation.

[1, 2] A writ of mandate will not issue where there is a plain, speedy, and adequate remedy in the ordinary course of law. As a general rule, the right of appeal constitutes such remedy. A writ of mandate will not issue out of the Supreme Court or a district court of appeal when an application for such writ has been denied by the superior court. Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Hartigan v. Pacific Gas & Elec. Co., 38 Cal. App. 763, 177 Pac. 484.

[3, 4] The proceeding on the petition for an order to show cause in the superior court, while not in the form of an application for a writ of mandate, was in substance and effect the same as an application for a writ of mandate. Although the order of court denying the relief demanded in that proceeding was not one of the orders mentioned in section 963 of the Code of Civil Procedure, it was a "final judgment" within the meaning of those words as used in subdivision one of that section. It was in effect a final judgment against the petitioner "in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purposes of an appeal, although there has been no final decree in the suit." Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 96 Pac. 803.

[5] Although the sheriff was not a party defendant in the replevin action, he was a party to the record so far as the collateral proceeding on the order to show cause was concerned, since he had been brought in as such party by the order to show cause. It follows that the order, being in effect a final judgment in that proceeding, was entirely subject to the right of appeal. Elliott v. Superior Ct., 144 Cal. 506, 77 Pac. 1109, 103 Am. St. Rep. 102.

We are of the opinion that the demurrer to the petition should be sustained. Since the facts to which we have referred are admitted, it would be useless to grant leave to amend. It is therefore ordered that the demurrer be sustained, and the proceeding dismissed.

We concur: SHAW, J.; JAMES, J.

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56 Cal. App. 238

CARTER v. GARETSON (GARETSON, Intervener. (Civ. 4146.)

(District Court of Appeal, First District, Division 1, California. Jan. 20, 1922. Hearing Denied by Supreme Court March 20, 1922.)

1. Attachment 🔑280—Third party can intervene to claim attached property.

A third party who has no interest in the action between plaintiff and defendant, in which property was attached as the property of defendant, can intervene in such action to claim the attached property.

2. Appeal and error 🔑1011(1)—Findings on conflicting evidence supported by evidence not disturbed.

Findings that the intervener was the owner of the attached property based on evidence which, though conflicting, was sufficient to support them, cannot be disturbed on appeal.

3. Vendor and purchaser 🔑266(8)—Collateral security for purchase-money note precludes vendor's lien.

Under Civ. Code, § 3046, giving a vendor a lien upon real property for the balance of the purchase money unpaid and unsecured, does not entitle the vendor to a lien where the note for the balance of the purchase money was secured by a pledge of corporate stock, even though the pledged stock eventually proved to be worthless.

Appeal from Superior Court, Imperial County; Phil D. Swing, Judge.

Action by George A. Carter against Ray A. Garetson, in which Josephine Garetson intervened, claiming the property attached. Judgment for plaintiff against the defendant and for the intervener as to the attached property, and the plaintiff appeals. Affirmed.

C. L. Brown, of El Centro, for appellant.

J. T. Reed, of Calexico, for respondent and intervener.

RICHARDS, J. The plaintiff in this action brought suit against the defendant, Ray A. Garetson, to recover upon a promissory note for the sum of $3,500 together with interest and counsel fees, and in said action caused an attachment to be issued and levied upon said real estate. The defendant appeared and answered, admitting all of the allegations of the complaint except the allegation with respect to counsel fees, the demand for which the defendant in his said answer asserted to be exorbitant. Thereafter Josephine Garetson, the wife of said defendant, filed, by leave of court, a complaint in intervention, wherein she alleged that she was the owner of the real estate upon which said attachment had been levied, and that same was her sole and separate property and estate, and further alleged that prior to said attachment she had filed a declaration of homestead upon said property by virtue of which it had been exempted from attachment and execution under the laws of the state of California. To this complaint in intervention the plaintiff in the action filed an answer wherein he denied that the said property so attached, or any portion thereof, was the sole or separate property of the intervener, but alleged that at all times it was the community property of defendant and intervener, and further denied that by virtue of the filing of said or any declaration of homestead the said property was exempt. The cause went to trial upon the issues as thus presented, whereupon the evidence developed substantially the following facts:

The defendant and the intervener intermarried in the year 1912, at which time the father of the intervener had caused to be executed and delivered to herself and her husband a deed to said property in the city of San Diego as a wedding gift, which property they had continued to own until some time in the early part of the year 1917 when they met the plaintiff, who at the time was the owner of an interest under the desert land act in the property in question in the present action. Negotiations began between the plaintiff and the defendant and his wife, the intervener, for an exchange of properties, by the terms of which the latter were to convey to the former their San Diego holdings in return for such a relinquishment by the plaintiff of his said desert land entry as would enable a new filing to be made thereon under said act. The intervener testified that at the time such negotiations were pending an oral agreement had been entered into between her husband and herself to the effect that in consideration of her consenting to convey her interest in the San Diego property to the plaintiff she was to have and receive the plaintiff's relinquishment to the Imperial county lands transferred to her, and that she was to have the right to make the entry upon the said lands under the desert land act in her own name and was to be entitled to have the patent thereto issued to her and was to have and hold the title to said lands as her sole and separate property and estate. She also testified that this oral agreement between her husband and herself was fully carried into effect, and that in consequence thereof she had become the patentee and owner of said lands as her separate property and had ever since held and owned the same as such. The intervener's husband also testified to the same state of facts and also testified that at the time of the transaction with the plaintiff it was agreed as between himself and the said plaintiff that he should execute to the latter his promissory note for the sum of $3,500 as a portion of the purchase price of the plaintiff's interest in said desert land entry, which note was to be secured by certain corporate stock, that he had executed said note with such security, but had been unable to pay the same, and that it was the note upon which this suit had been brought. The plaintiff on his part testified that he had no knowledge or part in the alleged oral agreement as to the title to be acquired by her as separate property to the Imperial county land, and supposed that the title to said lands would be taken in defendant's name, and that later he would be given a mortgage as security for the balance of its purchase price as represented in said note, which mortgage, however, had never been given. Upon the testimony of the respective parties as thus presented the court filed its findings of fact and conclusions of law wherein it found as to the plaintiff's cause of action against the defendant upon said promissory note that the plaintiff was entitled to judgment against said defendant for the full amount due thereon with interest and counsel fees but as to the intervener's cause of action as embraced in her complaint in intervention she was entitled to judgment that she was the owner of the property described therein as her sole and separate estate free and clear of said attachment lien. In so finding the trial court sustained the oral agreement between defendant and intervener as having been entered into and fully executed in good faith on the part of said intervener and without any intent on her part or on the part of said defendant to hinder, delay, or defraud latter's creditors. The court also found that the homestead referred to in the intervener's complaint in intervention had been duly filed for record, and that all of the allegations of the complaint in intervention in respect to the same were true. Judgment was accordingly entered in the intervener's favor upon her complaint in intervention, and from such judgment the plaintiff has prosecuted this appeal.

[1] The first contention of the appellant here is that the trial court was in error in permitting Josephine Garetson to file her complaint in intervention in this action for the reason that a claimant to property which has been attached in an action between two other persons to recover upon an indebtedness, in which action the claimant of the property attached has no interest, has, under the provisions of the Code of Civil Procedure of this state relating to intervention, no right to intervene. The appellant, with a fairness which is quite unusual, has cited the court to a long line of cases in this and other jurisdictions upholding the right of a third party to intervene in an action wherein the title to property of which he claims to be the owner is in danger of being injuriously affected by the proceedings in said action; the purpose of his intervention being that of preventing a cloud upon his title to said property. The cases referred to and commented upon by the appellant are Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Speyer v. Ihmels, 21 Cal. 281, 81 Am. Dec. 157; Coffey v. Greenfield, 55 Cal. 382; Kimball v. Richardson, 111 Cal. 386, 43 Pac. 1111; and Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141. The distinction which the appellant seeks to draw between the foregoing cases and the case at bar is that in each of the earlier of such cases the action was one directly involving the property of which the intervener claimed to be the owner. The language of the court in such

earlier cases does not, however, preserve this distinction, while in the last case above cited it would seem to have been entirely lost, since the court in that case held that a claimant of a sum of money which had been attached in an action to which she was not a party had a right to intervene for the purpose of protecting her interest in said fund against attachment. Dennis v. Kolm, supra. In so deciding the court refers to the cases decided by the courts of Louisiana applying the right of intervention as given by the Code of Procedure of that state, from which the provisions of our own Code relating to intervention were substantially taken, in which cases the right of a party whose property has been seized or attached in a suit between other parties to intervene for the protection of his interest in said property as against such attachment has been uniformly upheld. Yale v. Hoopes, 16 La. Ann. 311; Letchford v. Jacobs, 17 La. Ann. 79; Field v. Harrison, 20 La. Ann. 411. In line with these authorities it appears that in those states whose statutes upon the subject of intervention have embodied the provisions of the Code of Civil Procedure of California the same rule has been applied. In the case of Moreland v. Monarch M. & M. Co., 55 Mont. 419, 178 Pac. 175, it was decided, after a very full review of the decisions of the courts of California and other states upon the subject, that the owner of property attached in an action for debt between two other parties had a right to intervene in defense of his property against such attachment. The same rule has been enunciated by the courts of Idaho, Utah, and Washington. Potlatch L. Co. v. Runkel, 16 Idaho, 192, 101 Pac. 396, 23 L. R. A. (N. S.) 536, 18 Ann. Cas. 591; Houston, etc., Co. v. Hechler, 44 Utah, 64, 138 Pac. 1159; Langert v. Brown, 3 Wash. T. 102, 13 Pac. 704; 2 Ruling Case Law, p. 880, § 94. This being the state of the law, we find no merit in the appellant's said contention.

[2] The next contention of the appellant is that the evidence was insufficient to establish the intervener's right to the property in question as her separate property; but as to those points the evidence touching the transaction between her husband and herself and also between the said parties and the appellant herein as above set forth, though conflicting, was, we think, amply sufficient to justify the findings of the court in the intervener's favor. We may not, therefore, interfere with a judgment based upon such findings. It is to be noted in this case that the plaintiff, though fully advised by the intervener's complaint in intervention, and though fully informed, as he must have been, of the source and foundation of the intervener's said claim of separate ownership to said property, not only made no attack upon said claim or its source in his answer to said complaint in intervention upon the ground of fraud, but presented no evidence in support of said ground other than that attempted to be adduced by him in the course of cross-examination of the adverse parties. Such examination did not develop sufficient facts to support such a claim even if the state of the pleading had permitted its assertion. The court did, however, make a finding which was adverse to the plaintiff and which we think was fully sustained by the evidence in the case.

[3] Finally the appellant contends that, his action being for the recovery of a portion of the purchase price of the premises in question, as evidenced by the promissory note sued upon, he was entitled to have the priority of his vendor's lien established as superior both to the intervener's claim of separate ownership of said property and also as superior to the homestead attempted to be created by her therein. The difficulty with this contention on the part of the appellant is that a vendor's lien upon real property under section 3046 of the Civil Code can only persist "for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." The undisputed evidence in this case shows that the defendant's promissory note for the balance of the purchase price of the property in question was secured by certain shares of stock of a corporation. The partial inadequacy or final worthlessness of such security cannot militate against the fact that the acceptance and receipt of it by the plaintiff worked a waiver of his vendor's lien. Jones v. Allert, 161 Cal. 234, 118 Pac. 794.

For the foregoing reasons, the judgment is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 272

SANTIKIAN v. WEAKLEY. (Civ. 3984.)

(District Court of Appeal, First District, Division 1, California. Jan. 25, 1922. Rehearing Denied Feb. 24, 1922. Hearing Denied by Supreme Court March 23, 1922.)

Vendor and purchaser 🔑335—Purchaser cannot recover deposit on exercising option which vendor is willing to perform.

Where a purchaser elected to exercise an option and made the initial payment, and requested the contract to be made to himself and another, which request was complied with, the owner being ready and willing to perform, but the other purchaser refused to execute the contract of purchase, the purchaser could not recover his payment.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by George Santikian against J. E. Weakley for money had and received. Judgment for defendant, and plaintiff appeals. Affirmed.

G. L. Aynesworth and L. N. Barber, both of Fresno, for appellant.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for respondent.

RICHARDS, J. This appeal is by the plaintiff from a judgment in favor of the defendant in an action for money had and received. The facts of the case are these:

During the year 1920 J. E. Weakley, the defendant herein, was the owner of a tract of land in the county of Madera. The plaintiff, H. K. Santikian and his father, Z. H. Santikian, were desirous of purchasing said land, and, being so, requested one Paul P. David, a real estate agent, to go to said Weakley and procure from him a written option or privilege to make a sale of said lands upon the terms set forth therein. Among the provisions in the writing which said David thus procured were the following:

> "The purchase price of said property is $50,000.00, payable: $10,000.00 cash at the time the contract of sale herein provided for is made; $5,000.00 one year after that date; 5,000.00 two years after that date; 5,000.00 three years after that date; one-half of the remainder four years after that date, and the balance five years after the date of said contract. * * *
>
> "If this option be exercised, a deposit of $1,000.00 shall be paid to the first party, and he shall be notified of the acceptance of this option at that time.
>
> "The first party agrees to obtain an abstract or certificate of title, continued to date, and submit the same to the purchaser for examination; also prepare an agreement of sale in the full and usual form customarily used by his attorney, containing the terms of the sale herein mentioned, and general provisions in addition thereto. * * *
>
> "If this option be not exercised on or before the 19th day of June, 1920, then the right of the second party hereunder shall cease, determine, and end and this agreement shall be of no further force or effect.
>
> "This agreement shall and does bind the parties hereto, their heirs, executors, administrators, and assigns, and time is of the essence hereof."

There was a further provision in said writing wherein it was recited that a certain Japanese tenant was occupying the premises under an agreement by which he was to care for the same for the year 1920, which agreement he was to be permitted to carry out and for which he was to be paid biweekly. Upon the day upon which David procured this writing and immediately thereafter the Santikians, father and son, went to the law office of Mr. F. E. Cook in Fresno, who was Weakley's attorney and agent, and there met Weakley, to whom they stated that they were the persons for whose benefit said writing had been procured, and that they desired to exercise the right therein given to become the purchasers of said property according to the terms therein contained; and thereupon the plaintiff herein paid to the defendant, and the latter received, the sum of $1,000 as provided in said writing. Some effort was made at the time on the part of the Santikians to procure certain modifications of the terms of sale, but, this being ineffectual, they accepted the terms thereof with the proviso that the name of Mrs. Z. H. Santikian should be included with their names as the purchasers of the property. The parties then separated and the defendant proceeded to perform the portions of said writing which were by him to be performed. These required him to furnish an abstract of the property and to prepare an agreement of sale in accordance with the terms of said writing. These, when completed, were submitted to the attorney for the Santikians, who suggested certain slight changes in the agreement of sale, which being made, the document was signed by Weakley and his wife and by the Santikians, father and son, and was given to them to procure the signature of Mrs. Santikian. It appears, however, that George Santikian, and probably also his father, had changed their minds about going on with the transaction, since, when George Santikian presented the document for his mother's signature, he told her that the Japanese tenant upon the property was not going to carry out his agreement as to the proper care of the premises. This was admittedly a misrepresentation, but upon hearing it Mrs. Santikian refused to sign the agreement, whereupon the Santikians, father and son, who had already signed the same, took no further steps to carry into effect the purchase of said premises, but presently demanded the repayment of the $1,000 which George Santikian had paid to the defendant at the time of the exercise of the option or privilege to become the purchasers of the property. This demand being refused, the present action was instituted for the recovery of said sum. Upon the trial of the cause the court upon the foregoing facts gave its judgment for the defendant, from which judgment the plaintiff has prosecuted this appeal.

The sole contention which the appellant makes here is that since, as he claims, the minds of the parties did not meet in an executed agreement of sale of the premises in question, he is entitled to recover back the money which he had paid. In making this contention the appellant argues that it is entirely immaterial for what reason or upon what representation, true or false, the agreement of sale was refused signature by Mrs. Santikian, one of the parties thereto, by reason of which the negotiations for the purchase of the property fell through. It is enough, according to the appellant's contention, that the said agreement of sale was never executed. We are inclined to agree with the appellant that the reason assigned for the refusal of his mother to execute said document and the consequent failure of himself and his father to complete the transaction for the purchase of the property is quite immaterial to the questions raised upon this appeal; but it does not therefore follow that the appellant is entitled to a return of the money for which this action was brought. The difficulty with the appellant's case consists in his misconception of the nature of the transaction, in the course of which he paid the defendant the sum of money which he now seeks to recover. Such money was not paid in the course of an inchoate negotiation for the purchase of defendant's property which failed of fruition by reason of the fact that the agreement of sale was never executed. Such payment was made in the course of another transaction and in accordance with the terms of another agreement which was executed by both parties, and which the defendant upon his part has thus far fully performed. The terms of that agreement are to be found in the written option or privilege which Paul David procured from the defendant as the agent of and on behalf of the plaintiff herein. By the terms of that writing the Santikians, as the principals in interest therein, standing behind said David, could demand the right to become the purchasers of the defendant's property upon certain conditions as set forth expressly therein. One of these conditions was the payment to the defendant of the sum of $1,000 at the time of the exercise of the option or privilege of becoming the purchasers of said property. Upon the payment of said sum within the time limited for the exercise of said option the status of the parties became fixed. The Santikians gained the right to purchase said property upon the terms expressed in said writing. The defendant became bound to perform the terms thereof to be by him performed. These were to procure and submit an abstract or certificate of title to said property; to prepare a contract of sale in accordance with the terms of said writing; to accept the purchase price of the premises in installments and at the time specified in said writing; and to convey the premises described therein to the purchaser thereof according to the terms of said writing. Had the defendant on his part and after the acceptance of said money failed or refused to do the acts required to be done by him under the terms of said writing or failed or refused otherwise to comply with the provisions thereof, the Santikians unquestionably would have had the right to compel such performance or to recover damages for such breach. It is admitted, however, that the defendant fully performed the immediate acts required to be done by him by virtue of said writing in the way of causing to be prepared and submitted an abstract or certificate of title to the said premises, showing him to be the owner thereof, and also in the way of having prepared and submitted an agreement of sale embodying the terms of said writing, and it is also admitted that the defendant has at all time stood ready, willing, and able to go on with the performance of every portion of said agreement to be by him performed. The plaintiff, on the other hand, has admittedly failed and refused to perform his part of said agreement, giving as the sole reason therefor the refusal of his mother to sign the agreement of sale. We have therefore before us, not the case of an uncompleted negotiation for the purchase and sale of real estate in the course of which a deposit was made, and in which the minds of the parties never met, in which event plaintiff upon the authority of the cases cited by him would be entitled to a return of his deposit; but we have before us a transaction in which the plaintiff and his people exercised a certain option and privilege to become the purchasers of certain premises upon certain terms and conditions as stated therein, one of which was that he should pay to the defendant the sum of $1,000, upon payment of which he gained the right to purchase and bound the plaintiff by the obligation to sell the premises in question. The right which he thus gained he has refused to exercise. The obligation which he thus imposed upon the defendant has by the latter been fully performed. This being the position of the respective parties, it is clear that under the authorities the plaintiff has no right to the recovery of the money which he paid upon an agreement which the defendant has kept, but which the plaintiff himself has failed and refused to perform. Bradford v. Parkhurst, 96 Cal. 102, 30 Pac. 1106, 31 Am. St. Rep. 189; Glock v. Howard, etc., Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Poheim v. Meyers, 9 Cal. App. 31, 98 Pac. 65; Rayfield v. Van Meter, 120 Cal. 416, 52 Pac. 666; Dennis v. Strassburger, 89 Cal. 583, 26 Pac. 1070. The cases cited by the appellant, while sound law as to the state of facts to which they relate, have no application to the situation arising out of the facts of the case at bar.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 233

WAGNER v. RUPPE et al. (Civ. 4160.)

(District Court of Appeal, First District, Division 1. California. Jan. 19, 1922. Rehearing Denied Feb. 17, 1922. Hearing Denied by Supreme Court March 20, 1922.)

1. Pleading 🔑427—Objection set-off was not pleaded as such is waived by failure to object.

The objection that defendant did not plead his claim against plaintiff in the form of a set-off or counterclaim is waived, where it was not made either by demurrer or by objection to the proof of the items.

2. Pleading 🔑138—Averments denying issue of performance by plaintiff need not be expressly pleaded as set-off.

In an action by a contractor to foreclose a mechanic's lien, where plaintiff pleaded performance of his contract, an answer, alleging several particulars in which plaintiff failed to perform his contract as agreed, goes directly to the issue of performance which plaintiff had tendered, and need not be separately pleaded as a set-off or counterclaim to entitle defendant to a reduction of plaintiff's recovery by the amount he was damaged by plaintiff's defaults.

3. Appeal and error 🔑197(7)—Judgment not reversed for evidence outside strict issues admitted without objection.

In an action to foreclose a mechanic's lien for the contractor's percentage of the total cost of the building, where the answer did not expressly deny the cost of the building as alleged by plaintiff, but evidence as to such cost was admitted on behalf of both parties without objection, a judgment, supported by evidence finding the cost at less than alleged by plaintiff, will not be reversed.

4. Appeal and error 🔑197(7)—Judgment not reversed for evidence admitted without objection on theory on which case was tried.

Where both parties and the trial court proceeded on the theory that the owner's right to reduce the contractor's claim for defective work was embraced in the issue of full performance pleaded by plaintiff, evidence, admitted without objection on that theory, does not require reversal of the judgment, allowing defendant some of the items claimed.

Appeal from Superior Court, Los Angeles County; L. A. Valentine, Judge.

Action by Charles D. Wagner against Louis E. Ruppe and others to foreclose a mechanic's lien. Judgment for plaintiff allowing defendants certain items of counterclaim, and plaintiff appeals. Affirmed.

William C. Jensen, of Los Angeles, for appellant.

Wirt C. Smith, of Los Angeles, for respondents.

RICHARDS, J. This action was one brought for the foreclosure of a mechanic's lien upon premises owned by the defendant upon which a building had been constructed under the provisions of an agreement between the plaintiff and the defendant, by the terms of which plaintiff agreed to supply defendant plans and specifications and to superintend and oversee the construction and erection of a certain building upon said premises; said contract further provided that plaintiff should procure the best possible bids for all material wanted or used, including plumbing, gas, electrical wiring, painting, decorating, plastering, concrete, iron, and brick work, and all other necessities for the completion thereof, and that when said bids were so procured by plaintiff the same were to be submitted to said defendant for his approval and selection. Said contract further provided that plaintiff should receive for his compensation for said services the sum of 10 per cent. of the total construction price of said building, payments to be made upon the 10th day of each month of 10 per cent. of the total amount of bills then paid. The plaintiff alleged that he proceeded with the performance of this said agreement, which was by him to be performed, until on or about the 27th day of September, 1920, when said building was about nine-tenths completed, when his services were dispensed with by the defendant; that the construction price of said building up to the said 27th day of September, 1920, when his services in relation to the same ceased, was $47,392.41, and that the amount of his commission therein according to terms of his said contract were the sum of $4,739.24, of which $2,385 had been paid, leaving a balance due the plaintiff of $2,354.24, no part of which had been paid. The complaint then proceeded with the usual averments as to the filing of a mechanic's lien upon the premises for the balance due plaintiff upon said contract. The answer of the defendant expressly admitted the averments of plaintiff's complaint as to the terms of the contract between the parties, and also by failure to deny the same admitted the regularity of the proceedings to establish his lien. It then proceeded to set forth a number of particulars in which the plaintiff was charged with having negligently performed his duty in relation to the erection of said building by which the defendant had sustained certain specified damages, viz.: That the said plaintiff started the erection of a garage at a point too close to the main building on said premises, thereby rendering it necessary that said garage should be torn down and rebuilt, which caused the defendant additional expense of $300; that plaintiff neglected putting in the gas connections until after the cement work had been put in, thereby rendering it necessary for defendant to put the gas meters and connections on the other side of the building, thereby rendering it necessary to make new openings in the foundation, all of which involved an additional expense of some $200. That said plaintiff caused the

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roof to be constructed in such a careless and negligent manner that it leaked badly, staining the ceiling in one of the rooms of said apartment, and involving an expense of $40 to repair the said roof. The answer further alleged certain further other damages sustained by the defendant by reason of the alleged failure of the plaintiff to complete the building on time, but as to these it is not necessary to go into details, since the trial court found against the defendant as to these latter averments. The cause proceeded to trial upon the aforesaid pleadings, the plaintiff and his witnesses testifying in support of the averments of his complaint, and the defendant and his witnesses offering evidence to sustain the averments of his answer as to the specific items of damage which he had sustained by the acts and conduct of the plaintiff and through his mistakes and neglect. The court early in the course of the trial, in directing the order of the evidence, referred to the above affirmative defenses of the defendant's answer as a counterclaim. The plaintiff made no objection as to this characterization nor as to the evidence offered in support of such defensive matter upon the ground of any infirmity in the defendant's pleadings, and the cause was evidently tried upon the theory that the defendant's answer in this defensive matter was to be treated as a counterclaim. Upon the submission of the cause the court made its findings of fact and conclusions of law, wherein it was found that the total construction price of the building was $45,550, and not $47,392.41, as alleged in the plaintiff's complaint, and that the total sum of commissions to which the plaintiff was entitled was the sum of $4,555, and not $4,739.24, as alleged in the plaintiff's complaint. It was further found that there had been paid upon account of said commissions $2,385, leaving a balance due of $2,354.24 still unpaid. The court further found in favor of the defendant upon the above specified items of counterclaim, and that these aggregated the sum of $857.60, which it was held the defendant was entitled to have offset against the unpaid commission to which the plaintiff was otherwise entitled, leaving a net balance due the latter of $1,318, for which sum, with interest thereon from September 27, 1920, judgment was ordered and entered in plaintiff's favor. From such judgment the plaintiff has prosecuted this appeeal.

[1, 2] The appellant's first contention is that the trial court was in error in allowing the defendant to the set-off above referred to, for the reason that the defendant had not pleaded the same as or in the form of a set-off or counterclaim. There are two answers to this contention: The first is that the plaintiff made no objection, either by demurrer or otherwise, to the form in which the issue was tendered in the defendant's answer as to these items, nor to the defendant's presentation of his proofs regarding such items. He thus waived his objection both to the form of pleading and substance of proof of them. The second answer is that the averment of these items in the defendant's answer went directly to the issue which the plaintiff himself tendered as to his due performance of the services by him to be performed, under the terms of his said agreement, and hence no separate or express pleading by way of set-off or counterclaim was required.

[3] The appellant's next contention is that the trial court was in error in its finding that the total construction price of the building was but $45,550, when the complaint alleged and the answer did not sufficiently deny that the construction cost thereof was $47,392.41; the appellant claiming that he was entitled to a finding in the figures of the larger sum. There may be some question of the sufficiency of the defendant's denial touching the cost of the building in question. In the defendant's original answer there was a denial of the defendant's liability for a greater sum than $3,517.80 commissions, being 10 per cent. of the estimated cost of the building. This, it is true, is a doubtful form of denial measured by the standards of good pleading; and it may be also questioned whether the defendant carried this denial into his so-called "second and further answer." The record shows, however, that considerable evidence was without objection presented by both parties upon the subject of the cost of the building in question, and that the finding which the court made is justified by the evidence thus presented. This being so, the case would not be reversed because of a finding which spoke the truth, even though it might vary somewhat from the strict averments and admissions of the pleadings.

[4] As to the other attacks which the appellant makes upon the findings of the trial court upon the ground either that they are outside of the issues or are not justified by the evidence, we have examined the record only to find that the case was tried throughout upon the theory that the plaintiff's various alleged deficiencies in the performance of his contract were being tried in response to the issues he had himself tendered as to full performance on his part of the said agreement. From this view of the theory upon which the case was presented and tried we are satisfied that the findings of the trial court are fully within and fully justified by the evidence which was presented without objection throughout. This being so, we find in this record no sufficient reason for a reversal of the case.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 245

J. B. HILL v. PINQUE et al. (Civ. 4131.)

(District Court of Appeal, First District, Division 1, California. Jan. 21, 1922.)

1. Landlord and tenant 🔑53(2)—Purchaser could not maintain action for waste committed before purchase, in absence of assignment.

Purchaser could not maintain an action against tenant for waste committed before the purchase of the premises in the absence of an assignment of the cause of action therefor, not having had title to the property at the time of the commission of the waste.

2. Landlord and tenant 🔑53(2)—Purchaser could not cancel lease for waste committed by lessee before purchase.

Purchaser could not cancel lease, under Code Civ. Proc. § 1161, subd. 4, for waste committed by lessee before the sale of the property to purchaser.

3. Alteration of instruments 🔑16—Alteration of lease as to term held to warrant cancellation of lease.

Lessee's wrongful alteration of lease, without lessor's consent, as to the term thereof, *held* to entitle owner to cancel lease, under Civ. Code, § 1700.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by J. B. Hill, a corporation, against Mary E. Pinque and others. Judgment for defendants, and plaintiff appeals. Reversed.

A. M. Drew, of Fresno, for appellant.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for respondents.

KERRIGAN, J. This is an appeal from the judgment in favor of the defendants for costs in the second trial of an action brought originally for the cancellation of a lease upon the ground of nonpayment of rent and for the recovery of damages for waste alleged to have been committed upon certain leased premises. In the first trial judgment went for the plaintiff, but upon appeal it was reversed (179 Cal. 759, 178 Pac. 952, 3 A. L. R. 669), and upon the return of the case to the trial court the plaintiff amended its complaint, which, as thus amended, contained three counts, viz. (1) an action for the cancellation of the lease for waste under the provisions of subdivision 4 of section 1161 of the Code of Civil Procedure; (2) an action for damages to the property leased, committed by the tenant during the tenancy, by the removal of a part of the foundation of the leased premises, thereby causing the building to settle, to plaintiff's alleged damage in the sum of $2,000; and (3) a cause of action for the cancellation of the lease upon the ground that the defendants had wrongfully and fraudulently, and without the consent of the plaintiff, changed and altered the said lease from 9 years to 99 years.

To this complaint as thus amended the defendants demurred generally and specially, and the demurrers were by the court sustained to the first and third counts, trial being thereafter had upon the question of damages claimed in the second count. On this issue the court found that the defendants, in making certain permissible changes in said building, had committed no substantial waste, and that if said building was damaged by the making of said changes the damage had been done before the plaintiff became the owner of the premises and that it existed at that time.

[1] The evidence also disclosed that the plaintiff, through its president and others, examined the property before purchasing the same; that it knew the nature of the repairs that had been made to the building and regarded the consequent damage thereto as of a trifling nature. Under these circumstances it is clear that the plaintiff cannot maintain an action for waste in the absence of an assignment to him of the cause of action therefor. Title to the property at the time of the commission of the waste is necessary to sustain the right to an accounting for such waste. 40 Cyc. 527; 30 Am. & Eng. Ency. of Law, 282; Shelby v. Hearne, 6 Yerg. (Tenn.) 512; Hughlett v. Harris, 1 Del. Ch. 349, 12 Am. Dec. 104; Dickinson v. Mayor, 48 Md. 583, 30 Am. Rep. 492.

[2] Respecting the order sustaining the demurrer to the first count, as it appears from the complaint itself that the damages to the property had been done prior to the purchase of the premises by the plaintiff, it follows from what has been stated that the count in question stated no cause of action, and that the order of the court was correct.

[3] Coming to the third count, it was therein alleged that the defendant had wrongfully and unlawfully changed the renewal term of the lease from 9 years to 99 years.

Section 1700 of the Civil Code provides:

> "The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act."

This count of the complaint alleges a plain violation of this section of the Code; the order, therefore, sustaining the demurrer to this count was erroneous. Pelton v. S. J. Lumber Co., 113 Cal. 21, 45 Pac. 12. The judgment is reversed, and the cause is remanded to the trial court for further proceedings upon the issue tendered by the third count in plaintiff's amended complaint only, with instructions to the trial court to overrule the demurrer to the third count of the complaint and to permit the defendant to answer thereto.

We concur: TYLER, P. J.; RICHARDS, J.

56 Cal. App. 277

HANCOCK v. CLARK et al. (Civ. 3581.)

(District Court of Appeal, Second District, Division 2, California. Jan. 26, 1922.)

1. Pleading ⚿32—Complaint in action on building contract need not plead plans and specifications.

While plans and specifications are part of a building contract to which they relate, they are not part of the agreement in such a sense that they must be pleaded in a complaint in an action to recover for the construction.

2. Evidence ⚿460(9)—Parol evidence admissible to identify plans and specifications as those mentioned in building contract.

Where a building contract refers to plans and specifications as being attached to it, but they are not so attached, testimony may be received to identify particular plans and specifications as those mentioned in the contract, at least in cases not having to do with mechanics' liens.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by C. P. Hancock against Edith A. Clark and another. From an adverse judgment, the named defendant appeals. Affirmed.

Ellis, Ford & Nelson, of Riverside, for appellant.

W. G. Irving, of Riverside, for respondent.

WORKS, J. This is an action to recover for the construction of a house under a builder's contract. Plaintiff had judgment against one of the defendants, and that defendant appeals.

[1] One question presented by the case is whether the complaint states facts sufficient to constitute a cause of action. At the trial the defendants moved for a judgment on the pleadings on the ground that it did not, and the motion was denied. The alleged defect in the complaint lies in the failure of respondent to plead in full the contract upon which he relies for a recovery of the amount due him for building the house; the plans and specifications which were a part of the agreement not being pleaded either as exhibits or according to their legal effect. While it is well settled that plans and specifications are part of the contract to which they relate, as an examination of them is necessary to ascertain the complete agreement between the parties, they are not part of the agreement in such a sense that they must be pleaded in a complaint upon the agreement. 9 C. J. 867. The reason for this rule is stated in an early case to be that plans and specifications "consist sometimes of extensive and complicated plates or drawings, which it would often be exceedingly inconvenient, if not utterly impracticable to attach to and make a part of the pleadings in a case" (Learmonth v. Veeder, 11 Wis. 138); and it is at once apparent that it would be impossible to plead plans according to their legal effect. The complaint stated a cause of action.

[2] The contract, made part of the complaint as an exhibit, refers to the plans and specifications as "attached herewith" and as "hereunto annexed." During the trial the plans and specifications, not being attached to the contract, were offered in evidence after the taking of testimony tending to identify them as the ones referred to in the contract. This testimony was to the effect that the offered plans and specifications were furnished to respondent by appellant, that they were signed by her husband, her codefendant, in her presence at the time of the execution of the contract, and that they were followed in the construction of her house. Appellant objected to the offer, the objection was overruled, and it is contended that the ruling was error. It has been decided by many cases in this state that, where a building contract refers to plans and specifications as being attached to it, but they are not so attached, testimony may not be received to identify particular plans and specifications, as those mentioned in the contract. These cases, however, were mechanic's lien cases, and they were based upon a state of the Mechanic's Lien Law which required building contracts to be in writing. The present case is not a mechanic's lien case and falls, so far as the question now before us is concerned, within the general law of contracts. Under that law separate instruments may be shown by oral evidence to constitute but one transaction (Beedy v. San Mateo Hotel Co., 27 Cal. App. 653, 150 Pac. 810) the rule having an application even where there is in either of the instruments no reference to the fact that another instrument accompanies it (Torrey v. Shea, 29 Cal. App. 313, 155 Pac. 820; Merkeley v. Fisk, 179 Cal. 748, 178 Pac. 945). It has, in truth, been applied in a case which is in principle exactly like the present one, although the purpose of the action was different. See Watson v. Anderson, 36 Cal. App. 778, 173 Pac. 394. The court did not err in receiving the plans and specifications in evidence.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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56 Cal. App. 259

Ex parte PIANTANIDO. (Cr. 1041.)

(District Court of Appeal, First District, Division 2, California. Jan. 24, 1922.)

1. Prisons 🔑15—Prisoner not entitled to credits for good behavior, but question is for prison board.

Under the indeterminate sentence law 1917, a prisoner is not entitled to credits for good behavior, but the matter of good behavior and the recognition to be given to such conduct is a matter of consideration and affirmative action by the prison board in each particular case.

2. Habeas corpus 🔑54—Petition by prisoner claiming credits for good behavior held insufficient.

Petition for writ of habeas corpus by prisoner sentenced under the indeterminate sentence law, alleging prisoner to be entitled to discharge by virtue of credits earned by him, *held* defective for failure to show that the prison board had accorded prisoner credits for good behavior.

Application by Joseph Piantanido for a writ of habeas corpus directed to the Board of State Prison Directors. Writ denied.

Joseph Piantanido, in pro. per.

LANGDON, P. J. This matter comes before us upon a petition for a writ of habeas corpus. Petitioner alleges that on January 26, 1918, he was sentenced by the superior court, in and for the city and county of San Francisco, under the indeterminate sentence law, and in accordance therewith was committed to the state prison at San Quentin; that, on February 15, 1919, the board of prison directors, acting in conformity with the provisions of the law, exercised the discretion vested in it and fixed his term of confinement at five years. It is then alleged that by virtue of "credits earned by him," the petitioner was entitled to be discharged after three years and seven months' confinement, or upon August 28, 1921; that upon such date he was not released and, upon inquiry, ascertained that his credits had been forfeited for failure to obey the rules of the prison. Petitioner's allegation, relied upon for the issuance of the writ, is that he was not given due or any notice of the action of the board of prison directors in forfeiting his credits, nor any opportunity to be heard upon that matter.

[1] The point urged is squarely met in the decision of Division 1 of this court in the Matter of the Application of Fleet E. Thompson for a Writ of Habeas Corpus (Cal. App.) 201 Pac. 473. It is there pointed out that such a contention is based upon an erroneous theory of the present law governing this subject; that by the enactment of the indeterminate sentence law (St. 1917, p. 665), the Legislature did away with the plan theretofore in force by which credits for good behavior were given; and that under the indeterminate sentence law the matter of the good behavior of a prisoner and the recognition to be given to such conduct becomes a matter of consideration and affirmative action by the prison board in each particular case.

[2] Under this view of the law the petition before us is defective in the same respect as was the petition in Re Thompson, supra, in that it does not appear therefrom that the prison board by any act ever accorded the petitioner any credits whatsoever for good conduct, and under the allegations of his petition the prisoner is not entitled to his discharge until the expiration of his five years' sentence.

The petition is denied.

We concur: NOURSE, J.; STURTEVANT, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(56 Cal. App. 366)

DEL GRANDE v. CASTELHUN.
(Civ. 3796.)

(District Court of Appeal, First District, Division 2, California. Jan. 31, 1922. Hearing Denied by Supreme Court March 30, 1922.)

1. Vendor and purchaser 🔑334(2)—Vendor's false representations as to boundaries held to entitle purchaser to recover purchase price.

False representations by vendor as to boundaries of land *held* to entitle purchaser to recover purchase price paid.

2. Vendor and purchaser 🔑37(2)—Purchaser may rely on vendor's representations as to boundaries.

One dealing with the owner of real property may assume that he knows the true boundaries and may rely on his representations to that extent, regardless of the absence of a confidential relation between them.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by F. Del Grande against F. C. Castelhun, as executor, etc. Judgment for plaintiff, and defendant appeals. Affirmed.

F. J. Castelhun, of San Francisco, for appellant.

Harold R. McKinnon, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to rescind a contract for the purchase of a certain lot of land from defendant as executor of the estate of Engler. Rescission was founded on alleged false representations made to plaintiff's agent relating to the boundaries of the land. The lot was described merely by number and block on a recorded map. A fence was maintained on the premises which inclosed land used by Engler in addition to his own lot. Plaintiff's agent made a personal inspection of the premises, notified defendant that he desired the land within the fence, and inquired if the boundaries of the lot covered the land inclosed by the fence. Defendant assured him that they did, and when this representation was discovered to be false plaintiff rescinded the contract of purchase and brought this action to recover the portion of the purchase price paid. He had judgment, from which defendant appeals.

[1] The trial court found upon conflicting evidence that the false representations were made as alleged. This being so, it follows that plaintiff was entitled to damages at least to the amount of the purchase price he paid.

Several grounds are argued on appeal affecting the rulings of the trial court on the demurrer, motion to strike out portions of the complaint, and on the admission of evidence. The cause was fairly tried and none of these objections require consideration.

[2] On the merits of the case, it is said that the evidence is insufficient to support the finding of fraud because there is no showing of a confidential relation between the parties or of appellant's knowledge of the falsity of the representations. Under the particular circumstances it was not necessary to show either. One dealing with the owner of real property may assume that he knows the true boundaries and may rely on his representations to that extent.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(56 Cal. App. 212)

ROSENBERG BROS. & CO. v. BEALES et al.
(Civ. 3574.)

(District Court of Appeal, Second District, Division 2, California. Jan. 17, 1922. Hearing Denied by Supreme Court March 16, 1922.)

1. Sales 🔑197—Executory contract to sell does not pass title.

An executory contract for the sale of property does not pass title until later, though under an executed contract for sale the title passes when the contract is made.

2. Sales 🔑61—Only goods in possession of seller or increase therefrom can be sold.

There can be no valid executed sale until the goods are in existence and are in the possession of the seller, except of the increase of property which is in his possession, so that a contract to sell dried fruit, made before the seller had bought the fruit to be dried, was an executory contract, though it was in form a present sale.

3. Sales 🔑71(4)—Contract held to be for output, and not for quantity estimated.

Where the seller agreed to sell the output of dried apricots from his dryer during a stated year estimated at 75 to 100 tons, the contract was one for the output, and not for the estimated quantity, so that the seller is not liable for failure to deliver the minimum quantity stated when he delivered the entire output of his dryer, and there was no contention that the shortage in output was due to his lack of good faith.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Rosenberg Bros. & Co., a corporation, against George F. Beales and another, doing business under the fictitious firm name and style of Beales-Kimball Fruit Company, to recover damages for breach of a contract. Judgment for defendants, and plaintiff appeals. Affirmed.

Evans & Pearce, of Los Angeles, for appellant.

Wilbur Bassett, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action for the alleged breach of a written contract made by defendants with plaintiff's assignors, whereby the former agreed to dry certain apricots, and to sell and deliver to plaintiff's assignors the dried fruit. Judgment passed for defendants, and plaintiff appeals.

The contract, executed on April 7, 1919, was prepared by plaintiff's assignors, whom we shall designate as the "buyers." It seems to have been made by filling in the spaces in a printed blank form of contract adapted for use in buying fruit from fruit growers, although defendants, the sellers, were not growers of fruit, but operated a drying plant, the successful operation of which depended upon their ability to purchase the necessary green fruit from growers in the vicinity. In so far as it is material to our inquiry, the contract reads as follows:

> "Beale & Kimball Fruit Co., seller, whose P. O. address is Van Nuys, hereby sells, and Rosenberg Bros. & Co., the buyer, hereby buys all of the crop of fruit of the character hereinafter specified, *grown or to be grown* during the current year on the place known as Beale & Kimball dryer in Los Angeles county, California, about one mile from Van Nuys. The quantity (estimated by the seller), the variety of fruit sold, and the price to be paid therefor, cured and delivered in accordance herewith, are as follows:
>
> | Quantity. (Tons) | Variety. | Price per Lb. in Cents |
> |---|---|---|
> | 75 to 100
Estimate | Dried Apricots
1919 crop— | 16.¾ |
>
> Buyer furnishing sacks
>
> The seller agrees that he will properly dry and cure and deliver the whole of the crop above mentioned of the varieties herein specified. * * * The seller guarantees that he is the sole owner of the fruit sold, free of all incumbrances, and agrees to deliver the same to the buyer free of all incumbrances, f. o. b. cars at Van Nuys, California, not later than 1st day of Sept., 1919, which time may be extended with buyer's consent, but not otherwise."

The words that we have italicized, "grown or to be grown," were found by the court to have been inserted in the written contract by mutual mistake, and the decree, therefore, reforms the contract by striking them from the writing.

Owing to unforeseen conditions, defendants were able to procure from the growers in the vicinity of their plant not more than about 20 tons of apricots. These, when dried, made 6,529 pounds, all of which defendants delivered to the buyers. Plaintiff, to whom the buyers had transferred all of their rights under the contract, brought this action to recover damages arising from defendants' failure to deliver the difference between the 6,529 pounds and the lowest estimated amount named in the contract, to-wit, 75 tons.

The construction of the agreement is admitted to be the essential matter in controversy. Appellant contends, and its complaint alleges that plaintiff's assignors agreed to purchase, and respondents agreed to sell, 75 to 100 tons of dried apricots. Respondents, on the other hand, contend that the contract was correctly construed by the trial court as an agreement on their part to sell and deliver to plaintiff's assignors all of the output of their dryer, whatever that might prove to be, and no more. We think it clear that the learned judge of the trial court placed upon the contract the true construction. Omitting from the writing the words "grown or to be grown," which the trial court found were inserted by mistake, the contract is one whereby defendants, as sellers, agreed to sell, and plaintiff's assignors agreed to buy, "all of the crop of fruit * * * during the current year, on the place known as Beale & Kimball dryer. The quantity (estimated by the seller) * * * cured and delivered * * * [is] as follows: Quantity (tons) 75 to 100, Estimate." It is conceded that defendants are not growers of fruit. The word "crop," in the reference to fruit "on the place known as Beale & Kimball dryer," is therefore palpably an incorrect designation. It doubtless crept into the writing because the parties employed a form of contract adapted for use in buying fruit from growers. From all the circumstances, it is obvious that the word "crop" was used to signify the "output" of defendants' plant.

[1, 2] Although the contract was in the form of a present sale, it was an executory agreement to sell. The fundamental difference between a sale, properly so called, and an agreement to sell, is that in the former the title passes when the contract is made, while in the latter it does not pass until later. Here the defendants had no property in the green fruit at the time when they made their contract with plaintiff's assignors. They were relying upon being able to purchase from growers the requisite amount of green fruit that they were to dry and deliver to the buyers. But the subject of an executed contract of sale must be property the title to which can be immediately transferred from the seller to the buyer. Civ. Code, § 1722. This being so, all the authorities concur in laying down the rule that there can be no valid executed sale unless the thing sold actually exists and is in the possession of or under the control of the seller, or is to come out of something that is in the seller's possession or under his control, as, for instance, crops grown on his own land, the increase of his own cattle, and the like. North Idaho Grain Co. v. Callison, 83 Wash. 212, 145 Pac. 232.

> "The seller must have a present interest in the property, of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested

right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, *but not upon land in which he has no interest.*" Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357. (Italics ours.)

[3] The contract to be construed in this case is therefore an executory agreement to sell and deliver to the buyer all of the output of defendants' dryer during the year 1919, estimated to be between 75 and 100 tons, the apricots to be dried from green fruit not then in the possession of, but to be acquired and dried by, the defendants. Such a contract is not an agreement to sell a definite or certain quantity of dried apricots, in which case the terms "estimated," "about," and "more or less" would provide only against immaterial, accidental variations. By their contract defendants agreed to sell and deliver, at an agreed price, "all of the crop of fruit * * * during the current year, on the place known as Beale & Kimball dryer in Los Angeles county." This was not an agreement to sell a definite number of apricots to be dried. It was not an agreement to sell between 75 and 100 tons. It was an agreement to sell the entire "crop," i. e., "output," of defendants' dryer during the current year, whatever that output might prove to be, although it was estimated that it would be somewhere between 75 and 100 tons. This "output" constituted a definite and ascertained stock of dried apricots, as much so as if the agreement to sell had been an agreement to sell all of the dried apricots in a particular pile, or all of the dried apricots in a particular warehouse. The estimation of the amount that would constitute the output for the current year was not a warranty. Good faith was all that was required of the defendants in making the estimate or in their future operation of the dryer. Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622; Inman Bros. v. Dudley & D. L. Co., 146 Fed. 449, 76 C. C. A. 659; Marx v. American Malting Co., 169 Fed. 582, 95 C. C. A. 80; Bautovich v. Great Southern L. Co., 129 La. 857, 56 South. 1026, Ann. Cas. 1913B, 848. Although defendants dried but 6,529 pounds, the complaint is barren of any allegation tending to show that their failure to dry the amount which they estimated would be the output of their plant for the year 1919 was due to any fraud on their part or to any departure from the normal manner of conducting such a business.

The governing principle in this class of cases was enunciated by the Federal Supreme Court in Brawley v. United States, supra, as follows:

> "Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases, the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity."

Guillim v. Daniell, 2 Cromp., M. & R., 61, is in point. In that case the defendant agreed to sell and the plaintiff agreed to purchase all the naphtha which the defendant might make during a period of two years, "say from one thousand to twelve hundred gallons per month." Lord Abinger, construing the contract, said:

> "The agreement is simply this, that the plaintiff undertakes to accept all the naptha that the defendant may happen to manufacture within the period of two years. The words 'say from one thousand to twelve hundred gallons [per month]' are not shown to mean that the defendant undertook, at all events, that the quantity manufactured should amount to so much. If by fraud the defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here, it does not appear that, in the ordinary course of his manufacture, the defendant ought to have produced a larger quantity than he has done; and we cannot, therefore, say that he has broken his contract."

For the foregoing reasons, we think that plaintiff has failed to prove that defendants breached their contract.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

56 Cal. App. 261

VAUGHAN v. TULARE COUNTY.
(Civ. 2413.)

(District Court of Appeal, Third District, California. Jan. 23, 1922.)

1. Highways 🔑113(4)—Finding that concrete base complied with contract sustained.

In an action for balance due on a contract for highway construction, evidence *held* to sustain a finding that concrete base complied with the contract, requiring it to be four inches thick.

2. Trial 🔑375—Knowledge acquired by court in independent investigation is evidence.

Where there was controversy as to thickness of concrete base in highway, knowledge acquired by trial judge, who visited the work and viewed it, was evidence which it could consider in reaching its determination.

3. Highways 🔑113(4)—Certificate of engineer as to work done by contractor impeached for fraud or gross mistake.

A certificate of a county engineer as to the amount and value of excavation done by a contractor can be impeached for fraud, or gross mistake amounting to fraud, and a finding that nearly 25 per cent. of the yardage on a big contract was mistakenly omitted would support a conclusion that a "gross mistake" was made.

4. Account stated 🔑8—Does not bar recovery for items not within contemplation of parties.

An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made, nor items omitted by mistake; an account stated, as a rule, being only prima facie evidence of the accuracy and correctness of the charges stated therein.

5. Account stated 🔑1—Constitutes new contract and requires promise to pay.

An account stated constitutes a new contract, and a promise to pay the amount ascertained to be due is a necessary ingredient.

6. Counties 🔑204(1)—County surveyor has no authority to bind county to pay amount recited in an account.

A county surveyor has no authority to bind the county to pay the amount recited in an account on the theory of an account stated, and hence such an account is not binding on the other party; the board of supervisors being alone clothed with power to allow claims, under Pol. Code, §§ 4074–4079.

7. Account stated 🔑18(1)—Waived unless pleaded.

An account stated, not having been pleaded in the answer, was waived.

Appeal from Superior Court, Tulare County; T. N. Harvey, Judge.

Action by A. H. Vaughan against the County of Tulare. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred C. Scott, I. H. Ham, and W. W. Middlecoff, all of Visalia, for appellant.

Lamberson & Lamberson, of Visalia, and P. D. Nowell, of Tulare, for respondent.

BURNETT, J. On July 15, 1918, the defendant entered into a written contract with White & Gaskill, copartners, for the construction of the Woodlake-Visalia division of a system of paved public highways in said county of Tulare. To the plaintiff, by consent of the board of supervisors, this contract was regularly assigned. The work was begun on August 22, 1918, and the entire division was completed and opened on April 22, 1919. It seems unnecessary to set out the terms of the contract further than will hereafter appear. Payments were made from time to time to respondent as the work progressed, and on May 29, 1919, he filed his claim with the board of supervisors for the sum of $10,129.19, being the balance which he claimed to be due. This claim was rejected by the board on June 28, and the complaint herein was filed on July 15, 1919. On August 6, following, defendant filed its answer, wherein it denied that plaintiff had completed all the work required by the provisions of the contract, particularly as to the requirement of a "four-inch concrete base." A cross-complaint was also filed against Vaughan and his surety, American Indemnity Company, for damages in the sum of $15,109.70, claimed to have been suffered by the county through the negligence of the contractor in failing to construct said concrete base in accordance with the terms of the contract. To this pleading an answer was filed, challenging the allegation as to defective construction, alleging that the work had been completed in accordance with the requirements of the contract and the orders and instructions of the duly authorized officers, agents, and inspectors of said county, that the county, on March 22, 1919, had taken over the road, accepted it as constructed by said Vaughan, and ever since had operated it as a public highway. As a further answer it was alleged that—

> "While respondent Vaughan was doing the work of constructing the highway, the county of Tulare employed an inspector of construction to inspect the work and gave such inspector authority to supervise and direct the construction of the highway, and that said inspector and the county surveyor did thereafter during all the time the work of construction was in progress, supervise and superintend the work of construction; that such superintendent was present at all times when the material furnished by the county of Tulare under the terms of the contract was being placed in said highway, and that all of said work of construction was done and performed under the direct personal supervision of said inspector and said county surveyor and as directed by them and not otherwise; that all of said work was performed by the contractor in a good and careful manner to the entire satisfaction of

the inspector and the county surveyor; that all the material furnished by the county out of which said material said highway was to be and was constructed was used by the contractor in constructing the highway and was so used with the full knowledge and consent of and under and pursuant to the orders and directions of such inspector and county surveyor, and it would have been impossible to have made said highway of greater thickness than the same was made by the contractor out of the material furnished by the county of Tulare for the construction thereof, and that by reason of the facts alleged in said answer the county of Tulare ought not to be heard to complain of the thickness of said highway so constructed by the respondent Vaughan."

Upon these material issues the court found in favor of plaintiff, and upon his first cause of action awarded him $10,129.19.

The second cause of action was based upon a contract between one J. S. Caldwell and said county for the construction of what was designated as the Woodlake-Elderwood division of the public highways, the contract having been assigned to plaintiff. For this work the court found there was due the sum of $2,601.72 in addition to what had been paid and entered judgment accordingly.

[1] As to the first count the only contention that we need consider is that the evidence is insufficient to support the finding that the work was done in accordance with the contract. As to this the county declares:

> "The plaintiff offered evidence of some engineers that the pavement was a good pavement, and evidence that it had been thrown open to public use. But against this opinion evidence stands the physical facts that the pavement was not four inches thick."

But we can determine the "physical facts" only by an examination of the record, and therein is disclosed abundant evidence to show that the work was completed not only to the satisfaction of the representative of the county, but in substantial compliance with the requirements of the contract. It is true that certain slabs were introduced in evidence which were less than four inches in thickness. They were samples of the pavement taken by the county surveyor from the division in question, but it is affirmed by respondent and not denied by appellant that these slabs "were broken out and not sawed out, and it was readily apparent that they had been frequently chipped and broken and were ragged in contour." Besides, the area of any supposed deficiency was not shown, and in view of the opposing evidence for respondent we must assume that the defect, if any, was not of such extent as to impair the general efficiency of the work. In this connection we may recall the testimony of the engineer in charge that a variance of ¼ inch over an area equivalent to 10 per cent. of the work would be considered by him as permissible, and he and other experts testified that it was not humanly possible to lay concrete of an exact thickness over any considerable surface.

[2] But be that as it may, respondent points out in his brief the testimony of various witnesses, including the representatives of the county who had charge and direction of the work, together with certain circumstantial evidence that justify the trial court's finding. It seems unnecessary to quote the entire record of this showing. It is sufficient to state that said representatives, who had every opportunity for observing the work as it progressed, testified that all the material furnished by the county was used and that there was a compliance with all the specifications of the contract; certain experts also examined this division of the highway and expressed, as witnesses, the opinion that the work was well and thoroughly done and would compare favorably with any highway in the state; others made perforations of the pavement at various points and took measurements of the thickness of the concrete, which resulted according to the testimony of C. R. Sumner, a highway engineer of many years' experience, as follows:

> "At sample No. 1 we had 5 inches. At sample No. 2 we had 4½ inches. At sample No. 3 we had 4¼ inches. At sample No. 4 we had 4¾ inches. At sample No. 5 we had 3⅞ inches. At sample No. 6 we had 4 inches. At sample No. 7 we had 4⅜ inches. At sample No. 8 we had 5⅜ inches. At sample No. 9 we had 4½ inches. At sample No. 10 we had 4 1/16 inches. At sample No. 11 we had 4⅛ inches. At sample No. 12 we had 4½ inches."

The trial judge visited the division in question and there viewed the work, in company with the county surveyor and counsel for the respective parties. As to this visit it is declared by respondent and undisputed by appellant:

> "That measurements of various test holes mentioned in the testimony of several witnesses were made in the presence of the court."

Naturally, in view of the interest at stake and the sharp conflict in the evidence, the trial judge would avail himself of the opportunity to examine as closely and thoroughly as possible the character of the work to ascertain if the claim of respondent was just. And there is reason to believe that this independent investigation of itself might lead to a safe and satisfactory conclusion as to the merits of the case. Herein it is to be remembered that this knowledge thus obtained is evidence—and in a case of this kind, as above indicated, may be very potent evidence. In Hatton v. Gregg, 4 Cal. App. 537, 88 Pac. 592, it is said:

> "Both upon reason and the authority of People v. Milner, 122 Cal. 171, 54 Pac. 833, we are constrained to hold that the knowledge gained by the court from a view of the premises is independent evidence to be taken into

consideration by the court in determining the issues of the case."

In Wright v. Locomobile Co. of America, 33 Cal. App. 694, 167 Pac. 407, the main question was whether there had been a substantial compliance with the contract for the laying of a floor of a specified description in a building and great importance was attached to the action of the trial judge in examining the premises himself. It is implied in the opinion that this evidence might be considered sufficient to support the finding that the work was properly done. Indeed, since the knowledge thereby obtained is substantial evidence, it falls in the category of that which is binding upon an appellate court.

Among the findings of the court as to the second count is:

> "The said county surveyor did not, in making his final estimate as required by the terms and provisions of said contract and said specifications, include in said estimate any amount of yardage of oil cake moved by the plaintiff in excavating for said highway, and the court finds that the said plaintiff did move, in excavating for said highway, 2,890.8 cubic yards of oil cake, and that said county surveyor mistakenly omitted and neglected to consider in making his estimate of the amount of yardage of earth and materials moved in the excavation of said road and in accordance with said plans and specifications said 2,890.8 cubic yards of oil cake or any part thereof and did not include said yardage of oil cake in his final or any certificate made to said board of supervisors in accordance with the terms and provisions of said contract, and the court finds that the said county surveyor should have included said 2,890.8 cubic yards of oil cake in the quantity of earth and material moved by said plaintiff and the said board of supervisors should have credited said plaintiff with the amount of 2,890.8 cubic yards."

[3] One of the claims of appellant is that by the terms of the contract and in accordance with the doctrine of City Street Improvement Co. v. City of Marysville, 155 Cal. 427, 101 Pac. 308, 23 L. R. A. (N. S.) 317, the final certificate of the county surveyor as to the amount and value of the work is conclusive against the contractor, although denying that the county is bound thereby. The particular provision of the contract upon which appellant relies as binding the contractor is article 22, which reads as follows:

> "That no certificate given, or payments made under this contract, except the final certificate of final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the first party, and that, not until the lapse of thirty-five days after acceptance of the work by the board of supervisors, and no payment shall be construed to be an acceptance of any defective work or improper materials."

Appellant claims that "a correct reading" of this section sustains the contention. We cannot understand how appellant reaches this conclusion. It is expressly provided therein that the final certificate is "conclusive evidence of the performance of the contract" and "against any claim of the party of the first part," being the county. There is no specification that it shall be conclusive evidence of the amount due the contractor or against any claim of his. By implication, indeed, he is relieved from this conclusive effect of said certificate, and in article 23 following it was expressly provided that "the payment of the final amount due under this contract"—not as recited by the certificate of the surveyor—"shall release the first party." We conclude that "a correct reading" of these provisions makes it more probable than the converse, that the final certificate was intended to be conclusive evidence, against the county, of the performance of the contract, and not against the contractor, of the amount due.

At any rate, such certificate can be impeached for fraud, or for gross mistake amounting to fraud. American-Hawaiian Eng., etc., Co. v. Butler, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916C, 44. The finding of the court that nearly 25 per cent. of the yardage on a big contract like this was mistakenly omitted would support the conclusion that a "gross mistake" was made.

Another contention is that—

> "The settlement made between the county engineer and the presentation of the claims, and their allowance and payment, constituted a stated account, and is final and conclusive under article 23 of the contract."

In answer to this contention respondent declares:

> "In the consideration of the above matter we desire to direct the court's attention to the following facts, viz.: That the county of Tulare gathered and tabulated all data for calculating the yardage of earth moved on the Woodlake-Elderwood division; that such calculations were long and difficult and were carried out by the employees of the county; that such calculations were based upon surveys and data which were entirely inadequate and were grossly inaccurate; that changes in alignment and elevation were made of which no record was made or transmitted to the surveyor's office; that the claims of plaintiff (Sup. pp. 21–29) did not in any way show what items were included as a basis of the yardage calculations; that the claims were prepared entirely by the officers of the county of Tulare and the act of respondent's agent, J. S. Caldwell, in verifying the claims was in compliance with the law concerning the presentation of claims and was done because Mr. Caldwell knew that at least the amount of the claim as prepared was due to Mr. Vaughan, although he did not have exact knowledge as to the amount of work due but believed that the allowance made by the engineer was insufficient."

Appellant does not dispute the accuracy of this statement, and we shall accept it as true. In fact, our examination of the record discloses support for it.

[4] It is not disputed that the rule as to an account stated is correctly declared in 1 R. C. L. p. 217, as follows:

> "It is generally held that a person who merely renders an account to another is not precluded from denying its correctness where there has been no acceptance so as to make it an account stated, but a stated account was formerly held to be conclusive evidence of the correctness of the items contained therein as to both parties. Now, however, a stated account is held to be, as a rule, prima facie evidence only of the accuracy and correctness of the charges stated therein. It is a mere admission that the account is correct, but it is not an estoppel, and the account is still open to impeachment for fraud, mistake, or error unless the position of the opposite party has been altered to his prejudice."

That an account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made, nor items omitted by mistake, is clearly established in this state. 1 Cal. Jur. 199; Union L. Co. v. J. W. Schouten & Co., 25 Cal. App. 80, 142 Pac. 910; White v. Thompson, 40 Cal. App. 447, 180 Pac. 953.

[5, 6] Another view of the matter worthy of consideration is suggested by respondent as follows: An account stated constitutes a new contract. 1 C. J. 705–707; Converse v. Scott, 137 Cal. 239, 70 Pac. 13. A promise to pay the amount ascertained to be due is a necessary ingredient of an account stated. 1 C. J. 697. As a new contract its obligations would not be mutual if one party were bound and not the other. The county surveyor, who was one of the parties to this supposed account stated, had no authority to bind the county of Tulare to pay the amount recited in said account, since the board of supervisors alone is clothed with the power to allow claims against the county treasury or to enter into such contracts, if, indeed, the authority exists at all to create any obligation against the county upon an account stated. Sections 4074–4079, Pol. Code; 1 Corpus Juris, p. 704; City of Syracuse v. Roscoe, 66 Misc. Rep. 317, 123 N. Y. Supp. 403; State v. Brown, 10 Or. 215.

[7] Again, the action was brought and defended upon the original contract; an account stated not having been pleaded in the answer. Under such circumstances, the stated account is waived. 1 C. J. 709; Bump v. Cooper, 20 Or. 527, 26 Pac. 848; Harrison v. Henderson, 67 Kan. 202, 72 Pac. 878. It necessarily follows that there is no merit in the claim of appellant that it was incumbent upon respondent to plead fraud or mistake in order to overcome the effect of such account. It appeared only in the evidence, and there, as we have seen, plaintiff made his showing as to its true character.

If the claim as prepared by the county surveyor may be considered as an account stated—of which there is at least grave doubt (Richmond Dredging Co. v. A., T. & S. F. Ry. Co., 31 Cal. App. 399, 160 Pac. 862)—for the reasons stated the trial court was justified in ignoring it.

The question remains whether the evidence supports the finding that plaintiff was entitled to compensation for 2,890.8 cubic yards of oil cake. Respondent sets out in his brief certain testimony of the county surveyor and deputy county surveyor, from which it is a fair inference that the "oil cake" was not included in the estimate of the amount of material removed, which was made by said county official and which constituted the basis for the claim that was allowed by the board of supervisors. It is not denied, as we understand it, that the oil cake was soft and unsuitable material that had to be removed, and for which removal the contract provided for compensation. The only difficulty was in ascertaining the amount of the yardage. As to that, plaintiff had the testimony of two experienced engineers who made an investigation of the highway, observed the oil cake, and computed the amount of it. Their testimony, while not amounting, of course, to mathematical demonstration, when fairly considered, is sufficient to support the finding of the court. Besides, the trial judge visited this division as well as the other, and it is affirmed by respondent and not denied by appellant that he personally inspected deposits of oil cakes thrown aside on the right of way. His investigation probably satisfied him that the claim of respondent was just to the extent of 2,890 cubic yards.

There seems to have been a candid difference of opinion between the parties as to the amount of work done by the contractor, and on account of changes made in the alignment of the road, and because imperfect records were kept, it was difficult to determine with accuracy the extent of the excavation and removal of material. The court was compelled to rely largely upon the opinion and computation of experts and its own observations, and we must hold that there was an honest and successful attempt to do justice to both parties.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

(55 Cal. App. 774)

FEISTHAMEL v. CAMPBELL. (Civ. 3741; L. A. 6791.)

(District Court of Appeal, Second District, Division 1, California. Dec. 28, 1921. Hearing Denied by Supreme Court Feb. 23, 1922.)

1. Evidence 🔑590—Court need not believe bare statement of interested witnesses as against cogent and connected circumstances to contrary.

The trial court was not obliged to take the bare statement of interested witnesses, who sought to impress the defendant with the character of an innocent purchaser, as against a set of cogent and connected circumstances plainly indicating otherwise, under Code Civ. Proc. § 2061.

2. Escrows 🔑1—May create valid escrow by delivery of securities conditioned upon payment of money or consideration.

Wherever parties, under valid consideration, make delivery of instruments, such as deeds, certificates of stock, or securities of other sorts, conditioned upon the payment of money, or the rendering of further consideration, to the grantor or vendor, they may, as a part of the transaction, create a valid escrow.

3. Contracts 🔑10(4)—Option agreement supported by consideration enforceable.

An option agreement supported by sufficient consideration is an enforceable contract, notwithstanding its unilateral character, and the question of want of mutuality of remedy does not affect it, and an option to purchase stock deposited with an escrow holder is enforceable.

4. Escrows 🔑7—Duty of escrow holder under option to purchase.

Where corporate stock has been deposited in escrow under an option agreement, the escrow holder, as agent of the proposed vendees, has the duty to see that the property remains in his hands until the expiration of the full time fixed in the directions of the vendor, and to deliver the property to the vendee upon condition as to payment being satisfied, at which time the vendor loses his right of property in the stock.

5. Escrows 🔑14(1)—Wrongful delivery conveys no title.

Wrongful delivery by an escrow holder contrary to instructions under which he holds the property will confer no title, particularly as against those who take with notice.

6. Escrows 🔑10—Vendee's remedy against escrow holder refusing to make delivery.

Where certificate of stock is deposited in escrow under an option agreement and the vendee performs the condition required, the escrow holder no longer holds the property as the property of the vendor, and the remedy of the vendee is against the escrow holder to compel delivery of the stock.

7. Escrow 🔑10—Assignee of vendee under escrow agreement held entitled to compel delivery.

Where certificate of stock was deposited in escrow under an option agreement and vendees assigned their interest to plaintiff and plaintiff tendered the money required to complete the purchase to the escrow holder, he became entitled to the stock and to his remedy to compel the depository to turn over the document, and such remedy followed the stock into the hands of a subsequent purchaser from his assignor, who had knowledge of assignee's rights.

8. Escrows 🔑10—Holder held not necessary party defendant in action to compel delivery.

Where escrow holder has delivered the property to the wrong person, it is not a necessary party defendant in an action to recover the property by the party entitled to the possession thereof.

On Rehearing in Supreme Court.

9. Appeal and error 🔑1169(8)—Failure to make order as to money tendered in court held not to require reversal of judgment.

Where judgment was based on theory that tender in court had been properly made and had been kept good, and that under the judgment the defendant would be entitled to the money it will not be reversed on the ground that it should have included an order to the clerk for payment in pursuance of the tender previously made; defendant being at liberty to apply to the clerk for the payment and to obtain an order from the court, if necessary, directing its payment.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by F. L. Feisthamel against R. M. Campbell. Judgment for plaintiff, and defendant appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Frank F. Oster, of Los Angeles, for appellant.

Goodwin & Morgrage, of Los Angeles, for respondent.

JAMES, J. Plaintiff was awarded judgment for the recovery of a stock certificate representing certain corporate shares, and defendant has appealed therefrom.

On the 13th of May, 1918, R. A. Moore was the owner of 1,900 shares of the capital stock of the Grant Tool Company. On that day he deposited a certificate representing the full number of shares mentioned with a banking corporation, for the purpose of having the same held in escrow subject to conditions which he stated in writing. These instructions so addressed to the bank directed that the escrow holder deliver the certificate to M. M. Gilchrist, William J. Coady, John Grant, and A. J. Campbell, or their assigns, "or to any or either of them for the other or others," upon the payment to the bank for the vendor, within two years from the date of the instructions, the sum of $2,000, payable, as the document recited:

"Five hundred dollars any time within one year from the date hereof, and the sum of five hundred dollars every six months thereafter until said sum of two thousand dollars shall have been paid. After the payment of said first installment deferred payments are to bear interest at the rate of 6 per cent. per annum."

The writing concluded with the following paragraph:

> "These instructions are given in recognition of an option granted by me for a valuable consideration in an agreement with the parties herein mentioned contemporaneously herewith."

At the time the certificate was deposited and the escrow completed, all of the persons named in whose interest the option to buy had been given were the owners of a large amount of stock in the same corporation. On the 18th of March, 1919, the plaintiff purchased from Gilchrist 6,365 shares of Grant Tool Company stock, and from Coady 8,112 shares, at $2 per share. The agreement of purchase covering both of these interests was in writing and contained in one document. On the same day the plaintiff purchased from Grant 10,700 shares of the same stock and from A. J. Campbell 1,700, also the interest of both of these parties in a certain block consisting of 1,500 shares of the same stock then being held as collateral security for payment of a debt theretofore incurred by the vendors. This purchase from Campbell and Grant was also evidenced by a writing expressed in a single document, and the purchase price therein agreed upon was the sum of $1 per share. Each of the documents hereinbefore referred to contained a clause expressing an assignment of the interest of the vendors in the option to purchase the Moore stock which had been, as before stated, made the subject of the escrow deposit. The assignment was expressed in the following language:

> "First party * * * does sell and assign to the third party all his right, title and interest in and to a certain option to purchase 1,900 shares of the capital stock of said Grant Tool Company for the sum of $2,000, which said option is given by one Moore to the first party."

On the 26th day of March, 1919, the plaintiff here, the holder of the assignment in the option rights from Gilchrist, Coady, Grant, and A. J. Campbell, presented the written assignment to the trust officer of the bank in charge of the escrow of the Moore stock, made tender of $2,000, and requested that the stock be delivered to him. The trust officer declined to deliver the stock, stating that he did not deem the assignment sufficient and demanded that plaintiff secure a power of attorney from the four persons who had assigned their interest. Plaintiff at a later date, through his attorney, made another tender and a more formal demand upon the bank, but at that time the stock had already been delivered, under circumstances which we will now state:

[1] The evidence shows that one Dent had for several years been a friend and acquaintance of Grant and A. J. Campbell. He was not an attorney at law, but had been consulted by Grant and had advised the latter in a business way respecting transactions affecting the stock of the Grant Tool Company, and particularly during the transaction which resulted in the sale by Grant and Campbell of their stock to plaintiff. It will be noted that while Coady and Gilchrist received $2 per share for their stock, Grant and Campbell secured but $1; that being the price also, approximately, of the stock held in escrow under the Moore option. We gather from the record that when Grant and A. J. Campbell concluded the sale of their stock to plaintiff, they had not learned that plaintiff was paying Coady and Gilchrist a higher price, and that, when they did learn of this, they became dissatisfied, with the result that certain action was taken which is now narrated: A few days after the making of the sale by Grant and A. J. Campbell to plaintiff, a power of attorney signed by the two persons named was executed in favor of Dent. This power of attorney authorized Dent particularly to "demand, receive receipt and cause to be paid for 1,900 shares of capital stock of the Grant Tool Company, a corporation, evidenced by certificate No. 34, and now in the custody of the Citizens' Trust & Savings Bank, under its escrow No. 1180, or make any and all demands necessary or proper to be made to recover any and all corporate stocks or stock, moneys or money, to which we, or either of us, may be entitled by reason of our relationship as stockholders in the Grant Tool Company, a corporation. * * *" The inference is plainly indicated that Dent had learned from the bank that it would act upon a power of attorney from the parties mentioned in the escrow instructions. Dent, armed with this power of attorney, proceeded to look up Moore, the owner of the escrowed stock, and the latter, after some consultation with counsel as to his rights, went to the bank and accepted payment for the stock. The bank determined that the power of attorney presented by Dent authorized it to release the stock from escrow, and delivered it over. In view of the fact that one of the contentions of appellant is that the evidence was insufficient to show that defendant Campbell was not an innocent purchaser, without notice of any rights of the plaintiff, we shall pay particular attention to the evidence as it disclosed the conduct of Dent in connection with the acts of the defendant. Defendant Campbell was the father of A. J. Campbell and the father-in-law of Grant. As soon as Dent had secured the power of attorney mentioned, he wrote a letter, stating in effect that he believed he could secure 1,900 shares of stock of the Grant Tool Company at the same price mentioned in the escrow instructions to Moore, and offered to sell the same to defendant. This letter he took to defendant's place of

business in the city of Los Angeles, where, although he stated that he was well acquainted with defendant, he entered into no conversation respecting the stock at all, but delivered to him the letter, saying that he would return after a while. Dent insisted that he at no time disclosed to the defendant the situation respecting the sale of the Grant-Campbell interests, or respecting any assignment having been made of the option rights (although he admitted that he had seen and read that assignment). According to the testimony of both Dent and the defendant, Dent returned to the defendant's place in about an hour and the defendant told him that he would take the stock. On cross-examination the latter testified that at the time he knew nothing of the condition of the Grant Tool Company, as to its finances, as to the property it possessed, or, in fact, nothing at all respecting matters which might affect the value of the stock. He denied in general terms that he knew of the sale of the Grant-Campbell stock to the plaintiff, but admitted in the course of his examination that Grant's "little girl," his granddaughter, had said that her father had sold out. At any rate, defendant immediately prepared certified checks covering the amount which Dent explained to him was required, and these were deposited with Dent's counsel to await delivery of the stock. After the first checks were deposited, Dent found that there were other charges that Moore insisted should be paid, including his (Moore's) attorney's fee. He returned to the defendant and explained the situation, whereupon the defendant furnished the added amounts of money. After the stock was procured from the bank, it rested in the hands of Dent's counsel for a period of about six months. In July, Dent proceeded to take action in the matter of the sale of the stock of Grant and Campbell to the plaintiff. Under date of July 23d he drew a notice addressed to the plaintiff, expressing a tender of $12,400, and demanded that there be returned to Grant and A. J. Campbell 12,400 shares of stock; it being asserted in that notice that the same had been obtained from vendors by fraud. This notice he signed "A. J. Campbell, John Grant, by Henry G. Dent, Their Attorney in Fact." The $12,400 was actually tendered to the plaintiff under this demand, and it is significant to note that the money was furnished by the defendant here.

We will not attempt to make any further statement of the evidence as affecting the connection of the defendant with the purchase of the escrowed stock. The record, by a great wealth of circumstances, is ample to show that the defendant was not, in his dealings respecting this stock, disassociated from Grant and A. J. Campbell. The trial court was not obliged to take the bare statement of the interested witnesses who sought to impress the defendant with the character of an innocent purchaser, as against a set of cogent and connected circumstances plainly indicating otherwise. Code Civ. Proc. § 2061.

[2] Appellant advances the contention that there was no "escrow" as that term is made to describe the legal situation following the deposit of documents in the hands of a third person. It is argued that, in order to have constituted the depositary an escrow holder, with the obligation to protect the interests of the persons in whose favor the deposit was made, there must have been an agreement on the part of the latter to purchase; in other words, that the agreement should have been one of sale and purchase, and not a bare option. A number of authorities are cited which sustain the general proposition that where deeds are deposited with a third person to be delivered upon compliance with some specified conditions, there must, in order to make a good escrow, be a corresponding agreement on the part of the proposed beneficiary binding them to buy. Whatever may be the earlier holdings, it seems now to be established that wherever parties, under valid consideration, make delivery of instruments, such as deeds, certificates of stock, or securities of other sorts, conditioned upon the payment of money or the rendering of further consideration to the grantor or vendor, they may, as a part of the transaction, create a valid escrow.

[3,4] An option agreement, supported by sufficient consideration, is an enforceable contract, notwithstanding its unilateral character, and the question of want of mutuality of remedy does not affect it. "If mutuality, in a broad sense, were held to be an essential element in every valid contract, to the extent that both contracting parties could sue on it, there could be no such thing as a valid unilateral or option contract, or a contract evidenced by a subscription paper, or a contract to enforce a reward offer, or a guaranty, or in many other instances readily put in ordinary business affairs. * * * An option, supported by a consideration, furnishes another illustration of a contract which is valid, notwithstanding the lack of mutuality. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it." 6 Ruling Case Law, p. 687, and decisions shown in footnote. See, also, Pittsburgh Vitrified P. & B. Co. v. Bailey, 76 Kan. 42, 90 Pac. 803, 12 L. R. A. (N. S.) 745. The case of Clark v. Campbell, 23 Utah, 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716, is cited as expressing the opposite view. In that case there was not involved the question as to enforceability of an option contract based upon a valuable consideration, nor whether, under such a contract, there might be made a valid escrow. The court expressly stated that no consideration appeared to have been given for the option, and the main point involved was as to the right of a vendee to the dividends which

had been declared upon the stock between the date of the option agreement and the time when the right to purchase was finally exercised. The case of Bailey v. Security Trust Co., 179 Cal. 540, 177 Pac. 444, holds directly that an option to purchase stock deposited with an escrow holder is enforceable. Sections 1057 and 1053 of the Civil Code are referred to in that decision as authorizing such deposits to be made, both of deeds affecting real property, and personal property. Summing up its conclusions affecting the various matters involved, the court stated that to hold otherwise would be to put an end "to the common and convenient practice, which has of recent years found general acceptance in the business world, of consummating transfers of real and personal property through deposits in escrow." Once a valid deposit in escrow has been made, the escrow holder becomes the agent of both parties. Presuming a case like this, of an option to purchase stock, the escrow holder is the agent of the vendor for the purpose of holding the stock and receiving the purchase price if it be paid by the second parties, and it has the obligation also to return the stock at the end of the time fixed, where the vendees have not made payment of the amount agreed upon. The vendor in such a case has no right to withdraw property from the deposit until the expiration of the time stated. As an agent of the proposed vendees, the escrow holder has then the duty to see that the property remains in his hands until the expiration of the full time fixed in the directions of the vendor, and to deliver the property to the vendees upon the condition as to payment being satisfied. By the making of such an escrow deposit, the depositary becames a trustee under an express trust, and when the vendees have rendered the consideration required into the hands of the trustee, the escrow holder becomes the agent of the vendees in the holding of it, and the vendor loses his right of property therein. We quote further from Ruling Case Law, volume 10, and of the text as shown on page 640, which is sustained by authorities cited thereunder:

> "The more logical position and that approved by numerous authorities is that upon the happening of the event or the performance of the condition upon which manual delivery should be made by the depositary to the grantee, although not in fact physically delivered to him, a deed theretofore in escrow becomes ipso facto the deed of the grantee in whom the title vests, and that thenceforth the depositary or holder is regarded as the mere agent or trustee of the grantee."

See Cannon v. Handley, 72 Cal. 133, 13 Pac. 315.

And in the same text (R. C. L.), at page 642, it is announced that a court of equity may be resorted to to compel delivery of an instrument placed in escrow, where the conditions are fulfilled and the depositary refuses to deliver. It is further stated that the remedy is against the trustee and not against the grantor, adding:

> "If a conveyance is deposited in escrow and the grantor is about to withdraw, or permit the withdrawal of, the instrument before the expiration of the time during which it was to remain on deposit, and has conveyed to a purchaser with notice, a court of equity will grant relief, and, if necessary, an injunction keeping the title in statu quo and placing the grantee in the same situation that the vendor agreed he should be, by giving the right to perform the condition and to receive the deed according to the terms of the contract."

[5-8] It is uniformly held to be the law that the wrongful delivery by an escrow holder contrary to instructions under which he holds the property will confer no title, particularly as against those who take with notice. We have already suggested that, upon the performance of the condition required of a vendee, the escrow holder or trustee no longer holds the property as the property of the vendor, but for the vendee; and that the remedy of the vendee in such a case is against the trustee or escrow holder to compel delivery of the subject of the deposit. There was in this case a wrongful delivery of the certificate of stock to Dent. The escrow holder had due and sufficient notice that neither Grant nor A. J. Campbell had any further interest in the escrow deposit, but that they had by a sufficient instrument in writing assigned all of that interest to the plaintiff here. While the stock was still in possession of the trustee, the plaintiff tendered the money required to complete the purchase exhibited the instruments of assignment, and demanded that the property be delivered to him. Immediately upon the performance of these acts, plaintiff became entitled to the stock and became entitled to his remedy to compel the depositary to turn over the document. We have indicated, too, that there was sufficient evidence to show that A. J. Campbell made the purchase, or pseudo purchase, with knowledge of the facts concerning the conditions surrounding this particular stock. The vendees having available to them the remedy to compel the depositary to turn over the stock, we think that remedy followed the stock into the hands of the person who wrongfully became possessed of it. It was necessary that the defendant be named as a party in order that the stock be recovered, and we do not think that it was indispensable that the escrow holder should have been included as a defendant. The action as first brought included as defendants the vendor of the stock, the escrow holder, Grant, A. J. Campbell, and Henry G. Dent, as well as this defendant. The respondent by a demurrer, which he interposed to the original complaint, objected, among other grounds, that there was a mis-

joinder of parties defendant, and that he was improperly included as a party. His and other demurrers filed were sustained, when the plaintiff amended, making defendant here the sole party against whom relief was demanded, and setting out the facts by sufficient allegations concerning the making of the option contract and escrow agreement, as well as the subsequent action taken, as has been hereinbefore stated. We do not perceive any detriment which respondent has suffered by reason of his having been made the sole defendant in the case. The case in its evidence bears strongly the impression, more potent that a mere suspicion, that Dent, in securing the stock from the escrow holder, was acting on behalf of A. J. Campbell and Grant, for whose benefit the defendant here advanced the money with which to satisfy the vendor's demand. This suggestion is given weight by the fact that under the same power of attorney Dent later made a written demand on behalf of his principals, Grant and A. J. Campbell, for the return of the other stock purchased by the plaintiff from these men, and that, again, the defendant here advanced the money which was tendered in connection with that demand. The plaintiff not only tendered to the escrow holder the money required, but continued to offer to pay the amount and deposited the same into court to await the result of the trial. This case, as the record presents it, shows few equitable features which can properly be invoked in aid of the defendant's position; on the other hand, the plaintiff appears to have endeavored only to secure what his agreement with Grant, A. J. Campbell, and Moore entitled him to, and which, had not the escrow holder disregarded the plain language of the instructions under which the deposit was held, would have been rendered to him without the necessity of resorting to this suit.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a rehearing in this court is denied.

[9] In answer to the suggestion in the petition that the judgment of the court below should have included an order for the payment or delivery by the clerk of the $2,000 deposited in court in pursuance of the tender previously made by the plaintiff to the defendant, and for the purpose of keeping such tender good, we deem it proper to say that the failure to make such order would not be in any event cause for the reversal of the judgment. That judgment was based upon the theory that the tender had been properly made and had been kept good by the deposit, and that by reason of the judgment for the plaintiff the defendant would be entitled to the money. The defendant is at liberty to apply to the clerk for the payment thereof, and, if the clerk refuses, he may apply to the court for an order directing such payment.

We concur: SHAW, C. J.; WASTE, J.; LAWLOR, J.; SHURTLEFF, J.; SLOANE, J.; WILBUR, J.; RICHARDS, Justice pro tem.

56 Cal. App. 176

UNITED STATES TRADING CORPORATION v. NEWMARK GRAIN CO.

(Civ. 3562.)

(District Court of Appeal, Second District, Division 2, California. Jan. 13, 1922. Hearing Denied by Supreme Court March 13, 1922.)

1. Sales 🔑83—Duty to get cars and shipping permits from railroad administration held to rest on the seller.

Under a contract for sale of barley, purchased f. o. b., to be billed by the seller to point of destination with draft attached to the bill of lading, where the seller had his agents at the point of shipment, and the buyer was away from the place of shipment, the duty to get the cars for shipping and shipping permits from the railroad administration rested on the seller.

2. Sales 🔑54—Getting cars and permit for shipping by seller held to put a construction on a doubtful contract.

In a contract for the sale of barley where it was not specified which party should get cars and shipping permits from the railroad administration, the course of dealing adopted between the parties by which the seller had obtained the cars and shipping permits puts a construction on the contract to be adopted by the courts.

3. Customs and usages 🔑10—Contract of sale held not subject to a trade custom that seller should get shipping permits.

Where a contract for the sale of barley was made before an embargo was placed on certain shipments by the federal railroad administration, a local trade custom requiring the buyer to obtain permits for the shipment will not be construed to affect the contract, especially when the custom related to the town of L., of which the buyer was not a resident, and there was no proof of his knowledge of the custom.

4. Sales 🔑84—Contract not dissolved by embargo which ended prior to breach.

Where contracts for the sale of barley contained no war or force majeure provisions, a temporary embargo on shipments by the government which lasted about two months, and which ended before the seller refused to complete the contract, merely suspended the performance of the contract and did not dissolve it.

5. Sales 🔑153—Tender held not performance of contract for delivery f. o. b. at stated place.

Where a contract for barley was for delivery f. o. b. cars billed to N., a tender of a car in L., and of barley in a warehouse, represented by receipts, was not a sufficient tender of performance.

6. Sales 🔑151—Anticipatory breach during delay in performance on account of embargo in shipment held ineffective.

Where contract for the sale of barley to be delivered f. o. b. on cars billed to N. was suspended by government embargo, the buyer had a right to disregard an anticipatory breach of the contract by the seller and treat the contract as subsisting, and could sue for a breach after the time for complete performance had expired, after the termination of the embargo.

7. Sales 🔑418(2)—Damages for breach of contract of sale held to be measured when the seller refused to perform after ending of embargo on shipment.

Where performance of contracts for the sale of barley was suspended by a government embargo on shipping, during the existence of which the seller made an anticipatory breach and refused to complete the contract after the ending of the embargo, the damages should be measured as of the date when the seller after the lifting of the embargo refused to make further delivery.

8. Sales 🔑418(2) — Buyer's damages for breach of contract stated.

If, before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be demanded by the buyer will govern, and not the market price on the date of such notice or anticipatory breach.

9. Appeal and error 🔑1071(6) — Failure to make findings as to tender of goods sold held not to make judgment defective.

Where contracts for the sale of barley required it to be delivered f. o. b. on cars billed to N. and shipment was delayed by government embargo and in the action for damages defendant pleaded a tender of performance, the evidence of which did not warrant a finding for him, failure of the court to make a finding on the issues of tender will not work a reversal of judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the United States Trading Corporation against the Newmark Grain Company. From judgment for plaintiff, defendant appeals. Affirmed.

Emery & Rehart and Bicksler, Smith & Parke, all of Los Angeles, for appellant.

Christopher M. Bradley and Sloss, Ackerman & Bradley, all of San Francisco, for respondent.

FINLAYSON, P. J. This is an action for damages for the nondelivery of the balance of certain barley which the defendant had contracted to sell to plaintiff and to ship to the latter at New Orleans, La. Plaintiff recovered judgment, and the defendant appeals.

The complaint contains two counts. In the first it is alleged that on June 13, 1919, plaintiff and defendant entered into an agreement whereby the former agreed to buy and the latter agreed to sell 2,000 tons, or 4,000,000 pounds, of barley, at certain agreed prices, the barley to be delivered free on board cars at California for shipment to New Orleans, payments to be made on sight drafts attached to bills of lading; that defendant delivered 3,869,967 pounds, leaving a balance of 130,033 pounds undelivered; that the time for the delivery of such balance expired November 12, 1919, on which date defendant refused to make any further deliveries; that at that date the market value of the barley, free on board cars in California, exceeded the contract prices by 78¾ cents per hundredweight; wherefore plaintiff alleges that it has been damaged in the sum of $819. In the second count it is alleged that on June 23, 1919, plaintiff and defendant entered into an agreement whereby the former agreed to buy and the latter agreed to sell 1,000 tons, or 2,000,000 pounds, of barley, to be delivered free on board cars in California for shipment to New Orleans, at certain prices, payments to be made on sight drafts attached to bills of lading. It is then alleged that, as in the case of the first contract, defendant, on November 12, 1919, refused to make delivery of an undelivered balance, namely, a balance of 768,822 pounds; that on that date the difference between the contract prices and the market value was 65 cents per hundredweight; wherefore, it is alleged, plaintiff has been damaged in the sum of $4,997.34.

[1] Plaintiff is a corporation carrying on its business at San Francisco, and defendant is likewise a corporation, with its principal place of business at Los Angeles.

Prior to entering into either of the two contracts mentioned in the complaint, namely, on the 9th, 10th, and 12th days of June, 1919, plaintiff and defendant had entered into three similar agreements for the purchase and sale of barley, each of which was evidenced by telegraphic correspondence. In the first of these prior agreements, that made on June 9, 1919, it was agreed that the barley should be delivered "f. o. b. cars [at] Imperial Valley points, and shipped to plaintiff in care of the Public Elevator at New Orleans." In the agreement of June 12th it was agreed that the barley should be delivered "f. o. b. cars rail points," and that it should be shipped "in 40-ton cars as per our instructions of June 9/19 to New Orleans." That is, defendant, by the terms of this agreement of June 12th, was instructed, in effect, to ship the barley to plaintiff at New Orleans in care of the Public Elevator at that city, after loading it free on board the cars at California points.

The contract alleged in the first count of the complaint, that for the purchase and sale of 2,000 tons of barley, is evidenced by four telegrams and a letter of confirmation. By the first of these telegrams, sent by plaintiff at San Francisco to defendant at Los Angeles on June 13, 1919, plaintiff ordered of defendant 1,000 tons of barley "for shipment not later [than] July twentieth, same terms [and] price as last purchase." This, read in the light of the agreement for the preceding purchase—that of June 12, 1919—meant that plaintiff offered to purchase of defendant 1,000 tons of barley to be delivered free on board the cars at rail points in California and shipped in 40-ton cars to plaintiff at New Orleans in care of the Public Elevator at that city. Defendant, on the same day, June 13, 1919, telegraphed its acceptance of plaintiff's order. Thereafter, but on the same day, defendant, by a telegram to plaintiff, offered to sell the latter an additional 1,000 tons of barley. Plaintiff immediately wired an acceptance. Then followed a written confirmation, dated at San Francisco June 13, 1919, signed by plaintiff and later accepted and signed by defendant, which, in so far as it is material to our inquiry, reads:

> "We hereby confirm purchase from you today by wire * * * barley 2,000 tons * * * f. o. b. cars main line Calif. rail points on or before Jul. 20. Remarks: Ship same as other lots."

The words "ship same as other lots," referring as they do, to the preceding purchases, were tantamount to a shipping instruction from plaintiff, the buyer, to defendant, the seller, to deliver the 2,000 tons free on board the cars at rail points in California not later than July 20, 1919, and to ship it in cars from the rail points in California where the shipments originated to plaintiff at New Orleans in care of the Public Elevator at that city.

The contract alleged in the second count of the complaint, that of June 23, 1919, for 1,000 tons of barley, is evidenced by three telegrams followed by a written confirmation. By the first of these three telegrams, a telegram sent by defendant at Los Angeles on June 23, 1919, to plaintiff at San Francisco, the former offered to sell plaintiff 1,000 tons of barley to be shipped not later than August 10, 1919. Plaintiff wired back that the prices named in defendant's offer were too high, but offered to accept defendant's proposition if the prices were reduced 50 cents per ton. Defendant immediately wired an acceptance of plaintiff's counter offer. Then followed a written confirmation, dated at San Francisco June 23, 1919, signed by plaintiff and later accepted and signed by defendant, which, so far as material, is as follows:

> "We hereby confirm purchase from you today by wire * * * barley 1000 tons * * * price f. o. b. cars. * * * Remarks: Ship us New Public Elevator New Orleans."

It will be recalled that in the first of the two contracts that are the bases of this action, that of June 13, 1919, defendant agreed to deliver the barley free on board the cars in California not later than July 20, 1919, and that in the other contract, that of June 23, 1919, it agreed to make such delivery not later than August 10, 1919. Delivery within the times agreed upon was subsequently waived by mutual agreement, and the barley thus became deliverable within a reasonable time. Some time in the latter part of August, but prior to the expiration of the period contemplated by the parties in their agreement for an extension of the time for delivery, the railroad administration (the railroads of the country having been taken over by the government during the war) issued an order requiring every shipper of barley from points in Southern California to points on the Gulf of Mexico to obtain a permit from the Southern California Export Committee as a condition precedent to the shipment. Without the permit no cars could be obtained for a shipment of barley to Gulf ports. This order, creating what the witnesses in the case have referred to as an "embargo," continued in force until about the 1st of November, 1919.

Prior to the time when the "embargo" went into effect, defendant, according to its agreements, had shipped about 2,500 tons of barley under the two contracts that are involved in this action, leaving approximately 500 tons undelivered. In making these shipments defendant loaded the barley free on board the cars at points in California, billed each car to plaintiff at New Orleans in care of the Public Elevator at that city, where, in due time, it was received by plaintiff, and mailed to plaintiff each bill of lading, attached to a sight draft.

There seems to have been no dispute between the parties respecting the performance of the contracts until the "embargo" went into effect. Then the trouble commenced. Plaintiff, not because it deemed itself obligated to secure the necessary permits, but solely as a courtesy to defendant, made efforts to obtain permits, but without success. Each party claimed that it was the duty of the other to obtain the necessary permits. Finally, after considerable correspondence between the two, defendant, on November 12, 1919, in response to a telegram from plaintiff, telegraphed the latter a definite refusal to make any further shipments, whereupon this action was commenced.

Five main points are pressed upon this appeal. The first is that, upon the government's promulgation of the "embargo," it became the duty of plaintiff, as the purchaser, to secure the necessary shipping permits, and that, having failed to meet this requirement, defendant was absolved from all obligation to make further shipments.

As we have pointed out, the contracts called for the delivery of the barley free on board cars in California, shipped to plaintiff in care of the Public Elevator at New Orleans. Also, as we have stated, the uniform practice followed by the parties before the embargo went into effect was for the defendant to secure the bills of lading from the carrier and attach them to sight drafts drawn on plaintiff at San Francisco for the purchase price of each carload. Under the terms of their contracts, construed in the light of their settled course of conduct, we think it clear that the burden rested upon defendant to furnish the cars and all necessary means of transportation, including such necessary permits as might be procurable by the exercise of reasonable effort.

There has been a difference of opinion between the courts of different jurisdictions as to whether the duty devolves upon the seller or the purchaser to furnish the cars where there is a contract for delivery f. o. b., and the contract is silent as to which one shall furnish them. The early English cases held that in a contract to ship f. o. b. the duty of specifying or furnishing the transportation facilities falls upon the buyer. Some of the American state courts have followed the same holding. On the other hand, a great many of the states have followed the rule, of general application, that where a person has agreed to perform an act, whatever is necessary to the performance of the act is a part of the agreement, and it is implied that he must furnish the means of accomplishing the act, and that, therefore, when a vendor has contracted to sell goods f. o. b. cars, he must procure the cars and furnish all the necessary means of transportation. The authorities are reviewed and the question carefully considered in the case of Culp v. Sandoval, 22 N. M. 71, 159 Pac. 956, L. R. A. 1917A, 1157. In an Illinois case (Harman v. Washington Fuel Co., 228 Ill. 298, 81 N. E. 1017) the Supreme Court of that state said:

> "Some courts have followed the rule applicable in other cases, that where one makes an agreement to perform an act, whatever is necessary to the performance of the act is a part of his agreement, and it is implied that he will secure the means necessary to the accomplishment of the act. The natural meaning of the words 'free on board' is, that the goods are to be furnished by the seller on board free of all charges and expenses up to and including the loading, and the courts adopting the rule just stated hold that the seller must furnish the cars. Other courts, apparently following the rule established when goods were to be delivered free on board a ship, have held that the duty to furnish cars rests upon the purchaser. The term in question was frequently inserted in contracts for sale and delivery of goods free on board a vessel, and it was held that the seller was under no obligation to act until the purchaser should name the ship on which delivery was to be made, for the reason that until the seller knew the ship he could not put the goods on board. It was held that the seller was entitled to know on what ship and where he was required to deliver the goods, and that rule has been referred to although it is manifestly wholly unsuited to shipments by rail under present conditions, at least unless the sale is made to a railroad company or the means of transportation contemplated is under the control of the purchaser."

In a recent decision by our own Supreme Court it is said that the question is one of intention, the intent of the parties to be determined from the particular circumstances of each case; that the expression f. o. b. merely makes it the duty of the seller to load at his own expense; and that the letters f. o. b., in and of themselves, throw no light upon the question as to the intention of the parties respecting the duty of the one or the other to furnish the necessary transportation facilities. Hackfeld & Co. v. Castle (Cal.) 198 Pac. 1041. In that case the court says:

> "It would seem that in the absence of any express provision on the point (and usually there is none), what the parties contemplated must be determined by what was reasonable under the particular circumstances of each case. When the buyer is not at the point of shipment, and when between that point and the point of destination there is a regular and customary method of transportation with fixed rates and uniform conditions, so that it is practically immaterial to the buyer whether he or the seller arrange for the transportation, and there is no difficulty and no substantial burden in arranging for it, the fact that the seller is on the ground and it is convenient for him to arrange for it, when it is not convenient for the buyer, would seem to make it reasonable that the seller should attend to the matter. This is generally the situation in the case of shipments by rail."

Under the circumstances of the instant case, it would seem to be reasonable to conclude that the parties contemplated that the seller is the one who should attend to arranging for the transportation and the procurement of the necessary cars. The initial points at which the shipments of the barley originated seem to have been wholly in the southern part of the state, where defendant had its agents or representatives. Between these points and New Orleans, the point of destination, there is a regular and customary method of transportation by rail. Plaintiff, the buyer, whose principal place of business is in San Francisco, was far away from the points of shipment. Defendant, who was on the ground, could arrange for the transportation far more conveniently than could plaintiff. Under these circumstances, we think that the parties, at the time when they made their contracts in the month of June, intended that defendant, as the seller, should make all arrangements for the transportation of the barley to New Orleans.

Moreover, it seems to have been the settled understanding that the plaintiff should make its payments on sight drafts attached to bills of lading procured from the carrier by the defendant. Obviously, these bills of lading, which, when issued, evidenced the carrier's contract of carriage, could not be obtained from the railway company until the barley had been delivered to the carrier for shipment and its shipment to the point of destination contracted for by the carrier. This, of course, would necessitate the procurement of the cars by defendant, since it was the defendant who arranged with the carrier for the bills of lading.

[2] But all doubt as to the correct construction to be placed upon these contracts is set at rest by the interpretation which the parties themselves gave to them. Until the embargo created the difficulties which confronted plaintiff and defendant, the latter uniformly arranged for the necessary transportation facilities, making all shipments to plaintiff at New Orleans in cars obtained by it for that purpose, without any claim that it was plaintiff's duty to furnish the same. This course of dealing between the parties, whereby they put their own practical interpretation upon their contracts, convincingly shows that it was well understood by both when they entered into their agreements that the duty of obtaining the cars rested upon the defendant. "If the parties have themselves put a construction upon the contract by one or the other assuming to furnish the cars, this construction will be adopted whether such duty was assumed by the buyer or by the seller." 35 Cyc. 198. See, also, Consolidated Coal Co. v. Jones, etc., Co., 232 Ill. 326, 83 N. E. 851; Standard Scale & S. Co. v. Baltimore Enamel & N. Co., 136 Md. 278, 110 Atl. 486, 9 A. L. R. 1502; and Peirson-Lathrop Grain Co. v. Barker (Mo. App.) 223 S. W. 941.

[3] It is claimed by appellant that the evidence discloses the existence of a usage in and about Los Angeles, during the life of the embargo, pursuant to which it was customary for the buyer to procure the necessary shipping permits. The existence of an established, uniform trade custom that permits should be obtained by the buyer is not proved by uncontradicted evidence. On the contrary, there is a decided conflict in the evidence as to the existence of any such custom. Mr. Lange, plaintiff's secretary and treasurer, himself an importer and exporter of grain, testified that it was incumbent upon the seller to procure the permits. It may be that in so testifying the witness was not specifically referring to the existence of any particular custom or usage. But, be this as it may, his testimony that it was the seller's duty to procure the permits is wholly inconsistent with the existence of such a custom as is claimed by appellant. "Every custom, in order to become obligatory, whether local or general, must be so well known and understood that it may fairly be presumed that all persons engaged in that trade are acquainted with it and assent to it. To be obligatory, it must not be merely a loose practice, but precise, definite and certain, so as to supply the place of the common law in the given case, and be capable of being applied to the contract in defining and fixing the rights of the parties under it." Young v. One Hundred, etc., Brick (D. C.) 78 Fed. 149, 151. Moreover, there was no proof of the existence of the alleged custom elsewhere than in and about Los Angeles; nor was there any evidence that plaintiff, a resident of San Francisco, had any knowledge of any such custom. "A nonresident will not ordinarily be presumed to have contracted with reference to a purely local usage, but must be shown to have had knowledge of it." 17 C. J. 462. Finally, the contracts for the shipment of this barley were made prior to the creation of this embargo, and, therefore, before any trade custom respecting the duty of either the buyer or seller to obtain permits could have sprung into existence. For this reason the parties cannot be deemed to have made their contracts with the idea that their respective covenants would be controlled by a subsequent trade custom requiring the buyer to obtain from the government permits for the shipment of barley, all of which, when the contracts were entered into, was to be shipped not later than August 10, 1919, which date preceded the embargo. Their respective rights and obligations must be ascertained from the language of their writings read in the light of the then existing circumstances, and not in the light of subsequent conditions which, so far as the evidence discloses, were not within the contemplation of either party when they entered into their contracts of bargain and sale.

For the foregoing reasons we are satisfied that, under the terms of the contracts, it was the defendant's duty to procure the permits, load the barley on the cars, obtain from the carrier bills of lading calling for the carriage of the barley consigned to plaintiff at New Orleans in care of the Public Elevator in that city, and do whatever else might be necessary for the transportation of the barley to New Orleans.

Nor was it necessary for plaintiff to furnish defendant with any special shipping instructions. As was pointed out by plaintiff's witness Lange, the contracts themselves, by requiring defendant to load the barley free on board the cars and to ship it to plaintiff in care of the Public Elevator at New Orleans, contained all the shipping instructions necessary to enable defendant to carry out its part of the agreements.

[4] It next is contended that the embargo dissolved the contracts, thereby extinguishing defendant's obligation to make any further deliveries. The contracts, which were not formal, but were created by correspondence, contained no war or force majeure provisions. They were simple bargains of sale and purchase. The vast disorganization effected by the war and the embargo on transportation which the railroad administration found it expedient to create undoubtedly affected a revolution in shipping conditions, and rendered it practically impossible for defendant to make deliveries, in accordance with the terms of its contracts, during the life of the embargo. But this did not put an end to the contracts. The embargo was not a permanent prohibition, but a temporary embargo only. It continued for a period of a little over two months. It came to an end prior to November 12, 1919, on which date defendant breached its contracts by absolutely refusing to make any further delivery. At that time, the embargo having ended, defendant could readily have performed its obligations in the manner undertaken by it in its contracts with plaintiff. It has not been shown that there ever was any probability that the embargo would continue for such a length of time as to frustrate the object of defendant's engagements from a business point of view, nor was this government regulation of such a character that, in and of itself, it frustrated the real object of the contracts. The case is clearly distinguishable from those wherein the government had requisitioned the very subject-matter of the contract for an indefinite period.

In embargoes such as this one was, the rule is that unless the parties have provided against it by their contract, they must submit to whatever inconvenience may arise therefrom. Congress, in authorizing the establishment of such war-time regulations, did not intend to invalidate contracts of sale. Lysle Milling Co. v. Sharp (Mo. App.) 207 S. W. 72. In Hadley v. Clarke, 8 T. R. 259, 100 Eng. Reprint, 1377, it was held that an embargo, to continue until the further order of the council, preventing a shipment to a foreign port, merely suspended, and did not dissolve, the contract of carriage; so that, although more than two years elapsed before the removal of the embargo, it was held that the shipper could recover damages for a failure thereafter to perform the contract. The rule that an embargo, to continue for an indefinite time, preventing performance, suspends, but does not dissolve, a contract contemplating the shipment of goods, is supported also by the case of Baylies v. Fettyplace, 7 Mass. 325. This doctrine that a domestic embargo preventing performance merely suspends, and does not terminate, a contract of affreightment, although the embargo is in terms unlimited as to time, and the concurrence of both the legislative and executive branches of the government is necessary to its removal, was approved also in Odlin v. Insurance Co. of Pennsylvania, 2 Wash. C. C. 312, Fed. Cas. No. 10,433, where the question, in an action on an insurance policy, was whether an embargo, imposed by the government to which the insurer and insured belong, subsequently to the beginning of the risk, furnished a legal ground for abandonment. A similar case is McBride v. Marine Ins. Co., 5 Johns. (N. Y.) 299. In Touteng v. Hubbard, 3 Bos. & P. 291, 127 Eng. Reprint, 161, it was said that an ordinary embargo does not put an end to the contract of affreightment, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconveniences may arise therefrom, unless they have provided against it by the contract. See, also, 6 R. C. L. p. 1001.

Our conclusion that an embargo such as this one was merely suspends performance of the contract and does not dissolve it, and that the doctrine of commercial frustration is not applicable to the facts of this case, is supported by the most recent decisions upon the subject. For example, the Maryland Court of Appeals, in the recent case of Standard Scale & S. Co. v. Baltimore Enamel & N. Co., supra (136 Md. 278, 110 Atl. 486, 9 A. L. R. 1502), addressing itself to a similar situation, spoke as follows:

> "It is clear, we think, that the defense relied upon, that the performance of the contract, as to the prompt delivery of the trucks in question, was rendered impossible by an embargo on shipment from Columbus, Ohio, going east, by the government, cannot be sustained under the facts of this case. In 35 Cyc. 244, the general rule, as to impossibility of performance of contracts arising subsequently to the making of a contract is thus stated, as supported by authority, that a seller who promises unconditionally to deliver takes the risk of being unable to perform, although his inability is caused by inevitable accident or circumstances beyond his control. It is further said at page 245 of the same volume that, in accordance with the general rule, it has usually been held, that the seller is not excused from delivery by the obstruction of routes of transportation, whether due to the freezing of waterways, seizure of a railway by the government, freshets, or by other causes, unless such contingencies are expressly provided for in the contract and especially will the rule prevail where other routes of transportation were open to the seller. And that a failure to deliver under the terms of the contract is not excused by the inability of the seller to procure cars or other means of transportation unless there is a stipulation covering such contingency, and

even in such case he must show that he had made a reasonable effort to procure transportation. The same principle and rule of law has been announced by this court and the Supreme Court of the United States in a long line of well-considered cases. (Benson v. Atwood, 13 Md. 20 [71 Am. Dec. 611]; Kribs v. Jones, 44 Md. 396; Pennsylvania R. Co. v. Reichert, 58 Md. 261.) In Southern Bldg. & L. Ass'n. v. Price, 88 Md. 163 [42 L. R. A. 206, 41 Atl. 54], it is said, it is familiar law that if at the time of making the contract the thing promised be possible in itself, it is no excuse for nonperformance that its performance became subsequently impossible from causes beyond the control of the promisor. (Jones v. United States, 96 U. S. 24 [24 L. Ed. 644]; United States v. Gleason, 175 U. S. 588 [44 L. Ed. 284, 20 Sup. Ct. Rep. 228])."

In Washington Mfg. Co. v. Midland L. Co., 113 Wash. 593, 194 Pac. 777, the Supreme Court of Washington stated the rule as follows:

> "If appellant, acting in good faith, and with diligence, might have filled the order without disobedience of the embargo or interference with the government's needs, *or filled it after the embargo had ended,* then clearly it was its duty to do so, and the embargo did not materially affect the contract. The effect of like governmental regulations has been generally held to extend the time for delivery, but not to vitiate the contract. (Boxford Knitting Co. v. Moore & Tierney, Inc., 265 Fed. 177; Mawhinney v. Millbrook Woolen Mills, 105 Misc. Rep. 99, 172 N. Y. Supp. 461; J. C. Lysle Milling Co. v. Sharp [Mo. App.] 207 S. W. 72; Hadley v. Clarke, 101 English Reports, Full Reprint, 1377.)" (Italics ours.)

See, also, Peirson-Lathrop Grain Co. v. Barker, supra.

[5] Appellant's third point is that it made a tender of performance in September and again on October 7, 1919, but that respondent refused the proffered barley. The sole basis for appellant's claim that a tender was made in September is the following: On or about September 5, 1919, defendant had one carload of barley in Los Angeles. The shipment had originated at a point in California, the barley having been loaded on the car at some place in this state. It was billed to defendant at Los Angeles. After this car had arrived in Los Angeles, it was offered by defendant to plaintiff. The offer was declined. At that time the embargo was still in force; and though no permit was required for any shipment from a California point to a California point, a permit was necessary if it was desired to divert the shipment from its destination point in California to New Orleans, or to any other Gulf port. No permit seems to have been obtainable, and therefore it was practically impossible to divert the car from Los Angeles to New Orleans. As we already have shown, defendant's contracts called for barley loaded free on board the cars at points in California and billed to plaintiff at New Orleans. Obviously, the offer of a car billed to Los Angeles, and which, for lack of the necessary permit, could not be diverted to New Orleans, was not a tender of performance under defendant's contracts.

To support its contention that it made a tender on October 7, 1919, appellant relies upon the following: On that date, neither party having succeeded in securing the necessary permits, defendant sent a telegram to plaintiff, wherein, after offering to give plaintiff warehouse receipts for an amount of barley equal to that which remained undelivered under their contracts, defendant concluded by saying that if such tender of warehouse receipts should not be accepted by plaintiff before noon of the following day, the sale would be treated as canceled. No warehouse receipts were actually produced. It seems that the grain belonged to a third party—The Globe Milling Company—and there is no evidence that defendant was ever in a position to deliver even warehouse receipts to plaintiff. But aside from this consideration, even if defendant had had the barley in a warehouse, and even if it had held the warehouse receipts therefor, a tender of such receipts would not be the equivalent of an offer to perform contracts which required the defendant to load the barley free on board cars billed to plaintiff at New Orleans. If, some time after the embargo had become effective and after its dilatory effect had become apparent, defendant had notified plaintiff that it would make delivery of the barley in cars billed to New Orleans just as soon as the embargo should be lifted, or as soon as permits were procurable, provided plaintiff would agree to accept delivery at that time and pay for the barley under the terms of the contracts, and if, after such notification, plaintiff had replied that it would not accept the barley after the expiration of the embargo, or after such time as the requisite permits might be available, then the situation might have been different. But a tender of a car billed to Los Angeles, or a tender of warehouse receipts, was wholly unavailing.

[6-8] It is suggested that if defendant breached its contracts it was on October 7th, when it gave notice that it would treat the contracts as canceled if plaintiff refused to accept warehouse receipts. Plaintiff was not obliged to treat the contract as breached prior to November 12, 1919, when, the embargo having expired, defendant peremptorily refused to make any further deliveries of barley. Plaintiff had the right to elect to ignore any anticipatory breach on defendant's part prior to the expiration of the embargo or prior to the time when the necessary permits might become available. As we have shown, the embargo, though it did not dissolve the contracts, worked a temporary suspension of them, to the extent, at least,

that defendant could not be held liable for damages for non-delivery during the life of the embargo or while permits were not procurable. It is a fair inference from the evidence that permits were not procurable by either party during the term of the embargo. Defendant, therefore, until the embargo's expiration, could not complete the performance of its contracts, nor could it be held liable for damages for nondelivery during that time. And, though it might have had the right to refuse to accept and pay for barley not tendered until after the expiration of the embargo (Brooks Tool Mfg. Co. v. Hydraulic Gears Co., 89 L. J. K. B. N. S. 263, 9 A. L. R. 1507), nevertheless, plaintiff, if it elected so to do, could hold defendant to a performance of its contracts after the embargo was lifted. That is, notwithstanding defendant's attempted anticipatory breach on October 7, 1919, plaintiff, at its election, could refuse to accept such attempted renunciation by defendant of its contract obligations, could treat the contracts as subsisting, and could sue for a breach of contract after the time for complete performance had expired, i. e., after the termination of the embargo. 9 Cyc. 698; Oppenheimer v. Brackman, etc., Co., 32 Can. S. Ct. 699, 711. Because plaintiff, at its election, could treat the time when the embargo should be lifted as the time for completion of performance by defendant, the damages should be measured as of the date when defendant, after the lifting of the embargo, refused to make further delivery, which was November 12, 1919, the date adopted by the court for that purpose. In measuring damages, the rule is that if, before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be demanded by the buyer will govern, and not the market price on the date of such notice or anticipatory breach. Walker Grain Co. v. Denison Mill, etc., Co. (Tex. Civ. App.) 178 S. W. 555; Byrd Printing Co. v. Whitaker Paper Co., 135 Ga. 865, 70 S. E. 798, Ann. Cas. 1912A, 182; York-Draper, etc., Co. v. Lusk, 45 Kan. 182, 25 Pac. 646; 35 Cyc. 637–638.

[9] Finally, appellant claims that the court failed to find upon all the issues in the case. The answer set up as a special defense that defendant made a tender of performance on September 5, 1919, and again on October 7, 1919. The court made findings upon all the issues tendered by the complaint, but made no findings with respect to defendant's allegations of tender. For the reasons already stated, the evidence did not warrant a finding for appellant upon the defense of a tender of performance. The findings that were made fully support the judgment. Where the judgment is supported by the findings, it will not be reversed for a failure to find upon an issue, the burden to support which rested upon the appellant, if a finding thereon must necessarily have been adverse to appellant. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

56 Cal. App. 247

RINDGE et al. v. CRAGS LAND CO. et al.
(Civ. 3721.)

(District Court of Appeal, Second District, Division 1, California. Jan. 24, 1922. Hearing Denied by Supreme Court March 23, 1922.)

1. Waters and water courses ⟹167(1)—Upper riparian owner could maintain dam on creek in absence of detriment to lower owner with right of appropriation.

An upper riparian owner could maintain a dam on a creek running through his land as against the objection of the lower owner entitled to use the water by right of appropriation, in the absence of a showing of real detriment to the lower owner.

2. Trial ⟹398—Inconsistency in findings reconciled to support judgment.

Any inconsistency in findings must be reconciled so as to support the judgment.

3. Waters and water courses ⟹143—Appropriated right measured by quantity put to beneficial use.

The extent of appropriated right to water is measured by the quantity of water actually put to a beneficial use, and not the quantity taken at the point of diversion.

4. Waters and water courses ⟹40, 127—Rights to use of water may be acquired both as riparian owner and as appropriator.

A person may be possessed of rights as to the use of waters in a stream both as to riparian character of the land owned by him and also as an appropriator.

5. Waters and water courses ⟹130—Appropriator can gain nothing as against riparian rights which have attached.

An appropriator can gain nothing as against riparian rights which have attached; the only water subject to appropriation in such case being the excess water over and above what might reasonably be subjected to a beneficial use by the lands bordering the stream.

6. Waters and water courses ⟹7—Riparian rights do not attach to public lands.

Riparian rights do not attach to public lands until land has been transmitted to private ownership.

7. Waters and water courses ⟹7—Right to use of water flowing through public land may be acquired by appropriation though not sufficient water is left to supply riparian needs.

The right to the use of water flowing through public land may be acquired by appropriation, by subjection of water to a beneficial use, even though the use leaves an insufficient supply of water for riparian needs, and the subsequent owner of the land takes land subject to the right of the appropriator.

8. Waters and water courses ⚷7—Riparian owner may acquire by appropriation right to water flowing through upper government land though effect is to rob upper land of any riparian right.

A riparian owner may appropriate water running through upper land owned by the government to the extent that the water is reasonably necessary to satisfy the necessary uses to which it is designed to be put, though the effect is to rob the upper property of any riparian right in the stream.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by May K. Rindge and another against the Crags Land Company and another. Judgment for defendants, and plaintiffs appeal. Modified and affirmed.

Anderson & Anderson and Nathan Newby, all of Los Angeles, for appellants.

Meserve & Meserve and Mott & Cross, all of Los Angeles, for respondents.

JAMES, J. Plaintiffs brought this action to secure equitable relief of several kinds, all designed to protect rights asserted to be held by them to the use of waters flowing in Malibu creek, in the county of Los Angeles. Defendant Crags Land Company owns land immediately above and adjoining that of plaintiffs. At a point on the former's land Triunfo and Las Virgines creeks converge to form Malibu creek, which latter flows thence and through the lands of plaintiffs to the Pacific ocean. It was asserted that the defendants had, by the erection of a dam on Triunfo creek, interfered with the natural flow of the water feeding into Malibu creek. It was also asserted that in another canyon called "Morrison," wherein there was a spring which fed its waters into Triunfo creek, defendants had cut off the supply at the spring by conducting the water away through a pipe and subjected it to their own uses. Plaintiffs claimed not only that their riparian right to use the waters of Malibu creek had been interfered with by the acts complained of, but that a further right of the plaintiff May K. Rindge, as an appropriator of 100 inches of water from the stream, had been also affected to that plaintiff's damage. The prayer in effect was that plaintiffs' title to the water rights be quieted, that maintenance of the dam be enjoined, and that the court determine the relative riparian rights of the plaintiffs and defendants to the use of the waters which furnished the flow in Malibu creek. The trial judge, after a lengthy hearing and the taking of a great amount of evidence, included in which were two views made by the judge of the lands, streams, and locations involved, entered findings and judgment. The court determined that the dam erected on Triunfo creek did not interfere with the flow of the water naturally passing down that creek, nor with the surface or under-surface flows which contributed to make up the water which ordinarily reached the land of the plaintiffs and became a part of Malibu creek. It determined that, as to the spring in Morrison canyon (that spring being upon the land of the defendants), the water thereof belonged to the defendant land company, and that, when allowed to run in its natural state and condition, this water was not sufficient in quantity to reach Triunfo creek, and hence did not and could not furnish any part of the water eventually appearing in Malibu creek.

As the determination of the court regarding the Morrison Canyon water is fully sustained by the evidence, that subject may be here left out of a further discussion of the case. Referring now to the dam, as to which the plaintiffs have made their first complaint: This dam was built across a narrow gorge on Triunfo creek, the sides and bottom of which were of rocky material. The dam when completed was about 50 feet in height and about 147 feet in length across the top thereof. The width at the bottom was a great deal less footage, owing to the slope of the canyon walls. The dam, when filled up to the overflow point, caused the water to back up through the canyon gorge for a distance of about 5,300 feet. No impediment was offered by the dam to a free overflow of the water once the reservoir basin had been filled. The dam was not used by the defendants for any purpose other than to impound the waters held behind it, and none of those waters were taken from the damsite. It was the claim of the plaintiffs that the existence of the dam caused such an obstruction to the flow of natural waters in the Triunfo canyon as to cause great loss thereof, and that the quantity of water which this creek furnished as a tributary to Malibu creek, both surface and underground, became greatly diminished. The court, as we have stated, heard a great deal of evidence, that of many engineering experts included, which was to the point that the existence of the dam and consequent impounding of the waters caused no loss whatsoever to the running or percolating supply feeding into Malibu creek—in fact, some of the testimony indicated that, by the existence of the dam and the collecting of storm waters, which, had they not been caught and impounded, would have run off into the sea, there would be a conservation of the supply and that the summer contribution of Triunfo creek to the waters of Malibu creek would be increased.

[1, 2] We have examined a great deal of the evidence as it is shown in a voluminous record presented with this appeal. It would extend this opinion to an unnecessary length to attempt to present any comprehensive abstract thereof. It may be sufficient to say that there was evidence of a substantial kind sustaining the findings of the trial judge that the erection of the dam on Triunfo creek in no wise caused the damage which plaintiffs, in their complaint and the amendments thereto, asserted had been sustained by them, or any damage whatsoever. Defendants had the right to maintain the dam in the manner described, being responsible and subject to restraint only in the event of a showing of real detriment suffered by plaintiffs. Fisher v. Feige, 137 Cal. 39, 69 Pac. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77; San Joaquin & Kings River Canal & Irrigation Co. v. Fresno Flume, etc., Co., 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832; Gallatin v. Corning Irrigation Co., 163 Cal. 405, 126 Pac. 864, Ann. Cas. 1914A, 74. Appellants complain that the findings of the court are inconsistent, wherein the issue as to the effect of the dam is determined. We think that sufficient appears in the findings to make it clear that the court considered all of the elements of possible damage, and, so considering, intended to determine the issue adversely to the plaintiffs. Any inconsistency in findings must be reconciled in such a way as to support the judgment of the court. American National Bank v. Donnellan, 170 Cal. 15, 148 Pac. 188, Ann. Cas. 1917C, 744.

[3] Plaintiff May K. Rindge claimed the right to water asserted to have been obtained under appropriations made by herself and predecessors to the extent of 100 miner's inches. It was shown in evidence that, at a time when the title to all the property of the defendants was in the government, plaintiff and the predecessors of plaintiff had gone upon that land, and established a point of diversion and performed necessary acts to complete an appropriation of water from Malibu creek. From that time forward the water, under this claim of right by appropriation was regularly taken from Malibu creek, and used for irrigation purposes upon the lands of said plaintiff and her predecessors. The point of diversion was changed on two occasions. There was evidence sufficient to show that, while a much larger quantity of water was taken out at the points of diversion, not more than 4.95 inches was subjected to beneficial use, as a large part of the water entering the flume at plaintiff's intake escaped by leakage and flowed back into the stream. The court's findings agreed with this evidence, and, as the extent of the appropriated right is measured by the quantity of water actually put to a beneficial use, the decision on that point must be deemed to be correct. Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. 168; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213. The court did, however, notwithstanding that it was found that the plaintiff May K. Rindge and her predecessors had by sufficient acts made an appropriation of 4.95 inches of water from the stream, deny to said plaintiff any judgment making certain and continuing that right, upon the apparent ground that a landowner, claiming rights to the use of water in a stream, could not claim both as riparian owner and as an appropriator. On the findings as made, unless the conclusion of law deduced by the trial judge against the plaintiff's right in the regard last mentioned is correct, the judgment must be modified. The trial judge first determined the number of acres owned by each of the parties which were riparian to Malibu creek and its tributaries; he determined that the available supply of water was insufficient to meet the riparian needs of the respective parties, and determined that each should have a continuous flow of the water in consecutive period of hours, in the proportions as their respective holdings bore to each other.

[4-8] It is established in California that a person may be possessed of rights as to the use of the waters in a stream both because of the riparian character of the land owned by him and also as an appropriator. An appropriator can gain nothing as against riparian rights which have attached, and, once such rights have become affixed, they continue and are not lost, regardless of whether the water has been put to any beneficial use upon the land; the right is one continually and perpetually appurtenant. There would remain, then, as subject to appropriation, only the excess water over and above what might reasonably be subjected to a beneficial use by the lands bordering the stream. As to land held by the government, it is not considered that a riparian right has attached until that land has been transmitted to private ownership; hence an appropriator, having in sufficient manner taken possession of the waters of a stream, and actually subjected them to a beneficial use, may claim a continuance of the use, even though that use leaves land which belonged to the government at the time of the appropriation without sufficient to supply riparian needs: hence the subsequent owner takes his ownership as affected by the right of the appropriator.

> "An appropriation does not of itself deprive any private person of his rights; it merely vests in the appropriator such rights as have not previously become vested in private ownership, either by virtue of some riparian right or because of prior statutory or common law appropriation and use. It affects and divests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public

lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee. An appropriation of water and use thereunder does not become effective to divest private rights in a stream, unless it has been continued adversely thereto for the period of five years under such circumstances as to gain a title by prescription, and then only to the extent of the use." Duckworth v. Watsonvile, etc., Co., 150 Cal. 520, 89 Pac. 338.

And thus it may happen that a riparian owner, being insufficiently supplied with water by the flow of a stream, and anticipating the attaching of other riparian claims when the government land above him may be transferred to private ownership, may, upon such government land, make an appropriation which will be good, although it may have the effect to rob entirely the upper property of any riparian right in the stream—this to be qualified only with the condition that the total water claimed under the combined rights does not amount to more than is reasonably necessary to satisfy the necessary uses to which it is designed to be put. As to the proposition last announced, see Senior v. Anderson, 130 Cal. 290, 62 Pac. 563, where the court says:

> "Her riparian rights could only entitle her to a reasonable use of the water upon her riparian lands, but having before she acquired title from the United States appropriated more water than was required for beneficial uses upon said land, she could acquire no right to any additional quantity under the law of riparian rights."

And upon the general subject see Healy v. Woodruff, 97 Cal. 464, 32 Pac. 528; Van Bibber v. Hilton et al., 84 Cal. 585, 24 Pac. 308, 598; Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089; Smith v. Hawkins, 127 Cal. 119, 59 Pac. 295; 3 Farnham on Waters and Water Rights, p. 2020; 1 Kinney on Irrigation (2d Ed.) p. 902; 1 Wiel on Water Rights, p. 346. Upon the facts found we think the court should have determined, first, that the plaintiff May K. Rindge was entitled to take from Malibu creek 4.95 inches of water continuous flow; that this appropriated water should be deducted from the proportion assigned to the defendant Crags Land Company for riparian uses. This would require a readjustment of the proportions in which the parties would be entitled to share in the remaining water. In other words, the judgment should be that the land of the Crags Company, by reason of the prior appropriation by May K. Rindge has had its riparian right to waters flowing into Malibu creek diminished by the amount of that appropriation, while the riparian rights of the plaintiffs are not diminished at all on account thereof. The judgment will not, of course, affect rights which persons not parties to the action may have in the waters of the several streams.

We think no substantial error was committed by the trial court in its rulings admitting or rejecting testimony.

The judgment in so far as it determines that May K. Rindge possesses no right to use the waters of Malibu creek as an appropriator, and as it determines the proportions in which and the manner by which the parties shall share in such waters, or those tributary, as riparian owners, is vacated; as to such matters the trial court is directed to amend its conclusions of law and the judgment, to accord with the conclusions expressed in this opinion. As to all other matters adjudicated, the judgment is affirmed. The parties hereto shall bear their own costs incident to the appeal.

We concur: CONREY, P. J.; SHAW, J.

56 Cal. App. 291

PEOPLE v. PHILLIPS. (Cr. 577.)

(District Court of Appeal, Third District, California. Jan. 26, 1922.)

1. Perjury 🔑11(2)—Testimony in personal injury case nurse had been hired is material.

In an action to recover for personal injuries to the wife, testimony by the husband that he had a nurse to care for the wife and assist in the housework was material on the issue whether the wife was incapacitated by her injuries from performing her household duties, so that, if false, such testimony was perjury.

2. Perjury 🔑11(8)—False testimony need not be directly material.

The false testimony on which a charge of perjury is based need not be directly and immediately material, but it is sufficient if it is so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove it.

3. Perjury 🔑31—Prosecution need not negative ultimate fact false testimony tended to prove.

In a prosecution for perjury based on false testimony as to a fact from which a fact directly in issue might be inferred, the prosecution need not negative the truth of the ultimate fact which the false testimony was intended to establish.

4. Criminal law 🔑762(5)—Instruction defendant was charged with perjury held not to indicate he was guilty.

An instruction that defendant was accused by an indictment of perjury alleged to have been committed in the manner following, quoting the indictment, did not intimate that defendant was guilty, especially where the court specifically instructed that the indictment was not any evidence of guilt.

5. Perjury 🔑36—Materiality of testimony is question for the court.

In a prosecution for perjury, the materiality of the alleged false testimony is always a question for the court, and not for the jury.

6. Perjury 🔑37(1)—Instruction held not to leave issue of materiality to jury.

An instruction that defendant was indicted for perjury and that the false testimony was material was not erroneous as submitting to the jury the issue of the materiality of the alleged false testimony.

7. Criminal law 🔑1172(1)—Submitting to jury whether alleged perjured testimony was material held harmless.

In a prosecution for perjury, where the alleged false testimony was material as a matter of law, accused was not prejudiced by error in requiring the jury to find the testimony was material before they could convict.

8. Perjury 🔑37(1)—Instruction on false testimony including a statement on belief held not erroneous.

An instruction that if the defendant gave the false testimony alleged in the indictment knowing it to be false, the jury should convict, was not erroneous, even though a part of the answer to one question was not stated as a fact but as a belief of the witness, since the other statements, if false, were sufficient to sustain the conviction and the instruction required a finding they were all false.

9. Perjury 🔑12—Knowingly false testimony as to belief constitutes offense.

Though as a general rule testimony as to belief is not perjury, though the facts are otherwise than as stated, a willful and false statement of a belief which the witness knows does not exist may be made the basis of a prosecution for perjury.

10. Perjury 🔑12—Testimony as to payment held not a belief.

In a prosecution for perjury, where the alleged false testimony was a statement that he employed a nurse for his wife when she was injured, and that he thought he paid her $108, the statement as to payment was not a statement upon belief, but was in effect a statement he had paid some amount.

11. Criminal law 🔑510—Rule as to necessity of corroborating accomplice's testimony inapplicable in perjury case.

The rule requiring corroboration of the testimony of an accomplice is of no effect in a prosecution for perjury, where the testimony of the alleged accomplice related to the falsity of the alleged testimony of accused, in view of the rule that the falsity of the testimony must be proved by two witnesses or by one witness with corroborating circumstances to sustain a conviction for perjury.

12. Perjury 🔑34(4)—Corroboration of only witness as to falsity of testimony held insufficient.

In a prosecution for perjury in falsely testifying accused had employed a nurse for his wife when she was injured, where the nurse testified she had not been employed, evidence by the mother of the alleged nurse that she had visited plaintiff's wife on a few occasions and saw no nurse there, without corroboration of the nurse's testimony that she was going to school, or other evidence disproving defendant's testimony the nurse was employed after school hours and in the evening, *held* insufficient corroboration to sustain the conviction.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

J. W. Phillips was convicted of perjury, and he appeals from the judgment and from an order denying his motion for new trial. Reversed.

Frank L. Gafney, H. T. Hiatt, and Charles B. Harris, all of Sacramento, for appellant.

U. S. Webb, Atty Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of perjury, and he appeals from the judgment and order denying his motion for a new trial. The basis for the charge in the indictment is that upon the trial in the superior court of an action to recover for injuries caused to his wife in an automobile accident he testified falsely as follows:

> "Q. Did you have a nurse for your wife after the accident? A. Yes; a nurse girl to assist in the housework, and took care of my wife. Q. How much did you pay her? A. I think it was $108."

[1] We can see no merit in the claim that said testimony was not material to any issue in said action for damages.

In the complaint in said civil action, after setting out specifically certain injuries received by the wife, plaintiffs alleged "that by reason of said injuries to said plaintiff Alice D. Phillips has undergone, and now undergoes, and will in the future undergo great physical pain and agonies, and great mental suffering, and was unable to perform her household duties for about two months." In the answer "defendants deny that, by reason of said or any injuries to said plaintiff Alice D. Phillips, she has undergone or will undergo in the future great or any physical pain and agony or agonies, and great or any mental suffering; deny that plaintiff was unable to perform her household duties for about two months, or for any other time or at all."

Whether she was able to perform said duties became therefore a material and very important issue in the trial of the action for damages. Any fact or circumstance tending to establish that issue in favor of either party would be admissible. While the fact that the wife had a person to nurse her and to assist in the housework would not prove directly that said plaintiff was unable to do her housework, yet it would be a circumstance calculated to render it probable that she needed such assistance. In other words, from the employment of a nurse and assistant it would be a reasonable inference that her physical condition was such as to require it. It seems clear that the testimony related to a matter that might have an important bearing upon the verdict of the jury and could furnish the ground for a charge of prejury.

[2] Of course, it is well settled that—

> "The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto, or otherwise." 22 Am. & Eng. Ency. of Law, 687; People v. Senegram, 27 Cal. App. 303, 149 Pac. 786; People v. Barry, 63 Cal. 63; Ex parte Davis (Cal. App.) 199 Pac. 576.

[3] Nor do we perceive any merit in the claim that the prosecution, in order to negative such testimony, was required to prove that the wife did not actually need a nurse. In that respect a difference exists between perjury relating directly and that relating indirectly to an issue. If the alleged perjurious testimony had been that his wife needed a nurse, then appellant's contention would be sound. But the charge being based upon a collateral fact, and it being material to the main issue, it is sufficient to prove the testimony false, although it might be impossible to prove the main issue to the contrary to the claim of appellant. As to the issue in the civil action the inquiry here extends no further than to ascertain whether the testimony would have a tendency to support either party's position. "A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact," and it is no defense that, while the circumstances to which he thus swears do not exist, the fact sought to be established by them does exist. Commonwealth v. Grant, 116 Mass. 17.

[4] The court assuredly committed no error in instructing the jury as follows:

> "The defendant at the bar of the court, J. W. Phillips, is accused by the grand jury of the county of Sacramento, by an indictment filed in this court of the crime of felony, to wit, perjury, alleged to have been committed in the manner following: [Reading the language of the indictment.]"

The court therein did not intimate that the defendant was guilty of the charge. The fact is that the court specifically instructed the jury:

> "That the indictment does not constitute any evidence of guilt of the defendant, and the court instructs the jury that no juror should permit himself or herself to be in any degree or to any extent whatever influenced by it."

[5, 6] Nor is there any force in the claim that by said instruction the court left it to the jury to determine whether the alleged perjurious matter was material. Appellant is right in the assertion that—

> "The question of materiality is always one for the court to determine and not the jury." People v. Senegram, supra.

The trial court recognized the rule, and withdrew from the jury the determination of the question, by instructing them that if they found all the other elements of the charge to be true beyond a reasonable doubt, they must find the defendant guilty. Moreover, during the trial the trial judge stated:

> "The question of materiality is a question of law, and the jury is not concerned with that. The jury hasn't anything to do with the materiality of the evidence. That is a question of law, whether or not it is material; it is a question of law; the jury has nothing to do with it."

[7] The jury certainly needed no further instruction upon the subject. But, even if

the jury had been instructed to determine the materiality of the testimony, it is difficult to see how the defendant would have been prejudiced, since it must be held that the testimony was actually material.

Appellant finds fault with this instruction:

> "If you find from the evidence beyond a reasonable doubt that the defendant, at the time and place mentioned in the indictment, was sworn as a witness in the cause of J. W. Phillips and Alice D. Phillips v. John H. Wheeler and E. H. Wheeler, hereinbefore mentioned; that said cause was then and there pending and on trial and at issue in the said superior court of the county of Sacramento as set forth in the indictment; the said defendant was sworn as such witness by the officer therein mentioned and acting in the capacity as set forth in said indictment, and was then and there sworn to tell the truth, the whole truth and nothing but the truth; and if you further find from the evidence that he, the said defendant, did then and there testify and declare, among other things, as follows:
>
> "'Q. Did you have a nurse for your wife after the accident? A. Yes, a nurse girl to assist in the housework and took care of my wife.
>
> "'Q. How much did you pay her? A. I think it was $108'
>
> —"and if you are further convinced from the evidence beyond all reasonable doubt that such answers were not true, but were then and there false and untrue, and that the defendant at the time of making the same knew such answers to be false, and that he made such answers willfully for the purpose and with the intent to deceive and mislead the court in said cause, and to induce the court and judge thereof to render judgment in favor of himself and against the plaintiffs in said action—then the defendant is guilty of perjury, and you should render your verdict accordingly."

[8] The objection is:

> "That the allegations with reference to the amount paid to Lillian Robinson were not positive or absolute, but, on the contrary, were given only according to his recollection an belief. The law does not authorize or warrant a conviction of the charge of perjury where a person swears to a thing according to his belief or as he remembers and so states."

It is to be observed, however, that the assignment of perjury in the indictment is directed to each of the answers given by appellant, and hence it follows that the charge as to the testimony in reference to the payment of the nurse may be ignored if the charge is sustained as to the other answer. People v. Senegram, supra. Therein it is said:

> That, since the indictment "alleges that each and every one of the answers was false, it must be deemed sufficient as a separate and distinct assignment of perjury based upon each answer sworn to by defendant."

[9] It may be added that the court, on request of the defendant, instructed the jury:

> "That if the testimony given by the defendant in the action of J. W. Phillips and Alice D. Phillips v. John H. Wheeler and E. H. Wheeler referred to in the indictment, purports to be given only according to his recollection and not absolutely, then he cannot be convicted of the crime of perjury. It is the law that one who swears to a thing according to his belief or as he remembers and so states, cannot be found guilty of the crime of perjury."

But the rule as thus stated needs some qualification. If a witness swears willfully and falsely to a belief in the existence of a fact which does not exist and which he knows does not exist, his testimony may be made the basis of a prosecution for perjury. Herein, if appellant did not pay any money to a nurse, he could not believe that he did. It is only where it is possible to have a belief contrary to the fact that such belief may not be assigned as perjurious. In Wharton's Criminal Law (11th Ed.) § 1510, it is said:

> "Hence it is held a good assignment of perjury that the defendant swore that he 'thought' or 'believed' a certain fact, whereas in truth and fact he 'thought' or 'believed' the contrary, and had no probable grounds for what he swore."

[10] The fact is that when said testimony of appellant is fairly considered it is to be understood as implying a doubt as to the amount he paid, and not as to the fact that he did pay the nurse for her services as such. His testimony is equivalent to the declaration:

> "I paid the nurse, and I believe the amount was $108."

From such testimony the inference would arise, of course, that such nurse was employed, and thus a case of perjury might be made out. Indeed, it was clearly the intention of the witness by said statement to confirm his previous declaration that such employment did exist, and said instruction was hardly applicable to the case, but appellant does not and cannot complain of it.

[11] Appellant contends that Lillian Robinson, the alleged nurse, was an accomplice, and no conviction can be sustained because she was not corroborated. This theory that she was an accomplice seems not to have been presented in the court below. However, as to corroboration it can make no difference, as the rule in case of perjury requires that it must be proved by the testimony of two witnesses or one witness and corroborating circumstances; that is, that the falsity of the statement of the accused must be shown to the jury beyond a reasonable doubt either by the testimony of two witnesses or by the testimony of one witness and by circumstances corroborating the testimony of such witness. The jury were so instructed fully and clearly, but we find in the record no sufficient showing to satisfy the requirement of the rule.

[12] In considering the question of the sufficiency of the evidence we cannot overlook the fact that the main witness for the prosecution virtually admitted that she entered into an agreement with appellant that she would testify falsely as to her employment, and it appears that in a certain deposition taken before Judge Busick she did actually depose that she wrote and gave receipts for money paid to her for services as nurse to Mrs. Phillips. The record also bears evidence to her forgetfulness and apparent reluctance to testify about certain important matters. However, she did state positively that she was not employed as such nurse or helper, and that she did not assist Mrs. Phillips in her work in any manner at any time. Furthermore, she testified that during the time in question she was attending the high school, and that her visits to the Phillips' home were made after school hours. Her credibility was, of course, for the jury to determine and we cannot say that she should have been disbelieved. But the only attempted corroboration was sought through the testimony of her mother, Mrs. Alice Robinson, who testified that she did not see any nurse employed at the Phillips home. Mrs. Robinson, though, visited there "just a little while" every week, and she was not positive that she went there even twice a week. Her opportunity for observation was therefore exceedingly limited and covered only a small part of the time in controversy. Her testimony is entirely consistent with the innocence of the accused and falls short of the statutory rule in reference to corroboration. Indeed, the claim of appellant was that the daughter, Lillian, helped Mrs. Phillips in the evening after school. In that he was corroborated by several witnesses, but for the prosecution there was no evidence whatever, except the testimony of Lillian, even tending to show that she was not thus employed at such periods. It is singular, indeed, that her mother was not interrogated as to where Lillian was during the evenings or whether she attended high school as claimed by her.

As illustrative of the rule in perjury cases we may refer to People v. Smith, 3 Cal. App. 68, 84 Pac. 452, and People v. Woodcock, (Cal. App.) 199 Pac. 565.

In the former, on a prosecution for burglary, Smith testified that on and during the entire night of the burglary one Lopez was with him at his ranch house, at a distance of 13 miles from the place of the burglary. In a subsequent prosecution for perjury in so testifying Lopez testified that this evidence of the defendant was false. Other witnesses testified to having seen Lopez on the afternoon preceding and on the morning succeeding the night of the burglary at other places, and it was held that the testimony of Lopez was not sufficiently corroborated.

In the latter case it is held that the corroborating evidence must connect or tend to connect the defendant with the commission of the crime, and "corroborative evidence is insufficient, where it merely casts a grave suspicion upon the accused, and it must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it."

No doubt perjury is frequently committed, and it should be discouraged in every legitimate manner, but the Legislature in its wisdom has provided that there must be corroboration, and it is not for the courts to relax this wholesome rule.

The judgment and order are reversed.

We concur: FINCH, P. J.; HART, J.

(56 Cal. App. 254)

ROSS v. NEW AMSTERDAM CASUALTY CO. et al. (Civ. 3973.)

(District Court of Appeal, First District, Division 1, California. Jan. 24, 1922.)

1. Appeal and error 🔑917(1)—Averments of complaint taken as true in reviewing ruling on demurrer.

On appeal from judgment for defendants entered on an order sustaining a demurrer to complaint without leave to amend, the averments must be taken as true.

2. Acknowledgment 🔑36(1)—Notaries do not certify to ownership in person executing instrument purporting to convey title.

A notary public, in certifying acknowledgment to an instrument purporting to convey title to property, does not certify to the ownership in the acknowledgor.

3. Notaries 🔑11—Complaint alleging false acknowledgment held not to state a cause of action.

Complaint alleging that notary public certified to acknowledgment to bill of sale with signature of fictitious person, and that plaintiff, in reliance upon bill of sale, and such false acknowledgment, purchased stolen automobile from person named therein as buyer, *held* not to state a cause of action.

4. Notaries 🔑11—Complaint held not to state a cause of action against notary personally on ground of a conspiracy to defraud buyer of automobile.

Complaint for false acknowledgment to bill of sale *held* not to state a cause of action against the notary in his personal capacity predicated upon the existence of a conspiracy to defraud the plaintiff entered into between the notary and the person named in bill of sale as buyer.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by M. F. Ross against the New Amsterdam Casualty Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Reisner & Honey, of San Francisco, for appellant.

Lilienthal, McKinstry, Raymond, Haber & Firebaugh, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants entered upon an order sustaining a demurrer to the plaintiff's second amended complaint without leave to amend. The action is one in form to recover damages against the defendant Mark Lane as a notary public, and against the defendant New Amsterdam Casualty Company, a corporation, as the surety upon his official bond, in the sum of $650, alleged to have been sustained through the official misconduct and negligence of said defendant Mark Lane as a notary public in the course of the following transaction as set forth in the plaintiff's second amended complaint substantially as follows: On or about November 6, 1919, the plaintiff paid to one Gladys Steele the sum of $650 as the purchase price of an automobile represented by said Gladys Steele to belong to her, and to have been purchased by her from one John Reed, and the said Gladys Steele, as an inducement to the plaintiff to buy said automobile, presented to plaintiff a bill of sale which she represented she had received from said John Reed, which bill of sale was in the usual form of such documents, but which had attached to it a certificate of acknowledgment in the statutory form of such certificates executed by said Mark Lane as a notary public, and certifying that John Reed, known to him to be the person described in and whose name was subscribed to the annexed instrument, had appeared before him as such notary public and acknowledged that he executed the said instrument. The plaintiff alleges that he relied upon said bill of sale, and particularly upon said acknowledgment, and paid over to said Gladys Steele said sum as the purchase price of said automobile, whereas in truth and fact said John Reed was a fictitious person, who never had appeared before said notary public nor acknowledged the execution of said instrument, and that the said certificate of acknowledgment and of said notary public attached to said bill of sale was false, fraudulent, and untrue, and was made and executed by the defendant Mark Lane, so that said Gladys Steele could represent that she was the owner of said automobile, and had purchased same from said John Reed; that said automobile was in fact stolen property, and belonged to one Rodgers, who subsequently reclaimed it through the police department from the said plaintiff, to his damage and loss in the sum of $650, which he now seeks to recover from Mark Lane or said surety upon his official bond.

[1-3] Viewing this action as one to recover damages from the defendant Mark Lane as a notary public, and from the New Amsterdam Casualty Company as surety upon his official bond, it would seem clear that the complaint fails to state a cause of action. Conceding, as we must, for the purposes of this appeal that the averments of the plaintiff's complaint are true, the damages which he is alleged therein to have sustained are not referable to the alleged falsity of the certificate of acknowledgment attached by said notary public to the alleged bill of sale of said Reed. A notary public, in affixing his certificate of acknowledgment to an instrument purporting to convey title to property, does not certify to the ownership in the person executing such instrument of the property described therein. Homan v. Wayer, 9 Cal. App. 123, 98 Pac. 80; Overacre v. Blake, 82 Cal. 77, 22 Pac. 979. In the case of Homan v. Wayer, supra, it is stated that—

> "The purpose of the certificate is to establish the identity of the grantor, and genuineness of the signature to the deed."

Assuming the fact to be as averred in the plaintiff's complaint, and conceding that the said defendant Mark Lane committed a breach of his duty as a notary public in falsely identifying by his said certificate of acknowledgment John Reed as an actual person, and also as the person executing said bill of sale, for which breach of duty he and his surety would be liable to any person injured thereby, the question still remains as to what injury the plaintiff suffered by the wrongful act of said notary. This question may be answered by the inquiry as to what advantage it would have been to the plaintiff had the notary's certificate been in all respects true. Neither John Reed nor Gladys Steele was, nor had either ever been, the owner of said property, and hence a bill of sale from both or either could not have been effectual to transfer any title to or interest in the same to the plaintiff. Therefore the plaintiff could have received no title to the automobile had John Reed been an actual person, and had the bill of sale from himself to Gladys Steele been actually made and properly executed and certified; how can he be said to have sustained any damage from the alleged fact that John Reed was a fictitious person and that his purported bill of sale was falsely acknowledged and certified to by the notary public? The case of Heidt v. Minor, 89 Cal. 115, 26 Pac. 627, seems to cover this precise situation. In that case the official misconduct for which the defendants, the notary and his official bondsman, were sought to be made liable consisted in the making and attaching to counterfeit mortgages, false certificates of their due acknowledgment. The court says:

> "The plaintiff is not entitled to recover any more than her loss, by reason of said certificates being false instead of true. * * * The official misconduct consisted in certifying falsely to the acknowledgments of the mortgages. The defendants are liable only for what would be the value of those mortgages if valid. The court has not found that they would be of any value if valid. Therefore the proper basis for determining the liability of the defendants is wanting."

The same principle is recognized in the case of McAllister v. Clement, 75 Cal. 182, 16 Pac. 775, wherein the court held that a false acknowledgment to a mortgage which was valueless could not be made the basis of a recovery against a notary public and his sureties upon his official bond. In the case at bar the plaintiff's complaint affirmatively shows that the bill of sale from Reed to Steele was valueless for the reason that the title to the property described therein was in another. This being so, there is no escape from the application of the foregoing cases to the case at bar.

[4] The appellant, however, contends that his complaint states a cause of action against the defendant Mark Lane in his personal capacity and apart from his liability for official misconduct. This contention could only be predicated upon the existence of a conspiracy to defraud the plaintiff, entered into between Gladys Steele and the defendant Lane. As to such a cause of action the defendant New Amsterdam Casualty Company would not be a proper party, since it requires no argument to show that it is not liable under the terms of its undertaking, for conspiracy or other forms of wrongdoing engaged in by its principal in his personal capacity and beyond the line of his official duty. As to the defendant Lane, however, the only averment in defendant's complaint which squints in the direction of such a conspiracy is the following:

> "That said acknowledgment of said bill of sale was false, fraudulent and untrue and was made and executed by the defendant Mark Lane so that the said Gladys Steele could represent that she was the owner of said automobile and had purchased the same from said John Reed."

This averment falls far short of alleging a conspiracy to defraud the plaintiff entered into between the defendant Lane and Gladys Steele, and entirely fails to measure up to that degree of particularity requisite in actions for damages for fraud and deceit. Taking the plaintiff's complaint as a whole, it is apparent that the pleader was attempting to state no such cause of action, since had he so intended he would not have sued the defendant's surety company, but, on the contrary, would have made Gladys Steele a party to the action. This action, viewed from the four corners of the plaintiff's second amended complaint, is an action against Mark Lane in his official capacity as a notary public, and against the surety upon his official bond for a violation of his official duty. As such, said complaint fails to state a cause of action against the defendants, and hence the demurrer to said complaint was properly sustained.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

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56 Cal. App. 331

AMERICAN MARINE PAINT CO. v. NYNO LINE, Inc. (Civ. 4154.)

(District Court of Appeal, First District, Division 1, California. Jan. 30, 1922.)

1. New trial 🔑70—May be granted for insufficiency of evidence to sustain verdict.

The trial court may in the exercise of discretion grant a new trial for insufficiency of evidence to warrant jury's determination of question of fact.

2. Appeal and error 🔑979(2)—Granting new trial for insufficiency of evidence held not to require reversal.

In broker's action for commission for sale of steamship defended on the ground that the broker procured the contract entitling him to commission of certain percentage by false representations that he was required to divide his commission with the buyers, granting a motion for a new trial because of the insufficiency of the evidence *held* not an abuse of discretion requiring reversal.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the American Marine Paint Company, a corporation, against the Nyno Line, Inc. Verdict for plaintiff, and from an order granting defendant's motion for a new trial, the plaintiff appeals. Affirmed.

See, also, 187 Pac. 71.

Ira S. Lillick, of San Francisco, for appellant.

W. G. Van Pelt, of Los Angeles, for respondent.

RICHARDS, J. This appeal is from an order granting the defendant's motion for a new trial. The action was one to recover a broker's commission for the sale of the American steamer Portland, belonging to the defendant, to certain purchasers for the sum of $325,000, upon which sum the plaintiff claimed that there was due it from the seller a commission of 5 per cent. upon the selling price, amounting to $16,500, by virtue of an agreement between itself and the defendant for the allowance of such commission upon the consummation of such sale. The complaint is in two counts, the first count setting forth in detail the transaction out of which the alleged liability arose; the second count being in the form of the common count for services rendered. The answer of the defendants consists of denials putting in issue practically all of the averments of the complaint. The answer then proceeds as a further and separate defense to set forth in substance, but with much detail, that in undertaking to act as the agent of the defendant in making the sale of its aforesaid steamer the plaintiff had conducted the transaction through its agent and representative W. C. Lacombe, and that the latter had falsely and fraudulently represented to the defendant that he would be required, in any sale which he would consummate with the would-be purchaser or purchasers of said steamer, to pay the purchaser or purchasers thereof a sum equal to 3 per cent. of the purchase price out of his commission, and that for that reason he would have to receive a commission equal to 5 per cent. of the purchase price, otherwise he could not consummate said sale, and would not undertake so to do; and that, relying upon such representation, the defendant agreed to sell said steamer for the price named and to pay said commission, which it would not otherwise have done, wherefore the defendant prays that the plaintiff take nothing by this action.

The cause has been twice tried before a jury upon each trial, and upon practically the same evidence. Upon the first trial the jury returned a verdict in the plaintiff's favor for the full amount of the plaintiff's claim, with interest. The defendant moved for a new trial upon the statutory grounds. The trial court granted said motion generally. Upon appeal taken from the order so doing it was affirmed by the second division of this court and in the decision affirming the same the court used these words:

> "The trial court may have concluded that the evidence was insufficient to justify the verdict, or that the instructions to the jury were misleading and confusing. The former conclusion would not be so unwarranted as to amount to an abuse of discretion under the record in this case, and the latter, also, would be justified, for it appears from the questions of several of the jurors, after they had been deliberating for a time and were unable to reach a verdict, that they were confused, and had no clear idea of the law applicable to the facts. * * * The granting of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed, except upon an unmistakable abuse. Groppengiesser v. Lake, 103 Cal. 38, 36 Pac. 1036; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019." American Marine Paint Co. v. Nyno Line, Inc. (Cal. App.) 187 Pac. 71.

The cause was accordingly retried before a jury, which again returned a verdict for the full amount demanded in plaintiff's complaint. Again the defendant moved for a new trial upon the statutory grounds, and again the trial court granted said motion, this time upon the express ground of the insufficiency of the evidence to sustain the verdict. It is from this second order granting a new trial that the present appeal has been taken.

Concerning the facts of this case there is little dispute, except as to the particular matters to be noted in the course of their recital. The plaintiff and the defendant are each corporations, and they were each represented in the transaction for the sale of the steamer in question by certain individuals as their agents, as to whose authority to act as such no question is raised. On or about January 17, 1917, W. C. Lacombe, representing the plaintiff, learned from a Mr. Young, who was representing Mr. Keller, president of the defendant corporation, and also from a Mr. Rees, captain of the vessel, that the steamer Portland was for sale, and Lacombe was asked by Young to undertake to sell it at a price which was not then definitely fixed. There was some talk about commissions, in the course of which Lacombe stated that he would want a commission of 3 per cent. himself, although the usual commission was 5 per cent. as he would be under no expense, and would therefore be willing to take 3 per cent. The affair went no further at that time, but about a month later Lacombe met a Mr. Aaby, who was the son and representative of a Norwegian shipowner. Negotiations began with Aaby assuming to represent these Norwegian interests, which resulted in an offer being made to Lacombe by Aaby for the vessel, the terms of which were transmitted by Lacombe to Keller, president of the defendant corporation. At the time of making such offer to Lacombe, Aaby requested that a commission for himself be considered in the sale price. The terms of Aaby's offer were transmitted to Keller by Lacombe in a telegram reading as follows:

> "Portland can arrange sale three hundred twenty-five thousand payable two hundred fifty thousand cash balance two weeks approved security buyers assume present charter paying in addition to above for all fuel and stores which amounts to ten thousand making a total cash to Chase Bank including secured notes two hundred ninety-three thousand dollars commissions five per cent foreign buyers which makes additional commissions necessary to close deal advice accept as is only offer after insurance investigation had Rees in consultation wire Rees authority execute bill of sale on banks approval rush answer."

To this telegram Keller sent Lacombe a reply reading as follows:

"If Dearborn & Co. have collected freight for present voyage amounting to about forty-two thousand dollars will accept two hundred and ninety-three thousand dollars for steamer Portland and fuel stores aboard provided fuel and stores aboard are not over ten thousand if over balance to be paid by purchaser purchaser to assume responsibility for and deliver present cargo at La Palice according to charter free of charge to us terms two hundred fifty thousand dollars cash put in Chase Natl. Bank and forty-three thousand dollars payable in two weeks secured to satisfaction to Chase Natl. out of this will pay you eight thousand dollars commission if this accepted wire quick and will wire instructions to Rees and Chase Natl. if not accepted tell Rees have Portland sail without delay."

A few days later Lacombe wrote a letter to Aaby in the following words:

"On behalf of Mr. W. E. Keller, owner of the steamer Portland, we make you firm offer of $325,000.00, three hundred twenty-five and 00/100, subject to acceptance before 2 p. m. today; terms to be agreed upon."

On the date of the delivery of this letter to Aaby, Lacombe wrote him another letter wherein it was stated that when the final payment was made on the sale of the steamer Aaby was to receive one per cent. of the total purchase price as a commission. At this time it does not seem to be disputed that Lacombe believed that Aaby was acting entirely for a foreign buyer. About the same time Lacombe had a further understanding with one Palmer, by which the latter was to receive 1 per cent. commission upon the sale. Palmer was the proprietor of a ship brokerage company in New York City and had an arrangement with Lacombe as to the division of commissions upon the sale of certain ships. Thereafter, and on the same day, Lacombe sent a telegram to Keller in response to his foregoing message reading as follows:

"Compelled allow buyers three per cent.: Cannot complete deal less five per cent."

After sending this telegram Lacombe had a further talk with Aaby, who deposited a check for $25,000 in a New York bank and handed Lacombe a letter more particularly defining the terms of the sale, upon which Lacombe sent Keller another telegram embodying the terms of Aaby's offer, but making no mention of commissions. By the check and letter of Aaby Lacombe learned for the first time that the actual buyer of the steamer was the Kerr Steamship Co. of New York City. Lacombe at this time was in New York, while Keller was in Los Angeles, and on the afternoon of February 29th, after the aforesaid telegrams had been sent and check received Lacombe called up Keller at Los Angeles over the telephone, and a conversation resulted, as to the terms of which the respective parties to the conversation and their witnesses who heard portions thereof at their respective ends of the line are in sharp disagreement. Respecting the matter of commission, Mr. Lacombe states:

"I also asked Mr. Keller had he received my two telegrams. Mr. Keller replied that he had, and said didn't I think the commission was rather stiff, and I told him no; I had to have the amount stated in my telegram, and I had other parties to take care of. Mr. Keller's remark to me, over the phone was, 'Well, then, go ahead and close it up.'"

In this statement Lacombe is, in a measure, supported by Mr. Palmer, who was present with Lacombe at the time, and who in his deposition stated:

"Later, after listening to the telephone he (Lacombe) said he could not accept any less commission because he had to look after parties here."

On the other hand, Keller testified to his version of the conversation as follows:

"He said he would have to allow the buyers 3 per cent. or the trade would not go through; claimed he would have to have 5 per cent. to put the trade through or it would not go. I objected to paying 5 per cent., and told him I thought it was entirely too high. He said the trade would not go through unless he could allow the purchaser of the boat 3 per cent. I told him I was anxious to sell the boat, and if it was absolutely necessary to make the trade, and he had to allow the buyers 3 per cent., to go ahead."

In this statement Mr. Keller is in a measure supported by Mr. Aaby, who was at the New York end of the line, and who says, referring to Lacombe:

"He talked about commission to foreign buyers."

In this telephone conversation Lacombe, it is agreed, asked Keller to confirm the same by wire, and accordingly on the following day Keller sent a telegram, which, in so far as it related to the commission, stated:

"We to pay you five per cent. commission on three hundred and twenty-five thousand dollars when remaining three hundred thousand is paid."

While the witness Keller was upon the witness stand, and after he had testified to his version of the foregoing conversation, he was asked by defendant's counsel these questions:

"Q. Mr. Keller, what reliance, if any, did you place upon the report made to you by Mr Lacombe that he had to pay the buyers 3 per cent.? A. Why, I relied on it absolutely. Q. Would you have agreed, Mr Keller, to pay Mr Lacombe 5 per cent. commission if he had not made the representation that you have testified to regarding paying the buyers 3 per cent.? A. I would not have."

Upon cross-examination of the witness Keller, counsel for the plaintiff made an earnest effort to show that the said witness had no reason to place any special reliance upon the statements of Lacombe. In reading the record touching this branch of the case we gain the distinct impression that the trial court dealt entirely too curtly, not to say discourteously, within this effort, made apparently in the utmost good faith by plaintiff's counsel, by checking and unduly limiting an inquiry into the reasonableness of the witness' statement regarding a vital element in the case, and placing said counsel in an attitude of embarrassment, if not of discredit, before the jury. We are urged upon this appeal to take into account this conduct on the part of the trial court for the purpose of estimating what the effect would have been in the way of strengthening the plaintiff's case before the jury and also before the court on motion for a new trial had counsel for plaintiff been unhampered in the foregoing inquiry. This we cannot do; but since it is our conclusion that this case must be retried we have deemed it proper to indicate that upon retrial of the cause a greater latitude be allowed the plaintiff in its cross-examination of the witness Keller as to the matter above indicated than was permitted upon the former trial.

With respect to the action of the trial court in granting the motion for a new trial in the light of the evidence before it we have reached the conclusion that the order to that effect must be affirmed. In so determining, however, we feel that in view of the fact that this cause has already been twice tried before juries which in each case rendered their verdict in the plaintiff's favor for the full amount of his claim, which verdict was in each case set aside by the court, something should be said which may serve to break the alternating current of this litigation. This will require a reference to certain facts in the case. It is a fact, of which no denial can be made, that Lacombe in his telegrams to Keller did state that he would be required to pay a certain per cent. of his commission to the buyers, and that this statement in these telegrams was untrue except in so far as Aaby, who represented a supposed foreign buyer, was concerned, and who was to receive 1 per cent. of said commission. It is also a fact, which is undenied, that Lacombe was by his several agreements to so divide the commission that Aaby would receive 1 per cent., Palmer 1 per cent., himself 1 per cent., and his principal, the plaintiff herein, 2 per cent. of said commission. As to the precise terms of the telephone communication between Lacombe and Keller, the evidence is conflicting. The trial court, however, undertook to instruct the jury as to these matters of fact, charging them in substance that they were bound to assume that Lacombe in his reference to "other parties" in the telephone communication referred to the buyers, and must have been understood by Keller so to do. In so doing the trial court trod dangerously near transgressing the constitutional inhibition against charging juries with respect to matters of fact; and, having done so, the trial court proceeded to charge the jury that the only question they would have to consider was the question as to whether Keller relied upon these representations, and, believing them to be true, entered into a contract for the sale of the vessel; and that in the event the jury so found, its verdict must be for the defendant. We question the sufficiency of this instruction in the absence from it of the element as to whether Keller would or would not have proceeded with the negotiation upon the terms specified as to the commissions had he known the truth to be that Lacombe was to divide his commission with others to the extent stated, but not with the buyers.

[1, 2] But, however this may be, these instructions left the jury but one debatable ground, and that was as to whether they believed Keller's testimony that he relied upon the statement of Lacombe as to "foreign buyers," and that but for that reliance would not have agreed to pay the commission of 5 per cent. which Lacombe insisted upon. It is evident that this is a debatable question of fact which it was clearly within the province of the jury to determine. The jury did determine it adversely to the defendant's contention. With that determination the trial court has disagreed in its order granting a new trial herein. It had under well-settled principles of procedure the discretion so to do. Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Condee v. Gyger, 126 Cal. 546, 59 Pac. 26. Whatever our views may be as to the correctness or conclusions of the trial court as to the single question of fact submitted by it to the jury, we are unable to bring ourselves to the point of holding that its action in granting a new trial upon that ground constituted such an unmistakable abuse of that large discretion with which trial courts are invested in passing upon motions for new trial, as to require a reversal of the case. Groppengiesser v. Lake, 103 Cal. 38, 36 Pac. 1036; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019. The fact that the cause will be retried gives opportunity for the correction of whatever errors the trial court may have committed in the former trial and upon said motion.

The order is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

54 Cal. App. 696

HARDWICK v. BOARD OF SCHOOL TRUSTEES OF FRUITRIDGE SCHOOL DIST., SACRAMENTO COUNTY, et al. (Civ. 2295; Sac. 3339.)

(District Court of Appeal, Third District, California. Oct. 28, 1921. Hearing Denied by Supreme Court Dec. 27, 1921.)

1. Schools and school districts 🔑164—Determination of school board as to propriety of dancing as part of curriculum not conclusive.

A determination by a school board, in inaugurating dancing as a part of the curriculum, that dancing is not opposed to religious scruples or belief of any person or persons, is not conclusive on the courts, which have the right to look into a public law or local ordinance for the purpose of determining whether upon its face it is reasonable, and, if it is found to be oppressive or violative of any fundamental rights of any person, it will be nullified, notwithstanding Pol. Code, §§ 1668, 1684; St. 1917, p. 1176, § 2.

2. Constitutional law 🔑42—Schools and school districts 🔑164—Persons opposed to dancing in public schools need not be members of religious organizations, or have religious beliefs.

Persons opposed to curriculum including dancing in public schools need not be affiliated with any religious organization, under Const. Cal. art. 1, § 4, and Const. U. S. Amend. 1, investing every citizen with right to worship according to dictates of his own conscience, nor need such persons have any religious beliefs, but may question the propriety of dancing as tending to degradation of moral standards and as distracting.

3. Schools and school districts 🔑172 — Parents cannot be eliminated from consideration in matter of discipline and education of children.

Neither the state nor a school board has the right to enact a law or regulation the effect of which will be to alienate in a measure the children from parental authority along lines looking to the building up of the personal character and the advancement of the personal welfare of the children, where the views of the parents are not offensive to the moral well-being of the children nor inconsistent with the best interests of society.

4. Evidence 🔑5(2)—Common knowledge that in certain dances persons clasp arms around one another.

It is a matter of common knowledge that in the "waltz," "polka," and the "fox-trot," popularly known as "round dances," the dancing is performed in couples, usually by a male and a female, their arms clasped around or about the shoulders of each other.

On Hearing in Supreme Court.

5. Schools and school districts 🔑177—Pupils cannot be expelled for refusing to dance.

School authorities had no right to expel children for their refusal, in obedience to their parents' command, to dance the waltz, polka, two-step, and a dance that is equal or similar to the fox-trot, or any other dance where the arms of the children, as they danced with the opposite sex, were clasped around and about the shoulders of their dancing partners, under Pol. Code, § 1668, authorizing manual and physical training.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by C. C. Hardwick against the Board of School Trustees of Fruitridge School District, Sacramento County, and others. Judgment for defendants, and plaintiff appeals. Reversed in the District Court of Appeals, and hearing denied in the Supreme Court.

Meredith, Landis & Chester, of Sacramento, for appellant.

Hugh B. Bradford, of Sacramento, for respondents.

HART, J. The appellant, C. C. Hardwick, is and was, at the time of the initiation of this proceeding, a resident and elector of Fruitridge school district, in Sacramento county, and was and is the father of Irma Hardwick, aged 13 years, and Douglas Hardwick, aged 9 years. These children had been, at all times down to the happening of the circumstance leading to the controversy responsible for this action, attending said school as students therein. Included within the curriculum of said school, as the same was established by the school authorities (the defendants, trustees), are dancing exercises, inaugurated under the supposed authority vested in the school authorities of the state by section 1668 of the Political Code, authorizing the introduction into the public schools of a system of manual or physical training.

The remaining parts of the story may best be told in the language of the petition or complaint, as follows:

"That in the teaching of such dancing the said children were and are taught, among other dances, the following: 'Ace of Diamonds,' 'Minuet,' 'Norwegian Mountain March,' and 'Children's Polka,' or what was formerly known as the 'Quadrille'; that in the formation of some of said dances, girls have boys as partners at times, and when boys are not available girls are designated to represent boys so as to form couples; that in such dancing the said children are taught the 'waltz' step, the 'polka' step, the 'two-step' and what is equal to the 'fox-trot'; that after such instructions are given for a period of time said children are prepared to participate on the regular dance floor, in up-to-date dancing.

"That at the direction of plaintiff and his wife, Florence A. Hardwick, the said children of plaintiff, Irma and Douglas Hardwick, sought to be excused from joining in such dancing on the grounds that such exercise was offensive to the conscientious scruples and contrary to the religious beliefs and principles of the said children and of plaintiff and his said wife; that plaintiff and his wife sought to have the said trustees and the principal of said Fruitridge school introduce in said school some other game or form of physical exercise for the benefit of children opposed to dancing; that the principal and trustees of said school refused to do so and insisted that plaintiff's said children join in the said dancing.

"That plaintiff and his said wife thereupon refused to allow their said children to join in such dancing for the reasons aforesaid; that on or about the 4th day of March, 1920, because of the refusal of the said children to join in such dancing, the said trustees expelled the said Irma Hardwick and Douglas Hardwick from attendance upon said school.

"That the said children are now without authority or right to attend any public school, contrary to law; that the expelling of said children from the said Fruitridge school by the said board for refusing to join in said dancing is without authority in law.

"That plaintiff has demanded of the said school board that his children be reinstated in said school and that they be excused from joining in the said dancing, but the said trustees have refused and still do refuse to reinstate the said children in said school or to transfer them to another."

The prayer of the petition was for a writ of mandate, directed to F. F. Silva, R. L. Ennis, and F. C. Brosius, as the board of trustees of said Fruitridge school district, commanding them as such board of trustees of said school district to reinstate the said Irma Hardwick and Douglas Hardwick in the said Fruitridge school, in said district, and for $500 damages.

A demurrer, upon both general and special grounds, was interposed to the complaint. The special grounds are:

"(1) That said complaint is uncertain in this: That it does not appear what sort of dances are the following: 'Ace of Diamonds,' 'Minuet,' 'Norwegian Mountain March,' and 'Children's Polka,' or what was formerly known as the 'Quadrille,' nor how said dances are executed.

"(2) That said complaint is uncertain in this: That it does not appear to what church discipline plaintiff subscribes, nor in what way the matter of said children so dancing conflicts with said conscientious scruples and religious beliefs and principles either of said plaintiff or of the said children of the said plaintiff."

The demurrer was sustained and leave granted plaintiff to file an amended complaint within ten days from the date of the decision on the demurrer. The plaintiff refused to amend the complaint, and judgment was thereupon entered refusing to issue the writ of mandate as prayed for.

The appeal is by the plaintiff from said judgment.

The argument of the respondents in support of the order sustaining the demurrer and the judgment thereupon entered is strictly in line with the hypothesis of the special grounds of the demurrer. It is in part that, to state a case, the plaintiff must disclose what his particular religious beliefs or principles are, or show that he is a member of or affiliated with some religious organization which is opposed to dancing under any and all circumstances or at any time. "So far as appears from the complaint," proceeds the argument, "plaintiff's religious beliefs are personal to himself and different from those of every other person in the state." It is asserted that if the complaint here is to be held sufficient in the statement of a cause for the granting of the relief asked for, the defendants would be at the great disadvantage of not being able to answer it; that they could not deny that the "folk dances" or games taught in the schools were offensive to the religious scruples of the plaintiff, "because plaintiff alone knows what these scruples are." The argument proceeds:

"At the trial of such a case all that the plaintiff would have to do would be to prove that certain things were done or taught in the schools, and then testify arbitrarily that these things were against his conscience and religion, and he would have them prohibited. * * * How could the people or the school authorities disprove the testimony of a man who stated that anything done in the schools was offensive or contrary to his religion? If this complaint is good, another stating that the mathematics or the chemistry or the letters or the history taught was contrary to any one's religious beliefs would be equally good."

Further proceeding, the respondents declare that the powers vested in school boards by the Legislature are to be exercised fully and freely, without interference by the courts; that the decision of said boards as to any matter coming within the scope of their powers is conclusive and can only be set aside or disregarded in cases where fraud is shown or the decision is "so clearly contrary to the fact, or so unreasonable or oppressive, as to imply fraud or show bad faith." From this postulate, it is argued that, when the matter of inaugurating dancing as a part of the curriculum of the public schools came before said board it was for that body to determine whether such exercises were opposed to the religious scruples or beliefs of any person or persons, and that, having decided that such diversions should be among the physical exercises to be practiced in such schools, such decision involved a conclusive determination by the board authorized to find upon and decide the proposition that dancing was not obnoxious to the objection that it was offensive to or in contravention of the religious beliefs or the "conscientious scruples" of any person or set of persons. The argument is, in some respects, unique, and in our judgment is wholly fallacious.

There is no subject as to which the sovereign power of a state may be exercised of greater importance than that of the matter of education. Indeed, of such overruling concern to society and government is the matter of education regarded that in this state, and, we may safely assume, in every other state of the American Union, there has been placed upon the statute books a law (Stats. 1919, p. 407), the violation of which by the parent or guardian of any child is attended by severe penal punishment, requiring children between the ages of 8 and 16 years, save in certain exceptional cases specified in the statute, to attend the public schools. As is well said in the case of Kelley v. Ferguson, 95 Neb. 63, 73, 144 N. W. 1039, 1043, 50 L. R. A. (N. S.) 266, 273:

> "Wherever education is most general, there life and property are the most safe, and the civilization of the highest order. The public school is one of the main bulwarks of our nation."

Again, in State v. Clottu, 33 Ind. 409, 411, it is said:

> "The matter of education is deemed a legitimate function of the state, and with us is imposed upon the Legislature as a duty by imperative provisions of the constitution. * * * The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province which by the Constitution is assigned exclusively to the law-making power."

To the end that the public school system may in full measure function according to its purposes, there must, of course, be rules and regulations for the government thereof, and these the Legislature has either directly provided or has vested the school authorities with plenary power to establish and, quite naturally and with eminent propriety, has committed to said authorities the right and power to prescribe the courses of study to be followed in the various grades of the system and to maintain at all times the discipline indispensably necessary to the successful prosecution of the high purposes thereof. To all such regulations, if they be reasonable or not violative of any of their fundamental rights, or those of their parents or guardians, the pupils are bound to conform or suffer a denial of the right to attend the public schools. Section 1684 of the Political Code expressly so provides, although it is not to be doubted that such a rule could be invoked and enforced in the absence of direct legislative authority therefor under the general power of the school authorities to maintain the system according to the design or purpose thereof.

It is also a proposition upon which there cannot exist any ground for legitimate controversy that, superadded to the mental training afforded by the public schools and public universities, there should be maintained a system of physical education or training or such training in the nature of physical exercises as will develop bodily and organic vigor in the pupils as an essential aid to the full development of their mentalities according to the instruction in the courses of studies prescribed. It is only the assertion of a palpable truism to say that nothing will go farther towards stimulating mental activity and accomplishment than a healthy, vigorous physical organization, and, on the other hand, nothing can go farther towards producing mental inertia than the sluggishness of the machinery of the human body or any of the vital parts thereof, often brought on by an improper treatment and care or lack of proper treatment and care of the bodily structure. This obvious proposition has been expressly recognized by the Legislature in section 2 of an act passed in the year 1917 (Stats. 1917, p. 1176), entitled:

> "An act to provide for the organization and supervision of courses in physical education in the elementary, secondary and normal schools of the state."

Said section reads as follows:

> "The aims and purposes of the courses of physical education established under the provisions of this act shall be as follows: (1) To develop organic vigor, provide neuro-muscular training, promote bodily and mental poise, correct postural defects, secure the more advanced forms of co-ordination, strength and endurance, and to promote such desirable moral and social qualities as appreciation of the value of co-operation, self-subordination and obedience to authority, and higher ideals, courage and wholesome interest in truly recreational activities; (2) to promote a hygienic school and home life, secure scientific supervision of the sanitation of school buildings, playgrounds and athletic fields, and the equipment thereof."

It is upon the general authority vested by the foregoing section in the school authorities that dancing has been introduced in some of the public schools of the state as a part of the physical education taught and practiced therein. It will be observed that the section does not pretend to describe specifically the nature or the character of the various physical exercises which shall constitute the system of physical education which may be so maintained. Dancing is not so mentioned as a part of such education or the exercises comprehended within such education.

[1] Replying first to one of the arguments advanced by counsel for the respondents, we remark that the contention that the enactment or adoption of a certain law or regulation or rule by the Legislature or a board or body to which certain powers may be committed is a conclusive determination of the

reasonableness of such law or regulation or rule is not wholly tenable. In other words, there is a well-recognized qualification to the rule that a determination by the Legislature or a local board or body of the facts upon which an act or rule or regulation, coming within the scope of the general powers of the Legislature or such board or body, is essentially founded, is conclusive upon the courts. The courts have the right to look into a public law or a local ordinance or regulation for the purpose of determining whether, upon its face, it is reasonable or in its operation will be unreasonably burdensome upon the body of citizens to which it may be applicable, and if it is found to be oppressive in its effect when put in operation or violative of any of the fundamental rights of any person or set of persons, it will and should be nullified by judicial fiat as unconstitutional and void, notwithstanding that the Legislature or the governing board enacting or adopting such law or ordinance or regulation has passed upon the facts upon which the law or ordinance or regulation is based and made a determination that it is reasonable or that it will not impose unreasonable burdens upon those who come within the purview of its terms. But the question which we are here called upon to decide is not whether it is within the scope of the legal power of the school authorities to include within the course of physical education carried on in the public schools the character of dancing mentioned in the complaint. Indeed, we will not subscribe to the proposition that such dancing may not properly be embraced within the curriculum of that branch of the public school service. The question here, however, is whether the children of persons conscientiously opposed, from religious convictions or otherwise, to dancing in any form, may be compelled, on pain of expulsion from school and of the denial of the right to attend any public school of the county, to participate in the dancing exercises as they are practiced in the school of which the respondents are trustees and as described in the complaint.

[2] The whole theory of the argument of the respondents seem to be that the question presented here is one of religion, and that, to state a ground for relief in this proceeding, it was requisite for the appellant to have set forth in his complaint the fact, if it be a fact, that he is a member of a religious organization which is opposed to dancing. In other words, it seems to be conceded, or substantially so, that to require pupils who are the children of persons affiliated with a religious organization which is opposed to dancing to indulge in that exercise in the public schools, on pain of expulsion therefrom, would involve an abridgment of the constitutional rights of such parents and such pupils. Indeed, assuming that the question to be decided here is solely one of religion, in our opinion no other conclusion could justly be arrived at in the face of the mandate of the federal Constitution providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Amendment No. 1) and the positive pronouncement of our own state Constitution (article 1, § 4), providing:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state; and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

These constitutional guaranties invest every citizen of this country with the right to worship Almighty God according to the dictates of his own conscience, free from molestation or interference by the Legislature or any other power in the government, so long as such worship is not offensive to the common sentiments of civilized mankind or is not against the public peace and good order. There are, it is known, certain doctrinal propositions upon which religious organizations differ; but it never has been and never will be doubted, so long as our Constitutions contain the provisions relative to the freedom of religious worship that are now therein contained, that any doctrine or principle which it is conceived by any religious organization will the more effectually promote the paramount purpose of such organization, to wit, the development of the religious and spiritual growth of the people, so long as such doctrine or principle is not offensive to our laws or our civilization or will not tend to disrupt the peace and safety of our society or governments, such organization will be protected by the laws of the country in the maintenance of such doctrine or principle. In other words, there will not be permitted to exist in the state any power the execution of which would in any way impair or destroy the right of such organization to practice such doctrine or principle and teach it to the world as an essential of a proper worship of the Creator. The reports, both federal and state, are replete with opinions of the higher courts clearly and forcefully sustaining this position. Indeed, the proposition thus declared is so well settled and so generally accepted as a part of the law of the land that the authorities referred to need not be named herein.

But the principles above stated are not alone applicable to religious organizations or to persons actively affiliated with such organizations. They apply as well to any person having religious convictions irrespective of whether he is a member of any church or other religious society. Manifestly, a person may have religious views or principles of his own, different, perhaps, on doctrinal matters, from those of any church organization or any other person. He may have a way, peculiar to himself, of worshipping the Supreme Being, and there is no logical ground for holding that in thus worshipping his Maker, he is not equally entitled with every other person or church society to the protection of the constitutional guaranties to which we have above adverted, assuming, of course, that his mode of worshiping is not offensive or detrimental to the peace and safety of society. In this connection we may call attention to the argument of counsel for the respondents, as if a fatal defect in the complaint was thus pointed out, that, so far as it appears from that pleading, the "religious principles" of the appellant may be personal to himself. A man's religion is always "personal to himself," whether he be a member of a church or not. Whom could a man's religion concern but himself? True, if a member of a church organization, he will, of course, as he should, endeavor, in the very best way of which he is capable, to spread and disseminate the principles of the religion of which he is a devotee and so assist in upbuilding and fortifying the spiritual standard of the world; yet, in the last analysis, his religion is his and is, of course, personal to himself, as it is to every other person who professes it.

The question involved in this controversy, however, is not necessarily one of religion or whether the dances mentioned in the complaint and to which the appellant is opposed are disapproved of by the religious organization to which he belongs, if, indeed, he is a member of any such organization. It is as much a question of morals, which may concern the consciences of those who are not affiliated with any particular religious sect as well as of those who are active members of religious organizations opposed to that form of amusement or exercise.

The writer of this opinion has no prejudice or holds no feeling of hostility against any form of dancing where the same is conducted with becoming propriety, and particularly has he none against what is known as "folk dances" (the old style of dancing which has from time immemorial been common among the people generally, such as the "quadrille" or "cotillion," the "Virginia reel," etc.), and there are many others who see no wrong in dancing where the same is properly conducted under proper circumstances. But that such performances, particularly among the younger people—those of immature judgment—where the same are indiscriminately indulged in between males and females are regarded, as we know from common knowledge, by a considerable proportion of the people as tending in no small degree to develop in the young thoughts or propensities incompatible with that higher concept of morality which is a prime desideratum of life and which should be first among the teachings of all public or private institutions having more or less to do with the molding of human character, cannot for a moment be doubted. Or, it may be that, while not regarding dancing as wrong per se, or as not necessarily tending to generate in the minds of the young indulging therein the germs of immorality, many persons, nevertheless, perceive in the amusement or the exercise, as it may be properly called when viewed as a part of the physical education taught in the schools, an element of infatuation so overruling in its effect upon the undeveloped judgment of minors as to distract their minds, to their irremediable detriment, from the more important and serious matters or affairs of both spiritual and temporal concern. These are considerations which may address themselves as well to the minds or consciences of those not connected with any church or other religious society as to the minds and consciences of those who are affiliated with such organizations; for unquestionably there are very many people, not professed worshipers of the Creator according to the doctrines, tenets, and canons of the churches, or not members of any religious sect or organization at all, who are citizens of the highest character, lead exemplary lives and believe strictly in righteousness; who, indeed, shape their lives and acquit themselves in all their temporal activities as nearly in accord with the mandate of the Golden Rule as the handicaps of human limitations will permit, and who, in obedience to their principles, entertain conscientious opposition to dancing under any circumstances. Indeed, there may be persons (and undoubtedly there are many) who have absolutely no religious convictions whatever based upon the teachings of the Good Book—in fact, even atheists and agnostics—who are conscientiously opposed to their children engaging in dancing in any form or under any circumstances upon the honest belief that such performances are not conducive to the moral uplift of the young. The proposition here may well be said to be something similar to that of the introduction of card playing in the public schools as a mental exercise, assuming that such a course should be pursued. There are many games at cards, in the proper or skillful playing of which there is required accurate or very correct thinking, and it is known that in the playing of such games those who are superior in thinking power or capacity are those who can play such games the most skillfully and successfully. Games at cards are not in and of themselves harmful where they are not played for money or other stakes. They are common in the homes and are indulged in by people of the very highest character and of the most perfect ideals, yet nothing would appall the people more than to be told that such games had been introduced into the public schools as part of their system of mental training or for the purpose of developing the power for thinking in the pupils. Indeed, such an announcement would immediately bring forth widespread and emphatic remonstrances against such an innovation—not because the people regard such a practice as being harmful per se, but because of the evil results which might and which common experience has shown often do flow therefrom, and these remonstrances would be the outgrowth, as is true of plaintiff's opposition to dancing as practiced in the Fruitridge school, of the conscientious belief that such a practice might tend to the degradation of the moral standard of the pupils.

[3] Thus it will be readily understood that, as before declared, the important proposition involved in this controversy is no more a question of religious liberty than it is a question of morals and the liberty of conscience upon a subject upon which people have the natural and the constitutional right to hold and put into practice divergent opinions. In truth, the proposition even extends beyond the question of the ultimate effect of dancing exercises upon minor children. It also involves the right of parents to control their own children—to require them to live up to the teachings and the principles which are inculcated in them at home under the parental authority and according to what the parents themselves may conceive will be the course of conduct in all matters which will the better and more surely subserve the present and future welfare of their children. Can it be true that a law which vests in others the authority to teach and compel children to engage in those acts which their parents, upon what they regard as a well-founded theory, have conceived that it is not conducive to their personal welfare to adopt and follow, have specially and strictly enjoined them not to engage in, is a valid enactment? Has the state the right to enact a law or confer upon any public authorities a power the effect of which would be to alienate in a measure the children from parental authority? May the parents thus be eliminated in any measure from consideration in the matter of the discipline and education of their children along lines looking to the building up of the personal character and the advancement of the personal welfare of the latter? These questions, of course, proceed upon the assumption that the views of parents affecting the education and disciplining of their children are reasonable, relate to matters in the rearing and education of their children as to which their voice and choice should first be heeded and not offensive to the moral well-being of the children or inconsistent with the best interests of society; and to answer said questions in the affirmative would be to give sanction to a power over home life that might result in denying to parents their natural as well as their constitutional right to govern or control, within the scope of just parental authority, their own progeny. Indeed, it would be distinctly revolutionary and possibly subversive of that home life so essential to the safety and security of society and the government which regulates it, the very opposite effect of what the public school system is designed to accomplish, to hold that any such overreaching power existed in the state or any of its agencies.

Addressing ourselves now particularly to the present case, it is first to be observed that the appellant does not voice any objection to the practicing of the dances described in the complaint in the school from which his children were expelled. And, we may add, as we have above intimated, such an objection would be wholly unreasonable and untenable. He merely objects to his children being coerced by the school authorities into taking part in those exercises contrary to the teachings they have received from their parents upon that subject; and the fact that he asks that his children be excused from participating in those dances is not unreasonable. We cannot perceive wherein the granting of his wishes in that particular can tend in any degree to interfere with the established discipline of the school. As there is not (and perhaps never will be) a general objection by parents or the public to that mode of physical education, the practice of dancing may be carried on, and those not hostile to it for religious or other sufficient reasons may avail themselves of that method of developing bodily vigor; and for those objecting to dancing for substantial, but not merely capricious reasons—indeed, such an objection as is bottomed by reason prompting the appellant's opposition to dancing—there are other physical exercises which may be adopted which will as effectually "develop organic vigor, provide neuro-mascular training, promote bodily and mental poise, and correct postural defects," etc., as will the kind of dancing that is, according to the complaint, included within the system of physical education which has been adopted and is habitually practiced in the school in question. There are the calisthenics and other athletics embracing a variety of physical exercises to which no reasonable opposition on moral or religious or other grounds can be urged. Then there is the military training which, if practiced, cannot but result, not only in developing bodily vigor and "bodily and mental poise" in those participating therein, but also in inculcating in some measure at least in the youths of the country sentiments of patriotism and thus educating them along lines which may be of great practical use and of infinite advantage to them and their country at some future time. These observations are suggested, not in a spirit of dictation to the school authorities as to what method or system of physical education shall be introduced in our public schools as a part of the system, but are offered only for the purpose of showing that the school authorities, in the management of the public schools, need not be seriously or at all embarrassed or the discipline of the school disturbed by the fact that there may be some pupils who, for reasons whose source is in the conscience, may not be permitted by their parents to take part in the dancing exercises as they are taught as a part of the physical education of the public schools.

The views expressed in this opinion are sustained by many authorities. We do not deem it necessary to name them all herein. The whole subject is exhaustively and admirably considered and many authorities reviewed in the case of State ex rel. Kelley v. Ferguson, 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. (N. S.) 266, supra. See, also, Mr. Justice Field's discussion of the subject in Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637, 640.

But the district attorney undertakes to establish an analogy between the proposition involved in this discussion and the circumstance, which occurred a few weeks ago in Solano county and which was reported in the daily press, of the expulsion of children of a certain citizen of said county from one of the public schools thereof because they refused to salute the flag of the country. The ground of the objection of the parent to the practice of saluting the flag in the public schools was that it was against his Bible teaching, that it is wrong to teach patriotism for the reason that such teaching leads to militarism. There is obviously no force to such objection. It is indeed repugnant to every idea and every consideration of the loyalty and love for our government and political institutions so essential to the maintenance thereof. No government could long survive in the absence of patriotism in the people living under it, and one of the first or primary duties not only of the public schools but of every other educational institution in this country is to inculcate in those who attend them the principles of patriotism. The flag of our country symbolizes the principles of our government, and we can conceive of no more appropriate act or practice which could be followed in our public schools, or which could go further in developing in the young a high order of citizenship, than the requirement that the pupils thereof shall at every session of said school salute our flag or otherwise give some demonstration of their love for the great principles which it represents. And we can conceive of no just or reasonable interpretation of the Bible, or any part thereof, which could, in the remotest way, inspire the thought that the teaching of patriotism or love of country is in any wise or in any degree or measure contrary to its teachings.

[4] The counsel for the respondents further undertakes to establish a distinction between the dancing which is described in the complaint and what he conceives to be "modern dancing," claiming that the latter or "up-to-date dancing" is the only character of dancing to which the churches which are opposed to dancing seriously object. In other words, it is claimed that there never has been any objection by the churches to so-called "folk dancing," because the method of its performance is not in any sense offensive and is entirely different from the modern method of performing that exercise. There is obviously no ground for any such a distinction, in so far as is involved the effect of that amusement when exercised in the form as described in the complaint, upon those of the young who engage therein. Indeed, the dances referred to in the complaint are not strictly the "folk dances" which were in common vogue 30 or even 20 years ago. The complaint, as we have seen, specifically describes the dances which are taught and practiced in the school in question as the "waltz" step, the "polka" step, the "two-step," and a dance that is "equal" or similar to the "fox-trot." The "waltz," the "polka," and the "fox-trot" are popularly known as "round dances," or where (as we know from common knowledge) the dancing is performed in couples, usually by a male and a female, their arms clasped around or about the shoulders of each other and the couple thus together or synchronously moving over and around the dancing floor, and, as the Century Dictionary describes it, performing "a series of cadenced steps and rhythmic movements." Thus it is very clear that the dances referred to in the complaint are no different, so far as the general method of executing them is concerned, from what are known as "up-to-date" dances. Indeed, the dances described in the complaint were included within the amusement of that character which was common among the people down to the time that so-called modern dances were introduced, and there has always been more or less opposition from religious as well as some nonreligious people against that form of amusement. In fact, the opposition of certain churches and the members thereof to dancing has always been so pronounced that it would, a half a century ago, have come as a shock, even to those of perverted notions of morality, if it had been announced that the dancing referred to in the complaint had then been introduced into the public schools as a part of the physical instruction therein.

The complaint further alleges, as will be noted, that, in the performance of the dances mentioned therein in the school in question, the "girls have boys as partners at times, and when boys are not available girls are designated to represent boys so as to form couples." It is also alleged that the dancing as so executed in said school is offensive to the conscientious scruples and contrary to the religious beliefs and principles of the children of the appellant as well as of himself and his wife. These averments, together with the description contained in the complaint of the character of dancing practiced in the school in question, sufficiently make out a case for the relief demanded to enable the respondents to rely thereto as specifically as the exigency of their defense may require.

The district attorney expresses the fear, however, that should the plaintiff take the witness stand and in support of his complaint state that he was, as a matter of religion or otherwise, conscientiously opposed to dancing, the respondents would find themselves in a position where they could not controvert that testimony. Manifestly, that proposition does not enter into the question whether the complaint does or does not state a cause for the relief sought thereby. But we can see no reason for any serious apprehension on the part of the district attorney in that particular. There is no reason why the testimony of the appellant could not be contradicted. If such evidence is available to the respondents, the district attorney could show that the appellant had permitted his children to dance on public occasions or at home, or that he himself engaged in such amusement; and this would tend to show that his acts were at variance with his protest against dancing as he states it in the complaint.

We have examined the question submitted here at length because of its singular importance, and after such examination have been irresistibly forced to the conclusion, as is manifest from the above discussion, that the complaint, the truth of the averments of which is admitted by the demurrer, is in all respects sufficient to warrant the granting of the relief prayed for.

Accordingly, the judgment is reversed.

We concur: FINCH, P. J.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [5] In denying the petition for a transfer to this court, we deem it proper to say that we concur in the conclusion of the District Court of Appeal that the respondents had no right to expel petitioner's children for their refusal, in obedience to their parents' command, to dance the waltz, polka, two-step, or a dance similar to the fox-trot, or any other dance wherein the children were required to dance with partners of the opposite sex with their arms clasped around or about the shoulders of their dance partner. In the petition for a transfer to this court the district attorney contends that the District Court of Appeal has misconstrued the allegations of the petition and that the petition fairly construed does not charge that the respondents required petitioner's children to engage in the form of dancing condemned by the District Court of Appeal.

We agree with the District Court of Appeal as to the interpretation of the petition. If issue is made by answer upon the facts alleged in the petition, the trial court can determine the true facts and render judgment accordingly. As we understand the opinion of the District Court of Appeal, it goes no further than to hold that the character of dancing above mentioned cannot properly be required of children whose parents object thereto.

Petition denied.

SHAW, C. J., and WILBUR, LENNON, SLOANE, SHURTLEFF, and WASTE, JJ., and RICHARDS, Justice pro tem., concur.

56 Cal. App. 217

BOGUE v. MAURER. (Civ. 4156.)

(District Court of Appeal, First District, Division 1, California. Jan. 17, 1922. Hearing Denied by Supreme Court March 16, 1922.)

1. Breach of marriage promise ⚷18—Pleading promise "on said date" held by reference to fix definite date.

Complaint for breach of marriage promise having alleged parties were unmarried "on or about the 5th of November," the words "on said date," immediately following, *held* to refer to the previous allegation of time, making the specific promise about November 5th.

2. Breach of marriage promise ⚷18—Allegation of time is not material where proof brings it within statutory period.

In a breach of marriage promise action, allegation of the date of the promise was not material where the proofs were sufficient to establish a promise or promises within the statutory period.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Zelpha Bogue against J. Maurer for breach of promise of marriage. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

John C. Miles, of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiff for the sum of $6,250 in an action for breach of promise of marriage.

The appellant makes two points for a reversal of the judgment, viz. (1) that the evidence is insufficient to support the verdict, and (2) the refusal to give, or modification of, instructions, by which the court declined to make the plaintiff's right of recovery contingent upon a finding by the jury that the promise sued on was made upon a specific date, and no other.

As to the first point, the plaintiff testified categorically to the promise of marriage, and the record contains other evidence in corroboration. This contention of the appellant therefore is without substantial merit.

The second point mentioned is the main reliance of the appellant in support of his appeal. His argument is that the complaint charged the promise to have been made on November 5, 1919, and that the plaintiff's testimony was directed exclusively to this same date; that the defendant met this testimony by a showing—which he regards as almost, if not quite, conclusive—that the defendant neither saw nor talked with the plaintiff on said date; that consequently the plaintiff was not entitled to a verdict unless the jury found that the promise was in fact made on the date alleged.

[1] We think the contention of the appellant in this regard not tenable. The language of the complaint upon this particular subject-matter is:

> "That heretofore, on or about the 5th day of November, 1919, plaintiff and defendant were each unmarried persons; * * * that on said date the defendant requested plaintiff to marry defendant, and at the same time promised to marry the plaintiff."

It is urged that this is an allegation of a promise made on November 5, 1919, and not on or about that date. We think this too narrow a construction of the language, and that, the pleader having alleged the unmarried condition of the parties to have existed "on or about the 5th day of November," the words immediately following, viz. "on said date," refer to the previous allegation of time, viz. "on or about the 5th day of November"; for it is obvious that, if the pleader intended to confine his allegation of the making of the promise to the specific date of November 5, he thereby rendered inept the preceding allegation of the existence of the unmarried condition of the parties as "on or about" that date.

[2] Furthermore, the allegation as to the time of the promise was not material provided the proof brought it within the statutory period—which it concededly did; and it is also freely admitted by the appellant that, even if the allegation is to be construed as he contends, proof that the promise was made within a reasonable period either before or after the alleged date would not be a material variance. The gravamen of the complaint was the promise to marry and its breach; it would therefore be unreasonable to make the plaintiff's recovery depend upon proof of an immaterial and incidental factor. The jury might well have accepted as true the plaintiff's testimony as to the proposal of marriage, and yet have concluded that she was mistaken in her recollection as to the precise time it was made. It may be added that, although the proof of the original promise was directed to the specific date stated, we find other evidence in the record justifying the verdict of the jury, and which is in no way tied to the particular date in question. Thus the plaintiff testified to these incidents as occurring within a few weeks after the time of the original promise:

> "He asked me if I wanted to go to Honolulu, and I said, 'Yes.' He told me just as soon as he was well enough we would be married and we would go to Honolulu on our wedding trip."

Again:

> "He told me just as soon as he was feeling better that we would be married."

And, as corroborating the plaintiff's testimony as to the making of the promise, Mrs. Sadie Hindman, one of plaintiff's witnesses, testified that the defendant said to her:

> "Boguey (meaning the plaintiff) and I are going to be married."

Defendant also urges that he was entitled to have the jury instructed in the sense above indicated, upon the ground that each party is entitled to have his theory of the case stated to the jury, and to an appropriate instruction thereon; but obviously this principle would not warrant the court in giving to the jury an instruction which is incorrect as a matter of law.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

55 Cal. App. 765

WATSON v. FOUCH et al., Board of Trustees of Town of Williams.

(Civ. 2356; Sac. 3354.)

(District Court of Appeal, Third District, California. Dec. 24, 1921. Hearing Denied by Supreme Court Feb. 20, 1922.)

1. Municipal corporations 🔑4, 13—Procedure for organization must be strictly followed.

In the organization of municipal corporations, either under the Constitution by way of a freeholders' charter or under the Municipal Corporation Act, the procedure as prescribed must be followed with substantial strictness.

2. Municipal corporations 🔑51—Statute giving right to disincorporate liberally construed.

The language of St. 1895, p. 115, St. 1897, p. 17, St. 1899, p. 13, St. 1915, p. 982, and Henning's Gen. Laws 1920, p. 1937, permitting the disincorporation of municipal corporations, should be liberally construed, and, if there is any doubt as to the mode of exercising the right and power, such a construction should be given as will facilitate a free and full exercise of the rights of the electors.

On Hearing in Supreme Court.

3. Municipal corporations 🔑51—Election to incorporate a "municipal election" within statute permitting disincorporation.

An election called under Municipal Corporation Act, §§ 2, 3, as amended by St. 1889, p. 371, to incorporate a municipal corporation, wherein officers are necessarily elected, is a "municipal election" within the meaning of St. 1899, p. 13, § 1, allowing municipal corporations of the sixth class to disincorporate where a petition is presented to the board of trustees signed by not less than half of the qualified electors thereof as shown by the vote at the last municipal election held therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Election.]

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Ben Watson against B. L. Fouch and others, Board of Trustees of the Town of Williams. Judgment for plaintiff, and the defendants appeal. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Seth Millington, Jr., of Colusa, and Frank Freeman, of Willows, for appellants.

A. C. Huston, of Woodland, and C. D. McComish, of Colusa, for respondent.

HART, J. This is an appeal by the defendants from a judgment awarding a peremptory writ of mandate directed to the defendants, as members of the board of trustees of the town of Williams, Colusa county, Cal., compelling them to call an election for the disincorporation of said town of Williams.

The findings, which follow the allegations of the complaint, show the facts of the controversy which is the subject of this litigation to be, in substance, as follows:

The town of Williams is a municipal corporation of the sixth class, having been organized under and by virtue of the Municipal Corporation Act of California. The board of trustees of said town constitutes the legislative or governing board or body thereof, and the defendants are the regularly elected and duly qualified trustees of said town and members of said board. The petitioner is and was at all the times herein mentioned a resident and property owner and taxpayer of said town.

On the 1st day of October, 1920, a petition, in due legal form, and signed by 150 or more qualified electors, which number of electors constituted "more than half as many electors as voted at the last municipal election in said town," was presented to said board of trustees, the defendants herein, asking that an election be called for the purpose of submitting to the electors of said town the question of disincorporating the same. After the filing of said petition with said board of trustees, and on the 6th day of December, 1920, said board, after canvassing the same, by a vote of the members of said board, and upon a motion for that purpose duly made and seconded, granted the prayer of said petition, and ordered an election to be held on January 18, 1921, on the said question of disincorporating said town of Williams. After so ordering an election, and at a meeting held in the said month of December, and prior to the institution of this action, the said board of trustees, by a vote of said board, rescinded the said action of December 6, 1920, calling an election for the purpose stated, "and did then and there refuse, and thereafter refused, and still continue to refuse to call such election, and said board refuse to take any further action in relation to said election, since said last-named day."

It was stipulated at the trial that the only election ever held prior to the commencement of this proceeding in mandamus affecting or appertaining to the town of Williams as a municipal corporation was the election at which the electors of said town voted upon the question of the incorporation of said town as such a corporation.

The determination of the controversy presented here is dependent upon the construction of certain provisions of the act of 1895 (Stats. 1895, p. 115) and subsequent acts amendatory thereof in relation to the disincorporation of municipal corporations of the sixth class. See Stats. 1897, p. 17; Stats. 1899, p. 13; Stats. 1915, p. 982; Henning's Gen. Laws, 1920, p. 1937.

The provisions of the law prescribing the method of disincorporating a city of the sixth class are contained in section 1 of the act above referred to. So much of said section as is necessary to be considered in the determination of this appeal reads as follows:

> "A municipal corporation of the sixth class may disincorporate after proceedings had as required in this act. The council, board of trustees, or other legislative body of such corporation shall, upon receiving a petition therefor, signed by not less than half of the qualified electors thereof, as shown by the vote cast at the last municipal election held therein, submit to the electors of such corporation the question whether such municipal corporation shall disincorporate."

The appellants, in the court below and here, challenge the legal sufficiency of the petition filed by the respondent with the board of trustees for the disincorporation of the town of Williams, and this constitutes the single point presented and discussed in the briefs. The contention of the appellants is that the election at which was submitted the proposition for the incorporation of the town of Williams was not a "municipal election," within the meaning of that phrase as it is employed in the statute in question; that the "municipal election" referred to in the statute is an election at which officers are elected in and for a municipality and held subsequent to the act of incorporating a city or town as a municipality. It is hence argued that the election at which the electors of the town of Williams voted upon and carried the proposition of incorporating said town, being the only election ever held pertaining to said town with respect to its corporate character (no municipal election ever having been held therein after the incorporation thereof), there was not, and could not be, at the time of the preparation and filing of the petition for the disincorporation of said town, a legal basis or standard for such a petition or for determining whether the requisite number of qualified electors of said town have or have not signed the petition asking for the disincorporation thereof.

The precise question presented here is new, so far as we are advised by the briefs or by such independent investigation as we have been able to make. The solution of the controversy would appear, upon first blush, to be fraught with no little difficulty; yet, upon full reflection and a consideration of the principles which should govern in determining a question which, like the one submitted here, in no small measure involves the fundamental right of petition and in full measure the right conferred upon the citizens of a particular community themselves to say whether they shall or shall not be subject to the burdens and the mandates of a local or municipal government, the solution of the problem is not so difficult as it might appear to be.

[1, 2] It may be conceded that the election for the incorporation of a town under the provisions of the general Municipal Corporation Act is not, in the stricter sense in which the phrase "municipal election" is usually understood, a municipal election, since such an election is generally one held within and for the purposes of the municipality after its organization as such; still no sound reason can be assigned for holding that the phrase "municipal election" should be subject to a hard and fast rule of interpretation and its meaning thus limited to that in which it may ordinarily be understood in a case, such as this, where the right of the electors of a particular locality to determine for themselves whether they shall or shall not be subject to local self-government is made contingent upon what such interpretation may be. The rule is, it is true, that, in the organization of municipal corporations, either under the Constitution, by way of a freeholders' charter, or under the Municipal Corporation Act, the procedure therefor as prescribed must be followed with substantial strictness—that is to say, that any substantial departure from the procedure so prescribed would vitiate the proceedings looking to the framing of a freeholders' charter or the organization of the corporation. As to freeholders' charters, the mode prescribed by the Constitution for the framing thereof is the measure of the power, and the same is, of course, true to a very great extent in the organization of towns into municipalities under the statute, although as to the latter it has been said that its provisions "are to be construed liberally for the accomplishment of the object and promotion of justice." People v. Gunn, 85 Cal. 238, 246, 24 Pac. 718, 720. But this is not a case involving the framing of a freeholders' charter or the incorporation of the inhabitants of a town for the purposes of local government under the general law prescribing the mode for effecting such incorporation, although, as to the latter, no doubt the rule of construction which we think should obtain in the present case ought, with equal reason, to apply. As declared, the question here is whether, upon an extremely technical construction of a statute, such as the one involved here, the electors of a certain local territory shall be denied the opportunity of exercising the right, specially conferred upon them by the Legislature, to relieve themselves of what it may well be conceived that they have found is an unnecessary burden fixed and resting upon them by the establishment and maintenance of a municipal corporation. In such a case we think the rule ought to be, if it can be applied without disturbing or frustrating any of the essential purposes of the statue, and it be necessary to the exercise by the electors of such right, that the language of the statute should be given a liberal con-

struction. This proposition would, it seems, logically follow from these considerations: The Legislature, acting within the scope of its constitutional power, has ordained that, as to the matter of the organization of the inhabitants of small communities into local governments, with power to adopt and enforce certain police, sanitary, and other regulations appropriate to municipalities, the people themselves of such communities shall have the sole and exclusive say. To them is exclusively committed the power and the right to determine whether they shall or shall not be organized as a municipal corporation. In giving them this power, the Legislature, while with eminent propriety pointing out with sufficient specificness how they shall employ or invoke it, cannot be assumed to have intended so to hamper its exercise by restrictive provisions or omission to make certain provisions as to the procedure to be followed as practically to destroy the right and the power so given them. If, then, there be some doubt from the language of such a statute as to the mode of exercising the right and the power, such a construction should be given the enactment as will facilitate a free and full exercise of the rights of the electors under the law.

As to the statute involved in this controversy, it is perfectly clear that the central or all-important object of the provision thereof as to the nature or character of the petition to be filed for disincorporation is to impart to those only who are qualified electors within the limits of the municipality eligibility to sign such a petition and to fix the number of such electors to sign the same. Important, it is true, that, to warrant the calling of an election for disincorporation, the essential facts referred to should exist and be properly found, but, if they do exist, then the essential foundation or jurisdictional prerequisite for calling the election—the very object of the statute—exists. We are not thus to be understood as saying that the means pointed out by the statute for determining those facts should not be followed. What we desire to emphasize is the proposition that the real punctum saliens of the provision is, as suggested, in the requirement that none but qualified electors of the municipality are legally entitled to sign the petition, and the further requirement as to the number of such electors who must sign the same, and that the provision as to the means of ascertaining whether these facts exist constitutes merely the evidentiary method of ascertaining those facts; that, in view of these considerations, and if reasonably warranted by the language or the general context of the statute, or by a consideration of the statute by the light afforded by the paramount purpose for which it was enacted, a construction thereof which will have the effect of enabling the electors to exercise their rights in a case of this character should be given rather than a construction which will prevent such electors from exercising such rights. In other words, if the ascertainment of the facts essential to clothing the board of trustees with authority or jurisdiction to call the election may be obtained by any means fairly and reasonably afforded by the language of the statute, then that method for the ascertainment and finding of such facts should be resorted to rather than that the manifest will of a majority of the electors of the municipality favorable to disincorporation shall be thwarted.

While, as before suggested, an election held under the general Municipal Corporation Act for the purpose of incorporating a town, or its inhabitants, into a municipality, may not be, in the stricter view, as ordinarily entertained and expressed, a municipal election, yet, if it is not such an election, it must be admitted that there is no characterization appropriate to such an election. We are of the conviction, though, that it must be so regarded; for it is the essential or actually the organic act or step, under the Municipal Corporation Act, for organizing a municipal corporation, and its only purpose is strictly municipal in character—that is to say, its sole or only object is to incorporate the inhabitants of a town into a municipal corporation. It perhaps may properly be characterized, in a legal view, as a nondescript in the election system of the state, and still in characteristics or in its purposes it more nearly resembles a municipal election than any other election at which electors of the state or any of its subdivisions are thus given an opportunity to express their will or their views upon public matters, except, of course, an election strictly municipal in character. How is it to be characterized if it be not a municipal election? If not a municipal election, what is it? It is certainly not a county election; nor, while such an election is a "state affair," since municipal corporations are mere agencies of the state authorized to exercise within their respective boundaries, to a limited extent, certain powers of the state, can it be called a "state election" either in the common or the juridical signification of that phrase. No one will say that it is either a county or state election. Since, in purpose and effect and form, it bears a close analogy to a municipal election, it is in this case only reasonable to hold, as we do hold, that, for the purposes of the act under consideration, the election held for incorporating the town of Williams was a municipal election.

That the above construction is not only just, but is not inconsistent either with the general spirit or a reasonable view of the language of the statute, is, it seems clear to us, supported by these considerations which arise from the act itself, viz.: (1) That there is nothing in the act interdicting the filing of a petition to disincorporate at any time after incorporation has been effected. This right, so far as authority therefor is concerned, exists at all times until such an election has been had, and proceedings for that purpose before a municipal election has been held after incorporation would be abortive if it were necessary to sustain the construction insisted upon by appellants. (2) That the provision does not say that the test of the validity of the petition is the vote cast "at the last general municipal election," which language, if used in lieu of that employed, might warrant the implication that the election which it was intended should furnish the basis for determining whether the petition was signed as required should be a municipal election held after the act of incorporating the town had been effected.

We think that, for the reasons stated, the judgment should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a rehearing is denied.

[3] The Municipal Incorporation Act (St. 1883, p. 93), provides that, when an election is called to determine whether or not a certain territory shall become a municipal corporation, the call shall also require the voters to cast their ballots at such election for persons to fill the various elective municipal offices of such proposed municipality; that on the canvass of the votes thereat by the board of supervisors of the county, if the majority is for incorporation, the board shall declare such territory duly incorporated and shall also declare the persons receiving respectively the highest vote for such offices to be duly elected thereto, and that, upon the filing of a copy of the order in the office of the secretary of state, the persons so declared elected shall be entitled to enter upon the duties of their respective offices. Sections 2 and 3 (Stats. 1889, p. 371). In view of these provisions such election is clearly a "municipal election" held in such city, within the meaning of section 1 of the act allowing municipal corporations of the sixth class to disincorporate (Stats. 1899, p. 13), regardless of any other reasons for holding it to be such election.

SHAW, C. J., RICHARDS, Justice pro tem., and WASTE, WILBUR, LAWLOR, and SHURTLEFF, JJ., concur.

(56 Cal. App. 98)

HILL et ux. v. GARVEY. (Civ. 3727.)

(District Court of Appeal, Second District, Division 1, California. Jan. 11, 1922.)

1. Mines and minerals 🔑58—Findings in suit to rescind lease as to lessee's false representations, sustained.

In an action by lessors to rescind an oil lease for fraud and misrepresentation, evidence *held* to sustain findings as to lessee's false representations as to leases on adjoining property and as to the law as to drilling wells near one started, etc.

2. Mines and minerals 🔑58—Statement that lessee could obtain a lease on adjoining land held more than the mere statement of an opinion to induce execution of lease sought to be rescinded for misrepresentation.

The statement of lessee that he could procure a lease of adjoining land, made to induce the execution of a lease of land which would be drained by wells on adjoining land, and which was sought to be rescinded for misrepresentation, was more than the mere statement of an opinion, since it included a statement in effect that the owner had offered to lease to him; whereas, the evidence showed he had previously applied for the adjoining lease and failed.

3. Mines and minerals 🔑58—Mistake by lessors as to existence of a law misstated by lessee, and not rectified, ground for rescinding lease.

Where, to procure a lease, lessee falsely represented to lessors as to leases of adjoining lands secured and to be secured, that the law preventing drilling wells near one begun would prevent lessors from using their land, such mistake as to the law by lessors would be ground for rescission under Civ. Code, § 1578, subd. 2, providing for setting contracts aside for mistake of law where there is a misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify, as was the condition in this case, wherein it also appeared lessee intentionally deceived lessors and knowingly took advantage of their misunderstanding existing after his misstatement.

4. Mines and minerals 🔑58—Lessors held entitled to rely on lessee's misstatement as to terms being similar to other leases notwithstanding chance to investigate.

Lessors suing for rescission for misrepresentation were entitled to rely on a false representation by lessee to induce execution of an oil lease that the terms of their lease were the same as leases of adjoining land secured by lessee, though opportunity to investigate the truth thereof was available.

5. Appeal and error 🔑173(10)—Laches cannot be presented first on appeal.

Laches is a defense and not a condition of relief, and if it does not appear on the face of the complaint must be affirmatively pleaded and proved by defendant, and cannot be presented for the first time on appeal.

6. Mines and minerals ⚷59—Lessor's right to rescind not defeated for failure to restore consideration of $1 paid his son.

Lessor's right to rescind an oil lease would not be defeated because he had not returned consideration of $1, especially where the evidence showed it was paid lessor's son after lessor refused to receive it.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Frank Floyd Hill and wife against James Garvey. From judgment for plaintiffs, defendant appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Head & Rutan, of Santa Ana, for respondents.

CONREY, P. J. Action to enforce rescission of a lease of real property. On the 11th day of June, 1919, the plaintiffs executed a lease in writing to the defendant of the said real property for the purpose of obtaining oil therefrom. In October, 1919, plaintiffs served upon the defendant a notice of rescission, and thereafter, on November 13, 1919, commenced this action, wherein they claim that the lease was obtained from them by means of false and fraudulent representations made by the defendant, and believed and relied upon by the plaintiffs, whereby they were induced to execute the lease, and without which they would not have signed that instrument. The answer of the defendant contains denials of practically all of those parts of the complaint in which the alleged fraudulent acts of the defendant are stated.

It was alleged by the plaintiff, and by the court was found to be true, that on the 11th day of June, 1919, the defendant came to the place of residence of the plaintiffs, near the property described in said lease, and made the statements and representations to which we hereafter shall refer; that said statements and representations were untrue; that the defendant then and there well knew that they were untrue; that the defendant made such statements and representations for the purpose of deceiving and misleading the plaintiffs and for the purpose of defrauding the plaintiffs; that the terms and provisions of the lease are unfair to the plaintiffs and unconscionable; and that the plaintiffs received no consideration whatever for the signing thereof. Judgment having been entered in favor of the plaintiffs, the defendant appeals therefrom.

Concerning the findings of fact covering the several alleged false representations, appellant contends that the evidence is insufficient to support those findings. He further contends, as to some of the representations made, that they were no more than expressions of opinion, upon which the plaintiffs were not entitled to rely and which, even if incorrect, could not be held to be fraudulent.

The land of the plaintiffs was a rectangular tract containing 5.3 acres. A similar tract of 5.3 acres known as the McIntire property lies immediately north of the Hill land. Adjoining these two tracts on the east is a 10.07-acre tract known in this record as the Margaret Von Wedelstaedt property. Prior to his negotiations with the plaintiffs, the defendant had obtained from McIntire and from Mrs. Margaret Von Wedelstaedt separate leases of their said lands. By the Von Wedelstaedt lease, the lessor was bound to commence drilling or operations for sinking a well on the leased premises within 100 days from May 24, 1919, which was the date of that lease. By the McIntire lease, dated June 9, 1919, it was required that the lessor commence drilling or operations for sinking a well upon the leased premises "within ninety days after oil is obtained in paying quantities on lot 2, block 5, Golden State tract," which was the property described in the Von Wedelstaedt lease. The lease obtained by the defendant from the plaintiffs was dated June 11, 1919, and contained terms requiring that "within ninety days after oil is obtained in paying quantities on the north half of lot 1, block 6, of the Golden State tract" (which was the McIntire land), the lessor "shall commence drilling or operations for sinking a well upon said premises, and failing so to do, then this lease shall become void upon written notice of the party of the first part to the party of the second part." The Hill lease contained, among other things, the following paragraph:

> "It is further agreed by the party of the first part (the lessors) that neither they, nor any others, shall be permitted to drill or operate for oil within the radius of three hundred feet of any of the boundary lines of said property hereinbefore described."

[1, 2] Among the facts found, and which include those challenged by appellant, are the following:

> "That the execution of said instrument by the plaintiffs was procured by the defendant by means of undue influence and by false and fraudulent statements and representations. That the plaintiff, Frank Floyd Hill, is a young farmer; that his wife is a young woman, and that plaintiffs are inexperienced in matters of business and in the making of oil leases, and unfamiliar with the drilling and development of land for oil and the leasing of land for oil. That defendant went to the home of the plaintiffs in the nighttime on June 11, 1919, and requested and urged the plaintiffs to execute the said oil lease, and told the plaintiffs that he already had the land leased on two sides of their five acres of land, being the land hereinbefore described, and that he could procure a lease of the land on a third side of their said five acres; that the law of California prohibits the sinking of an oil well within 300 feet of one already started; that defendant had a company

organized with ample funds and ready to commence immediate operations for the drilling of an oil well; that if plaintiffs did not execute said oil lease, defendant would immediately cause wells to be started in such position that it would be impossible for the plaintiffs to lease their said five acres for oil development purposes, and that defendant would drain the oil from their land by means of said wells which he would cause to be started; that the terms of said oil lease were the same as the terms of leases obtained by defendant on property adjoining that of the plaintiffs; that the terms of said oil lease were such that, if defendant forfeited either of the other two leases on adjoining property which he had obtained, the said oil lease which defendant desired plaintiffs to execute would be automatically canceled; that he would not give plaintiffs time to consider the matter, or to seek advice regarding the execution of said oil lease, but that plaintiffs must execute the said lease at once, or forever lose the opportunity of leasing their land for oil development thereon. At said time plaintiffs requested that they be allowed until the next day to consider and investigate said matter, and that defendant refused to grant said request and stayed at the home of the plaintiffs from about 8 o'clock at night until about half past 11 of the same night, urging and insisting that plaintiffs execute the said lease. That each and all of the aforesaid statements and representations made by the defendant to the plaintiffs were false and untrue, which said defendant then and there well knew; that the plaintiffs believed said statements, and thereby the plaintiffs were induced and caused to execute the said oil lease."

The court also found:

> "That all the allegations and averments of the plaintiffs' complaint are true, and that all the denials and allegations of defendant's answer which are contrary to the allegations of said complaint are untrue."

The complaint alleged that the defendant represented to the plaintiffs that the corporation which had been formed had leased all of the lands surrounding the property of the plaintiffs. At the trial the plaintiffs admitted that no such representation was made concerning the premises adjoining their land on the west and that the defendant did not represent that he had obtained a lease of the adjoining property on the south which belonged to Bismark Von Wedelstaedt. According to the testimony introduced by the plaintiffs, the defendant, at said interview of June 11, 1919, stated:

> That on the next day before that date he had seen Bismark Von Wedelstaedt; that "he wanted us to take a lease on that property yesterday. We did not want it because we thought it was a little further over than our geologist thinks the oil lies, and we would rather have this, but we can get that lease at any time, With our leases on three sides of you, there will be no chance whatever of your getting any company to come in and drill on your own property. You have got to come in with us."

There is other testimony to the effect that the defendant stated that there was a law which compelled any one to stay away 300 feet from any well started by another company, and that he could put down enough wells around the property of the plaintiffs to keep them from drilling at all and they could not lease to any one. The evidence, therefore, is sufficient to sustain the finding of the court as made with reference to leases on adjoining property and the representation that the law of the state prohibited the sinking of an oil well within 300 feet of one already started. The evidence is further sufficient to sustain the finding that the defendant stated that if plaintiffs did not execute said oil lease, defendant would immediately cause wells to be started in such positions that it would be impossible for the plaintiffs to lease said five acres for oil development purposes, and that defendant would drain the oil from their land by means of such wells as he would cause to be started. The statement that defendant could procure a lease of the Bismark Von Wedelstaedt property was not a mere statement of opinion. It included a statement to the effect that the owner of that property had offered to lease the same to the defendant; whereas, according to the evidence, the fact was that the defendant had applied to said owner for a lease and had failed to obtain favorable consideration of his proposition. This is a sufficient answer to the contention of counsel for appellant that the statement was a mere expression of opinion and that there is no evidence that the opinion was dishonestly expressed.

[3] It is suggested by appellant that, assuming these representations to have been made, they could not be fraudulent in effect because the statement as made, concerning the laws of California, was nothing more than a misrepresentation of law made by one holding no fiduciary or confidential relation toward the party to whom it was made, and that it does not appear that the defendant had superior means of information or possessed knowledge of the law superior to that of the plaintiffs. As covering the general rule that misrepresentations of law do not constitute actionable fraud, we are referred to Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; McCarter v. Zeller, 35 Cal. App. 593, 170 Pac. 636; Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; De Laval Dairy Supply Co. v. Steadman, 6 Cal. App. 651, 92 Pac. 877.

Conceding that a bare misrepresentation of law is not ordinarily sufficient to entitle a party to rescind a contract or conveyance, this rule may fail in its application where the misrepresentation of law includes as part thereof a misrepresentation concerning a matter of fact closely connected therewith. Carr v. Sacramento C. P. Co., 35 Cal. App. 439, 170 Pac. 446. The land of the plaintiffs was a tract only 330 feet in width. According to evidence which the court found to be true, the defendant was representing that by reason of his ability to obtain the Bismark Von Wedelstaedt lease in addition to the two other leases which he had already obtained, and by reason of the law, as stated by him, he could and would prevent the plaintiffs from drilling for oil on their land if they did not lease it to him. Respondent contends that the false representation concerning the 300-foot law was a part of this misrepresentation of fact. We doubt the soundness of this argument. It is true that the misstatement of law and the false statement of fact were made at the same time and for the same purpose, but they were separable. Either one might be true and the other false. But there is another phase of this same matter that is controlling here. A mistake of law may be a sufficient ground for setting aside a contract where there is "a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." Civ. Code, § 1578, subd. 2. In the case at bar, according to the evidence, not only did this condition exist, but the defendant intentionally deceived the plaintiffs by representing the existence of a law which he knew did not exist, and knowingly took advantage of the misunderstanding which obviously existed in their minds after he had made that statement.

Counsel for appellant claims that there is no evidence that defendant represented that the company which defendant had formed was incorporated; and that in fact a company or association had been formed between the defendant and two others, for the purpose of conducting this proposed oil venture; that each of these three persons had agreed to contribute the sum of $10,000, which, together with other resources of the defendant, were sufficient to enable them to carry out the drilling program provided by the three leases. But we think that there is evidence that the defendant represented that he was acting on behalf of a corporation. Frank Hill testified that the plaintiffs expressed a desire to take at least until the next day to consider the matter of executing the proposed lease, but that the defendant refused to allow this time on the ground that he had a board of directors' meeting the next morning, when they were going to decide the location of this rig which they were going to put up. The same witness testified that the defendant said he had a company formed with plenty of capital back of him and that they had their lumber all bought and ready to ship at an instant's notice, and that they would begin operations within a week or ten days. This evidence, although contradicted by testimony on the part of the defendant, is sufficient to justify the findings of the court establishing that the "company" referred to by the defendant was a corporation and that he represented that said corporation had ample funds and was ready to commence immediate operations for the drilling of an oil well. The finding that these representations were untrue is supported by the evidence. The testimony of the defendant himself shows that there was no corporation and that his proposed organization had not been completed on the 11th day of June. He found it hard to organize. "Up to August we had about half the money lined up." In August the defendant went to New York on other business and was absent about three months. There is evidence that in August the defendant was trying to sell these leases to another party. From this, and other evidence, the court was well warranted in determining that a representation had been made by the defendant that a company (whether corporation or not) had been formed with ample funds, had purchased all of its lumber, and was ready to commence immediate operations for the drilling of an oil well, and that this representation was not true.

[4] Another misrepresentation discussed is that wherein the defendant stated that the terms of the lease that he was seeking to obtain from the plaintiffs, including a so-called "bonus," were the same as the terms of the leases he had previously secured on the Von Wedelstaedt and McIntire properties. On sufficient evidence, the court found that these statements were made as alleged. At the interview, on the night of June 11th, Mr. McIntire was present and the McIntire lease was there. They did not have the Von Wedelstaedt lease, or any copy thereof. The lease which the plaintiffs signed, like the McIntire lease, provided for the payment of the sum of $1,250—approximately $250 per acre —by the lessee to the lessors at or before the expiration of the time allowed for commencing drilling operations; but the Von Wedelstaedt lease provided for a similar payment at the rate of $500 per acre. It appears from this evidence, and the court so found, that the plaintiffs relied upon the assurance that this cash payment or bonus amounted to the same sum per acre in all of these three leases, and that, except for the reliance which the plaintiffs placed upon those assurances, they would not have executed the lease. It is argued that since there was no confidential relationship existing between these parties and since the opportunity to investigate the statements was available, the plaintiffs did not have the right to rely upon such statements without investigation and without verifying their truth, considering that the Von Wedelstaedts were at that time present at their home, within a half mile distance of the Hill residence. We think that the circumstances, to which we have alluded, are sufficient to have entitled the plaintiffs to rely upon the representations as made to them.

> "Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere existence of opportunities for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact." Teague v. Hall, 171 Cal. 668, 670, 154 Pac. 851.

[5] Invoking the rule that a person who seeks to avoid a contract for fraud will be deemed to have waived the fraud unless he rescinds promptly after discovery thereof, appellant here contends that the plaintiffs have been guilty of laches sufficient to block their right to relief in this action. In his testimony the plaintiff Frank Hill stated that on the next day after the lease had been signed he called up the office of an attorney at law and inquired whether there was a law preventing the putting of an oil well within 300 feet of one that had been commenced. The attorney replied that there was no such law, but further stated that the right to rescind the lease was a doubtful proposition. As to all of the other representations which have been found to be untrue, it appears that the plaintiffs proceeded to rescind very promptly after discovering the actual facts. The defense of laches was not pleaded herein, either by demurrer or answer. This particular ground of objection appears to be presented for the first time in the brief of counsel for appellant on this appeal.

> "We might also add that laches is a defense, and not a condition of relief, and, if it does not appear on the face of the complaint, must be affirmatively pleaded and proven by the defendants. 16 Cyc. 176. In the present case there was neither pleading nor corresponding proof of any prejudice suffered by the defendants through the delay of the plaintiff in not commencing its action sooner after the discovery of the fraud." Victor Oil Co. v. Drum, 193 Pac. 243, 250; Tracy v. Smith, 175 Cal. 161, 165, 165 Pac. 535.

[6] We think there is no merit in the claim that the plaintiffs failed to restore, or offer to restore, to the defendant everything of value received from him, and that therefore the plaintiffs cannot maintain the action. The plaintiffs made diligent efforts to find the defendant in order to serve upon him written notice of rescission wherein they offered to return everything which they had received from him. Upon discovery that he was in New York, they obtained his address there and mailed their notice to that address. The notice of rescission appears to have been received by the defendant 2½ hours after the filing of the complaint in this action. The lease made by the plaintiffs purported to have been made in consideration of the agreements therein contained and the payment by the defendant of the sum of $1. This dollar was not paid at the time of the execution of the lease. Assuming that said dollar was paid, the testimony shows that it was the only thing in the way of money or property that ever passed to the plaintiffs in connection with the lease. But the evidence is not such as to have required the court to find that it was paid. Each of the plaintiffs testified that they personally did not receive it. Mrs. Hill admitted that on the next day after the lease was signed the defendant came and offered her the dollar. She did not wish to receive it and did not take it. Thereupon the defendant gave it to the little boy of the plaintiff. Concerning this, Mrs. Hill testified: "I did not feel called upon to refuse to let the boy take it."

It seems to us unnecessary to take up for discussion the finding of the court that the lease was "unfair to the plaintiffs and unconscionable" in sundry particulars stated in the finding. Even if fair in its terms, the plaintiffs are entitled to cancellation of the lease in accordance with the facts found and the conclusions which herein have been stated.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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56 Cal. App. 220

CASTELHUN v. SAN FRANCISCO SAVINGS & LOAN SOCIETY.
(Civ. 4109.)

(District Court of Appeal, First District, Division 1, California. Jan. 18, 1922. Hearing Denied by Supreme Court March 16, 1922.)

1. Gifts 🔑47(1)—Plaintiff suing bank for deposit in name of third party alleged to have been given to plaintiff's intestate had burden of proof.

In action against a savings bank to recover deposit shown upon the books of the bank as the property of a third person, who had given plaintiff's intestate his passbook and had also bequeathed amount of deposit to intestate in his will, the plaintiff had the burden of proving a completed gift inter vivos as against defendant's contention that the gift was not intended to take effect until third party's death.

2. Gifts 🔑4—Elements of "valid gift" stated.

To constitute a "valid gift" there must be intention to give, and the delivery, either actually or symbolically, of the thing intended to be given.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

3. Gifts ⚷49(1)—Must be proved by explicit evidence where not asserted until after donor's death.

Where a gift is not asserted until after the death of the donor, every element necessary to constitute the gift must be sustained by explicit and convincing evidence.

4. Wills ⚷93—Evidence held to prove transaction testamentary in character.

In action against bank for amount of savings deposit in name of third party, who had given intestate his passbook and had also bequeathed amount of deposit to intestate in his will, but who had not died until after intestate's death, evidence *held* to sustain finding that the transaction was of a testamentary character and that the gift was to take effect only upon third party's death.

5. Gifts ⚷34—Gift to take effect on donor's death failed where donee died before donor.

Gift to take effect on donor's death failed on donee's death before that of donor.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by F. C. Castelhun, as executor of the last will of Benedict Engler, deceased, against the San Francisco Savings & Loan Society. Judgment for defendant, and plaintiff appeals. Affirmed.

F. J. Castelhun, of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

TYLER, P. J. This action was brought by F. C. Castelhun, as executor of the last will of one Benedict Engler, to recover from defendant the sum of $3,988.82, the amount of a savings bank deposit which appeared, upon the books of defendant company, as being the property of one August Volpert. Plaintiff alleges in his complaint that Volpert had, in the latter part of April, 1917, made a parol gift of the same by delivering to Engler his passbook covering the account. The trial court found that Volpert did not transfer the account or give the money to Engler as alleged, and rendered judgment in favor of defendant, and plaintiff appeals.

It is the claim of appellant that the evidence is contrary to and does not support the findings. It appears from the testimony of plaintiff himself that Volpert and Engler lived together, and that plaintiff was present at their home at Colma, San Mateo county, during the month of April, 1917, and that upon such occasion Volpert stated to him that he had given his passbook covering the funds on deposit in respondent's bank, to Engler, who at that time had possession thereof. At this time plaintiff suggested to Volpert that in addition to the gift he had better make a will in Engler's favor, and, upon Volpert giving his consent thereto, plaintiff subsequently prepared a will by the terms of which all of Volpert's property was left to Engler. This will was executed by Volpert on May 13, 1917. It further appeared in evidence that on March 12, 1919, Engler died, and that Volpert survived him about four months. At the time of Engler's death the passbook was found among his possessions. Defendant, to disprove the claim of plaintiff that the evidence above recited showed a completed gift in præsenti, introduced testimony to the effect that on two occasions after the alleged gift Volpert personally presented the passbook at respondent bank and withdrew money from his account. The withdrawals were made on August 27, 1917, and on December 28, 1917. On each of these occasions Volpert signed a receipt at the bank made out on a printed form, for the amount of money he withdrew. Further evidence showed that the bankbook was presented to the bank on July 1, 1917, and again July 1, 1918, and dividend entries were made therein to the credit of Volpert, all of which acts occurred subsequent to the date of the alleged gift. Under these facts it is the claim of respondent that the evidence does not show that there ever was a completed gift inter vivos between the parties for the reason that Volpert never at any time surrendered dominion and control over the funds or provided the means to Engler to obtain control of the same.

[1-5] It is further urged that the evidence fails to show that Engler ever accepted the alleged gift or exercised any acts of ownership over the same, but, on the contrary, that it does show that the entire transaction was testamentary in character and that Engler was to have become possessed of the money only upon the death of Volpert, who, having died first, the attempted gift failed. Appellant lays considerable stress on the fact that the passbook was found among the effects of Engler upon his death, from which it is argued that a completed gift of the deposit is strongly indicated. Here the burden of sustaining the gift was upon plaintiff. Sullivan v. Shea, 32 Cal. App. 369, 162 Pac. 925; Sprague v. Walton, 145 Cal. 234, 78 Pac. 645. The elements essential to constitute a valid gift are an intention to give, and the delivery, either actually or symbolically, of the thing intended to be given. Humble v. Gay, 168 Cal. 516, 143 Pac. 778. The rule is also established that, where a gift is not asserted until after the death of the donor, every element necessary to constitute the gift must be sustained by explicit and convincing evidence. The first demand made upon the bank by plaintiff to transfer the funds was in August, 1919, a month after the death of Volpert, and over two years subsequent to the time when it is claimed the gift was

made. It must be conceded that Volpert intended that Engler should have the funds after his death, for his will conclusively establishes such intention. This instrument, however, affords some evidence that the transaction was testamentary in character. The record discloses that the deposit in question was practically all the property that Volpert possessed, and the will expressly providing, as it does, for the payment of expenses incurred during the last illness of the deceased, and also for his funeral and other expenses, conflicts with the idea that he had practically disposed of his entire possessions. Nor does the fact, as claimed, that the passbook was found among Engler's effects, strongly support appellant's contention of a completed gift in præsenti. The parties had been living together, and Volpert had left his home and was taken to a hospital prior to the death of Engler, and the record is silent as to what disposition, if any, was made for the care and custody of his property. The fact that Engler never in his lifetime made claim upon the bank for the funds, or asserted any act of ownership over the same, necessitates explicit and convincing evidence that every element necessary to constitute a valid donation inter vivos existed. Here it is shown that Volpert, after the transaction, himself exercised acts of dominion and control over the deposit and drew against the same. The evidence in the case is limited, but the question of intent here involved was one of fact to be determined, like other questions of fact, by the trial court upon all the evidence. Under the circumstances of the case, we are of the opinion that the evidence sustains the finding that the entire transaction between the parties was of a testamentary character, and that Engler was to have become possessed of the funds only upon the death of Volpert. In view of the fact that Engler predeceased Volpert, transfer of the funds to Engler failed.

For the reasons given, the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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56 Cal. App. 280

MAHAN et al. v. MILLAR et al.

SAME v. CALIFORNIA OIL DEVELOPMENT SYNDICATE et al. (Civ. 3575.)

(District Court of Appeal, Second District, Division 2. California. Jan. 26, 1922.)

1. Appeal and error 🔑840(4)—Whether or not cross-complaint proper may be raised by demurrer, it will be reviewed on appeal when fully argued.

Whether or not the question of whether a cross-complaint is proper in a given case may be presented by a demurrer to it, such question will be considered on appeal, where counsel consider that the point is properly raised and have argued it fully under Code Civ. Proc. § 442.

2. Pleading 🔑147—When cross-complaint is permissible.

A cross-complaint is permissible in an action only when a defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, under Code Civ. Proc. § 442.

3. Pleading 🔑147—Cross-complaint is not permissible which affects property not within scope of action.

A cross-complaint is not permissible, under Code Civ. Proc. § 442, which seeks affirmative relief concerning a single and indivisible parcel of land which includes within its boundaries a lesser tract, which lesser tract is the subject of the action.

4. Quieting title 🔑39—Cross-complaint in suit to quiet title held not to show proper case therefor.

In action to quiet title, a cross-complaint concerning a trust in adjoining land, alleged to include the tract in question, was not permissible, where the unity was to be established only through a reformation of an instrument, without an attempt to show either fraud, mistake, or undue influence, under Code Civ. Proc. § 442.

5. Reformation of instruments 🔑16—Not possible without showing of fraud, mistake, or undue influence.

Reformation of an instrument is not possible without some showing of fraud, mistake, or undue influence.

6. Evidence 🔑419(11)—An understanding which could only find place as part of covenants of agreement not to be shown by parol.

An understanding between the parties sought to be injected into a writing which could find place there only among and as part of the covenants of the agreement could not be shown by parol in that it was "consideration."

7. Appeal and error 🔑840(4)—Whether cross-complaint could be treated as answer not considered.

On appeal in action to quiet title, where cross-complaint was filed and demurrers to it sustained and judgments were entered in favor of plaintiff and cross-defendant, and trial was had upon the issues formed by the complaint and an answer setting up the same matter as the cross-complaint by reference, and assaults were not made upon the judgments, except upon the ground that demurrers to the amended cross-complaint were improperly sustained, appellate court would not consider the question whether the cross-complaint could be treated as an answer.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Actions by William S. Mahan and another against J. D. Millar and the California Oil Development Syndicate, respectively, in which the respective defendants filed cross-complaints and brought in the Title Insurance & Trust Company as a cross-defendant. From adverse judgments, the defendants appeal. Affirmed.

L. B. Stanton, of Los Angeles, for appellants.

Robert M. Clarke, of Los Angeles, for respondents Mahan.

Erle M. Leaf and Otis H. Castle, both of Los Angeles, and C. Elvon Musick, of Pasadena, for respondent Title Insurance & Trust Co.

WORKS, J. The Mahans commenced an ordinary action to quiet title against Millar, the real property described in the complaint being a certain parcel of land which we shall designate as tract X, consisting of 360 acres. It appearing that California Oil Development Syndicate, hereinafter called the syndicate, had acquired the interest of Millar in tract X, the Mahans then commenced an action to quiet title to that tract against the corporation named. Millar filed an answer in the first action denying certain allegations of the complaint, and he also, together with the syndicate, filed a cross-complaint against the Mahans, by which pleading Title Insurance & Trust Company, which we shall below refer to as the trust company, was brought in as a cross-defendant. It was then stipulated that the two actions might be consolidated for trial, an order being entered accordingly. It was also stipulated that the answer and cross-complaint filed by Millar in the suit against him might stand as an answer and cross-complaint in the suit against the syndicate. The cross-complaint was later supplanted by an amended cross-complaint. This pleading was demurred to by the Mahans on the ground that it "does not state facts sufficient to constitute a cause of action" and by the trust company on the ground that it "does not state facts sufficient to constitute a cause of action by way of cross-complaint." The trial court sustained these demurrers without leave to amend and upon that ruling rendered judgment in favor of the trust company. The consolidated causes were then heard upon the issues presented by the two complaints and the answer which was interposed as to one complaint, and which was stipulated to stand as to the other. Judgment was thereupon rendered in favor of the Mahans, plaintiffs in each action. Millar and the syndicate appeal from that judgment, as well as from the judgment in favor of the trust company.

[1] The only point presented by the appeals is as to the correctness of the ruling of the trial court in sustaining the demurrers to the amended cross-complaint. In arguing that question counsel not only present objections designed to demonstrate the failure of the amended cross-complaint to state a cause of action, but they argue the question whether that pleading shows a proper case for cross-complaint under the Code of Civil Procedure, section 442, a question which involves a consideration of matters other than those appearing on the face of the amended cross-complaint; that is to say, it involves a comparison of the allegations of the cross-pleading with those of the two complaints. Without conceding that the question whether a cross-complaint is proper in a given case may be presented by a demurrer to it, we have determined to pass upon that question in the present instance for several reasons. In the first place, counsel evidently consider that the point is properly raised, and have argued it fully. In this connection it is to be noted that the demurrer of the Trust Company is so framed as to attempt to present the question. Next, the point is basic to the rights of the parties and, logically, should be settled before a resort is had to the question whether the amended cross-complaint states facts sufficient to constitute a cause of action. Then, also, the Supreme Court has many times considered the point upon demurrer, doubtless for reasons such as those we have just mentioned, for in none of the cases was it argued whether the question was proper or improper to be considered in that manner. See Demartin v. Albert, 68 Cal. 277, 9 Pac. 157; Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Clark v. Taylor, 91 Cal. 552, 27 Pac. 860; Silver Creek & Panoche L., & W. Co. v. Hayes, 113 Cal. 142, 45 Pac. 191; Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. 354; Earl v. Times-Mirror Co. (Cal.) 196 Pac. 57.

We take up, then, the question whether the amended cross-complaint was proper under the law providing for the filing of pleadings of that nature. We have already observed that the two pleadings filed by the Mahans were ordinary complaints to quiet title, and that the real property described in them was a parcel which we have designated as tract X. The amended cross-complaint alleges that the Mahans and Millar had entered into a contract whereby the former had employed and agreed to employ the latter to sell certain real property consisting of 160 acres, a description of which is inserted in the pleading and which we shall hereafter refer to as tract ABC. Tracts X and ABC are contiguous to each other. The amended cross-complaint further alleges that the contract whereby Millar was employed to sell tract ABC was merged into a declaration of trust executed to the trust company. A copy of this instrument, which was signed by the syndicate and the Mahans, is attached to the amended cross-complaint as an exhibit. Its legal effect is, however, stated in that pleading as follows, as shortened by ellipsis:

> "That in said declaration of trust it is provided * * * that said trust company held * * * said real property in trust for the following uses: To secure the payment to [the Mahans] of the sum of $24,000 with interest; * * * to sell and convey to purchasers investment units, hereinafter described; * * * to convey to the syndicate an undivided one-eighth interest in the community oil properties, hereinafter described in each tract, after the investment units were sold; * * * to distribute the proceeds of the sale of investment units, the first one-third to the syndicate, * * * the second one-third to [the Mahans] upon said sum of $24,000 and payment for the services of said trust company; * * * and the third one-third to the accumulation of a fund for the development of petroleum in said property; upon failure to make payment to [the Mahans] out of the proceeds of such sales within [a certain period] upon demand of [the Mahans] and after publication of notice * * * to sell said real property * * * to the highest bidder. * * *"

Leaving for a moment the terms of the declaration of trust, the amended cross-complaint then alleges that 400 out of 432 lots in each tract of 20 acres of the entire [tract ABC] are called "investment units" and are the sole lots therein to be offered for sale; and that the remaining 32 lots are entitled "Community Oil Properties," upon which the exploitation of said lands for petroleum was and is to be made as specified in the declaration of trust. Again taking up the provisions of the declaration of trust, the amended cross-complaint avers that—

> It is "provided therein that all deeds, * * * and other instruments affecting said property * * * shall be executed by said trust company, * * * that the syndicate is appointed agent of the trustee in making the sale of the property aforesaid, to generally assume the care and custody thereof and said syndicate was thereby by [the Mahans] appointed their agent for the sale and improvement of said property and institute a selling campaign. * * * That said syndicate was instructed to divide said real property into tracts of 20 acres each and subdivide and sell in each of said tracts 400 of the 432 lots into which each tract was and was to be divided."

The amended cross-complaint next alleges that on the day preceding the execution of the declaration of trust the Mahans and Millar, "acting for and on behalf of said syndicate," entered into a certain agreement, copy of which is attached to the pleading as an exhibit. That agreement we shall hereafter refer to as Exhibit B. It is alleged in the amended cross-complaint that—

> "Under and by" Exhibit B the Mahans agreed to sell and convey tract X "which is the same real property described in the complaint of [the Mahans] herein for the purchase price of $90,000, one-fourth of which said sum was * * * to be paid on or before [a certain date] with interest; * * * that [Exhibit B] should not become effective unless the sum of $10,000 * * * should have been paid on or before [a certain date] to [the Mahans] upon the purchase price of tract ABC which was and is the subject of said declaration of trust."

It is alleged in the amended cross-complaint that—

> At the time of the execution of Exhibit B it was known and understood by the parties to it that Millar executed it on behalf of the syndicate; that the consideration for its execution "flowing to [the Mahans] which is expressed in said contract as 'other good and valuable consideration' is and was the performance" by the syndicate in the sale of tract ABC; that the consideration for the execution of Exhibit B flowing to Millar and the syndicate was "the opportunity thereby given for the development of the lands adjacent to" tract ABC "by means thereof and the efficacious use of the advertising campaign to be undertaken in the sale of" tract ABC upon tract X; "that immediately consequent upon the completion of sales of the lands described in said declaration of trust [tract ABC] and development of the properties therein that said lands [tract X] described in said contract [Exhibit B] should be made the subject with said trust company of a trust identical with that hereinabove described; that one of the considerations for the undertaking of the duties and obligations imposed upon said syndicate under said declaration of trust was the contract [Exhibit B]; that said declaration of trust and said contract [Exhibit B] were in truth and in fact but parts of one and the same transaction and interwoven; that said real property [tract X] described in said exhibit B lies adjacent to and upon each side of the real property [tract ABC] described in said declaration of trust, and that the whole thereof was and is understood and intended by each and all of the parties hereto [sic] to make up and comprise one general plan for the development of the lands of [the Mahans] for the mutual interest and profit of all of the parties hereto; and that all of said real property [tract X] described in said Exhibit B was and is susceptible of development and sale under the plan and for the purposes as set forth in said declaration of trust"; * * * that it was understood and agreed by the parties that the clause in Exhibit B "involving" the payment of $10,000.00 "was inserted * * * solely and only to put a premium upon and permit an admeasurement of the practical success of the plan of development of said lands, and that said sum * * * was to be derived solely and only from the sales of lots in said lands [tract ABC] described in said deed to said trust company."

We have not found it necessary to repeat all the allegations of the amended cross-complaint, which is very lengthy. Being less specific as to the remainder of the pleading, we state that there are set forth in it the fact that the Mahans and the trust company wrongfully refused to perform their obligations under the declaration of trust, and that thereby Millar and the syndicate were prevented from performing certain covenants by them agreed to be performed under the trust arrangement. We do not set forth these allegations in detail for the reason that we shall assume, as a basis for the discussion which is to follow, that the refusal of the Mahans and the trust company to carry out the trust arrangement was wrongful, and that it operated to prevent Millar and the syndicate from performing all the obligations resting upon them under the declaration of trust. We make these assumptions, not because we are satisfied with the sufficiency of the allegations of the amended cross-complaint on the subjects to which they relate, but merely for the sake of the argument of the question before us. The amended cross-complaint also alleges that—

> Millar and the syndicate have expended certain considerable and specified sums "in the survey and subdivision of *said lands*, in the preparation of advertising matter, in the employment of agents, traveling expenses, and other expenses incident to the proper presentation of the advantages of said investment plan in the development of *said lands* before the public and in the employment of experts in petroleum development and preparation for the development of *said lands*."

The italics are ours, and they are employed for the purpose of indicating that it is not shown by the pleading *what* lands the expenditures were made upon or in connection with.

It may be assumed, however, that the outlay concerned either tract X, or tract ABC, or the entire body of land composed of both tracts, as shall appear most advantageous to the contentions of Millar and the syndicate. We are now brought to the prayer of the amended cross-complaint. It is, in effect:

> That the Mahans take nothing by their action; that they be required to execute to the trust company, or to a trustee to be designated by the court, deeds to "the whole of the real property hereinabove described to be administered upon under the order of this court and in accordance with the terms and provisions of the trust agreement hereinabove described"; that an accounting be had of the rent, income, and profits of "said real property" from the date of Exhibit B to the date of decree, and "that the same, if found to be received by [the Mahans], be made applicable to the payment of the sum and sums to be received by [the Mahans] under said contracts"; that the declaration of trust be reformed in the following particulars: (1) That the time for the performance of the covenants of Millar and the syndicate be extended; (2) that the real property tract X "be expressly made subject to the provisions of said declaration of trust and to subdivision and sale thereunder"; and, (3) that the declaration of trust and Exhibit B "be reformed in such other way or ways as the evidence in this cause and the rights of the parties hereto upon the trial hereof may seem to require in justice and equity"; that in case no specific performance is decreed the court award to Millar and the syndicate damages in the sum of $253,040, that all other relief be granted which is meet and aggreeable to equity.

Before we undertake a discussion of the question with which we are confronted, let us recapitulate the situation: (1) The complaints to quiet title relate only to tract X; (2) Exhibit B relates only to tract X; (3) the declaration of trust relates only to tract ABC, the two tracts being contiguous; (4) the theory of Millar and the syndicate is that the two tracts are to be considered as one and indivisible, because of an understanding that tract X was to be brought within the operation of the declaration of trust along with tract ABC; (5) accordingly, among other things, it is prayed that the declaration of trust be reformed to include tract X within its terms, thus making the two tracts one and indivisible; (6) it is also prayed, in effect, that the provisions of the declaration of trust be specifically enforced, after reformation in such manner as to make the two tracts one.

[2, 3] A cross-complaint is permissible in an action only when a defendant seeks affirmative relief against any party: (1) Relating to or depending upon the contract or transaction upon which the action is brought; or (2) affecting the property to which the action relates. Code Civ. Proc. § 442. It is at once evident that the present case does not fall within the first requisite of the section, for it is plain that the complaints to quiet title were based upon neither a contract nor a transaction. Those complaints did, however, relate to property. Does the case, then, come within the second requirement of the section? No authority is cited in any of the briefs which exactly fits the question thus presented, but two which are relied on by respondents cast some light on the subject (Bulwer Con. Min. Co. v. Standard Con. Min. Co., 83 Cal. 589, 23 Pac. 1102; Andreson Co. v. Regenold, 166 Cal. 44, 134 Pac. 999); although the rule announced by them would appear to be obvious. They were both actions to quiet title, and they are to the effect that matter in a cross-complaint referring to parcels of land other than those described in the complaint may be stricken on motion. There is at least one other opinion in the reports to the same general effect (McFarland v. Matthai, 7 Cal. App. 599, 95 Pac. 179); the question there, however, having been considered on demurrer and not on motion to strike. We may remark, parenthetically, that this case might have been included in the list of decisions first set forth in this opinion but for the fact that the cases intended to be cited there were limited to those passed on by the Supreme Court. In

the present case there could be no successful motion to strike matters in appellants' pleading referring to tract ABC. That is manifest. The amended cross-complaint, as we have already observed, in theory fastens that tract to tract X so securely that, perforce, the pleading can only be viewed as contemplating a single parcel of land which may be termed tract ABCX. That entire tract, under the averments made by appellants is in theory the sole and indivisible object of the trust reposed in the trust company, and, under those averments, the trust cannot be administered upon any part of tract ABCX to the exclusion of any other part—no more upon tract ABC alone than upon tract X alone. The amended cross-complaint must be upheld as a pleading seeking to enforce rights concerning tract ABCX in its entirety, or it is not to be upheld at all. We cannot believe that the Legislature, in enacting section 442 intended that the right to file a cross-complaint should extend so far. It cannot be that in a legal sense, speaking in the terms of the section, a cross-complaint *affects* the property to which an action relates when it seeks affirmative relief concerning a single and indivisible parcel of land which includes within its boundaries a lesser tract, which lesser tract is the subject of the action as shown by the allegations of the complaint. So we construe the enactment.

[4-6] Under suggestion of the foregoing argument there arises another and more certain and conclusive reason why the amended cross-complaint does not show a proper case for a cross-complaint. If we admit, without deciding, that it states a case as to tract ABC, the pleading being thus rendered impregnable against attack under a general demurrer, we are met with an entirely different situation as to tract X. While, as we have already observed, the theory of the entire amended cross-complaint is that tract ABC and tract X compose a single and indivisible tract ABCX, the allegation by which it is intended to show that they are one is utterly insufficient. Their unity is to be established only through a reformation of Exhibit B and of the declaration of trust in such manner as to bring tract X within the provisions of the latter, the express terms of the instrument including only tract ABC. The right to reformation is claimed only upon the ground that one of the considerations flowing to Millar and the syndicate for the execution of Exhibit B was "that immediately consequent upon the completion of sales of lands described in said declaration of trust [tract ABC] and development of the properties therein that said lands [tract X] described in said contract [Exhibit B] should be made the subject with said trust company of a trust identical with that hereinabove described," and it is also alleged—

> "That said real property [tract X] described in said Exhibit B lies adjacent to and upon each side of the real property [tract ABC] described in said declaration of trust and that the whole thereof was, and is understood and intended by each and all of the parties hereto [sic] to make up and comprise one general plan for the development of the land of [the Mahans] for the mutual interest and profit of all the parties hereto."

That is all—simply that and nothing more. There is no attempt to show that the so-called "consideration" was omitted from Exhibit B through either fraud, mistake, or undue influence, and the reformation of an instrument is of course not possible without some showing of that nature. We wonder whether appellants, in pleading this missing link as a part of the "consideration" for Exhibit B, did so in reliance upon the rule that the statement of consideration in a written instrument is not conclusive upon the parties, and that such a statement may be varied by parol proof of the true consideration. If such was their object the effort does not reach the mark. The understanding between the parties, sought now to be injected into Exhibit B, could find place there only among and as part of the covenants of the agreement. It could not be consideration within the meaning of the rule we have stated. It thus appears that appellants have failed to bring tract X within the range of the relief asked by their pleading, and, as that tract is the only property described in the complaints to quiet title, it is manifest that on this ground there is a failure to show a proper case for a cross-complaint.

[7] In discussing these questions we are not unmindful of the rule of law to the effect that a pleading may be treated as an answer even though its framer has called it a cross-complaint. Granting that the allegations of the amended cross-complaint here as to Exhibit B might amount to proper defensive matter under other conditions, we are forbidden upon several considerations so to regard them in their present setting. In the first place, although the circumstance is not altogether controlling, the parties in their briefs treat the pleading as a cross-complaint and as nothing else. Next, however, and more to the point, they *seem*, so far as the record discloses, never to have aided the trial court to a view of it as anything but a cross-complaint. Then, it will be remembered that no assault whatever is made upon the two judgments except upon the ground that demurrers to the amended cross-complaint were improperly sustained. A trial was had upon the issues formed by the complaints and the answer interposed to them, but no record is brought up disclosing what the evidence was on the trial. This latter circumstance is of particular moment in view of allegations of the answer to which we have not yet drawn attention. One of the paragraphs of that pleading is to the effect that the defendant "admits that plaintiffs are the owners of all that certain real property particularly described in paragraph 1 of the complaint of plaintiffs, subject, however, to the rights and to the title and interest of this defendant and of others in interest with him as more particularly set forth in the cross-complaint filed contemporaneously herewith, to which said cross-complaint reference is hereby made for all particulars of said claims and interests and to the particular estate in said real property as therein stated and alleged." Strictly speaking, this was of course no proper way to plead by way of answer such defensive matter, if any, as may be included in the allegations of the amended cross-complaint. Still, if no objection were made by the opposing parties, the court might have regarded the averment as an adoption or importation of the allegations of the cross-pleading, and might have heard evidence in support of them. Perhaps it did. Certainly, no attempt whatever is made by appellants to show by the production of a record here that they did not have an opportunity to present at the trial all evidence in their possession which by any possibility could have amounted to a defense. In short, we are given the opportunity to pass upon no question except the one that demurrers to a *cross-complaint* were improperly sustained. Having resolved that question, there appears to be no other office that we may perform. These remarks are based upon the idea that matters alleged in the amended cross-complaint *may* state a defense. We have not determined whether they *do* state one. For the reasons just given that labor would have been one of supererogation.

Both judgments are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

56 Cal. App. 368

In re RASMUSSEN. (Civ. 4183.)

(District Court of Appeal, First District, Division 2, California. Feb. 8, 1922.)

1. Divorce 🔑269(10)—Affidavit in contempt proceeding need only show order for alimony and disobedience.

Under Code Civ. Proc. § 1209, subd. 5, and sections 1211, 1219, relative to contempt, an affidavit for an order to show cause need only show the making of an order for payment of alimony and the husband's refusal to make payment as ordered.

2. Divorce 🔑269(11)—Burden on husband in contempt proceeding to show excuse for nonpayment of alimony.

Under Code Civ. Proc. § 1209, subd. 5, and sections 1211, 1219, relative to contempt, a wife, on the hearing of contempt proceedings for nonpayment of alimony, makes a prima facie case by proving the order for alimony, and the husband's refusal to make payment, and the burden is on the husband to show a legitimate excuse, such as that he has become unable, since the making of the order, to pay the alimony.

3. Divorce 🔑269(14)—Husband committed for contempt entitled to show inability to comply with order.

A husband, committed for contempt in failing to pay alimony, is afforded an opportunity to prove his inability to comply with the order, by Code Civ. Proc. § 1143, relative to the discharge of persons imprisoned on civil process.

Original application by Aage Rasmussen for a writ of review to review an order adjudging him guilty of contempt. Judgment affirmed.

James F. Brennan, of San Francisco, for petitioner.

LANGDON, P. J. This matter comes before us on a writ of review. The petition filed herein, which it is stipulated shall be considered as a return to the writ, shows that in a divorce proceeding, duly and regularly pending before the superior court of this city and county, a decree of divorce was fully entered on December 7, 1921, granting to Nellie Rasmussen a decree of divorce from petitioner, and awarding to said Nellie Rasmussen $5,000 of the community property of the parties. Said decree also recites the fact that community property of the parties, out of which the $5,000 was to be paid, was in the possession and under the control of the defendant, Aage Rasmussen.

Later, on December 15, 1921, Nellie Rasmussen duly and regularly filed in said court an affidavit for an order citing the said Aage Rasmussen to show cause why he should not be punished for contempt because of his refusal to obey the said order and decree of said court. Said affidavit recites the order and judgment previously made in the divorce action and the provision therein contained for the payment to Nellie Rasmussen of $5,000; that said property was in the possession of the said Aage Rasmussen; that a copy of the judgment and order in the divorce action had been served upon said defendant therein and demand made for the payment of the $5,000, which was then in the possession of said defendant; that said defendant had refused, and still refuses, to deliver said money to affiant, although said money is in his possession and he has the ability to comply with said order.

Upon this affidavit, which is not attacked by the petitioner herein as being insufficient, the order to show cause was duly and regularly made. The said Aage Rasmussen appeared at the hearing; witnesses were examined; a certified copy of the decree in the divorce action was offered in evidence. The court rendered its judgment, reciting therein the making of the order in the divorce action; the service of a copy of the same on Aage Rasmussen; demand by Nellie Rasmussen for compliance therewith; the refusal of the said Aage Rasmussen to comply with said demand; the fact that said Aage Rasmussen has in his possession sufficient cash money of the community property of the parties to deliver and pay said sum to said Nellie Rasmussen. The said Rasmussen was then found guilty of contempt as set forth in the affidavit, and he was ordered imprisoned in the county jail until such time as he obeyed the order of the court.

Rasmussen was confined to jail under such order of commitment, until December 24, 1921, at which time a writ of habeas corpus was issued out of division 1 of this court, and said Rasmussen admitted to bail in the sum of $100, pending the hearing thereon. Said proceeding upon habeas corpus is still pending, and said Rasmussen is at liberty upon bail. On December 29, 1921, his attorney applied to the superior court for an order purging Rasmussen of the contempt of court and revoking and annulling the prior order of said court adjudging him guilty of contempt. Upon this hearing the court took some evidence, and then continued the hearing for one week to await the determination of the appellate court after the hearing upon the writ of habeas corpus. With this latter proceeding in the superior court, we are, of course, not concerned here, as no judgment or order was entered therein.

From the foregoing recital of facts it appears that the superior court had jurisdiction to hear and determine the contempt proceedings, and that its order and judgment in that matter was, in all respects, within its powers. Rasmussen's failure to obey the lawful judgment of the court was a contempt of court. Subdivision 5, § 1209, Code Civ. Proc. The affidavit and statement filed in the contempt proceedings complied in all respects with the requirements of section 1211, Code of Civil Procedure. All proceedings were regular, and the showing made by Nellie Rasmussen established a prima facie case. In re McCarty, 154 Cal. 534, 98 Pac. 540. The judgment rendered was in accordance with the provisions of section 1219, Code of Civil Procedure. These matters are not seriously disputed by petitioner, but the contention is made that the evidence is insufficient to warrant the finding of the court that Rasmussen had the ability to perform the act required by the judgment in the divorce action.

[1, 2] The court, in the divorce action, found that the petitioner had the ability to pay his wife $5,000 out of the community property in his possession, and ordered him to make such payment. It is only necessary that the affidavit which constitutes the basis for judicial action in such a proceeding should show the making of the order for alimony and the fact of the refusal of the husband to make payment as so ordered. It is not necessary for the wife, on the hearing of the contempt proceedings for nonpayment of alimony, to prove anything more than the making of the order and disobedience of it by her husband in refusing to pay the amounts which the court found he had the ability to pay when it made the order. She makes a prima facie case at the hearing by producing the original order and by proof of the refusal of her husband to make payment according to its terms. In re McCarty, supra. All of these things were done in the present case.

The husband had the opportunity of presenting to the court any legitimate excuse he might have had for disobeying the order of the court. If his excuse was that since the making of the original order, he has become unable to pay the alimony required by it, it was incumbent upon him to prove that fact. He is in the best position to show why, for any reason, he has not obeyed the order, and it is his duty to do so as a matter of defense. In re McCarty, supra. This burden the petitioner in the present case did not sustain, and the trial court has found against him, in the judgment of contempt, upon this issue. Petitioner contends that this finding is not supported by the evidence. We think the finding was proper because of the failure of petitioner to produce satisfactory evidence upon this issue of which he had the burden of proof.

[3] As hereinbefore stated, there is pending before the superior court an application to purge petitioner of the contempt, which matter has been continued by said court and, doubtless, will be duly and regularly heard, and it may be that upon such hearing petitioner may be able to sustain the burden placed upon him to prove his inability to comply with the order of the court. Such an opportunity is afforded him under the provisions of section 1143, Code of Civil Procedure.

The judgment of the superior court is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

56 Cal. App. 348

GARGIA & MAGGINI CO. v. SANFILIPPO.
(Civ. 4112.)

(District Court of Appeal, First District, Division 2, California. Jan. 31, 1922.)

1. Sales 🔑181(11)—Evidence held to prove delivery by seller of fruit not grown as part of crop sold.

In action by buyer of prunes to be grown on certain ranch to recover amount paid on execution of contract, under provision entitling him to rescind contract if seller delivered fruit not grown on the ranch as a part of the crop thereof, evidence *held* to prove that seller delivered, as a part of the crop, prunes not grown on the ranch.

2. Appeal and error 🔑996—Appellate court bound by findings of trial court where conflicting inferences may be drawn from evidence.

Where conflicting inferences may be drawn from testimony, the appellate court is bound by findings of the trial court.

3. Appeal and error 🔑1071(1)—Variance between pleading and findings held harmless in view of judgment.

In buyer's action to recover payment made on execution of contract to purchase prunes grown on certain ranch and to recover damages for breach thereof, variance between allegations that defendant delivered "French prunes" not grown on such ranch, and finding that defendant delivered "dried prunes" not grown on the ranch, *held* harmless, where judgment awarded only nominal damages for breach thereof.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by the Gargia & Maggini Company, a corporation, against S. Sanfilippo. Judgment for plaintiff, and defendant appeals. Affirmed.

F. H. Bloomingdale and C. D. Cavallaro, both of San Jose, for appellant.

S. G. Tompkins and J. P. Sex, both of San Jose, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him in an action in which the plaintiff company sought to recover upon the following alleged facts: That on June 19, 1919, defendant entered into a written contract with the plaintiff by the terms of which the defendant was to sell to plaintiff all the prunes to be grown upon his ranch known as the McKagney place, near Campbell, Cal., during the year 1919. The prunes were of two varieties, known as French and sugar prunes. The price to be paid for the fruit was 15 cents a pound. At the time when the prunes were to be delivered, the market price at the place of delivery had dropped to 11 cents a pound for the French prunes. Thereupon the defendant secretly and fraudulently procured a large number of French prunes which were not grown upon the McKagney place and delivered the same to plaintiff as fruit grown upon said ranch, and plaintiff, without knowledge of the deception, paid for said fruit at the price provided by the contract. It is further alleged that at the time of delivery of the fruit the price of large sugar prunes had risen considerably, and defendant thereupon sold and delivered to buyers, other than the plaintiff, a large quantity of large sugar prunes grown on his ranch which should have been delivered to plaintiff under the contract between the parties. It is further alleged that at the time of the execution of the contract the plaintiff paid to defendant $3,000 under the terms of the contract and accepted defendant's note for said sum. Thereafter defendant offered to deliver to plaintiff, under its contract, an additional amount of French prunes which were not grown upon said ranch, and upon discovery of the fraud plaintiff rescinded the contract. The contract provided that, if the seller delivered or offered to deliver fruit not a part of said crop, the buyer should have the option to cancel the contract.

Plaintiff sought to recover the $3,000 advanced to defendant and also damages caused by its payment for French prunes not grown upon the ranch, at a price above the market price, and also damages for the loss suffered by it by reason of defendant's failure to deliver all the large sugar prunes grown on the ranch. The court made no finding on this latter matter and it is not involved on this appeal; otherwise, the trial court found, substantially, in accordance with the allegations of the complaint. It was specifically found that between the 1st day of September, 1919, and the 3d day of October, 1919, the defendant delivered to plaintiff, and offered to deliver to plaintiff under said contract, dried prunes which were not grown upon the McKagney ranch, and which were not a part of the crop mentioned in the contract, and that thereupon the plaintiff canceled the contract. It was found that, prior to the cancellation of said contract, the plaintiff had at all times fully performed its part of said contract. The court found that, by reason of the breach of said contract by the defendant, the plaintiff had been damaged in the nominal sum of one dollar and judgment was given for plaintiff for that sum, together with the $3,000 advanced to defendant under the contract, interest, and costs.

[1] Defendant appeals from the judgment, contending that the evidence is insufficient to support the findings. The contention is entirely without merit. The evidence abundantly supports the findings. The plaintiff produced witnesses who had hauled many loads of prunes to defendant's ranch from a

ranch situated at Berryessa and managed by defendant's brother. The two ranches were twelve miles apart. These prunes were delivered to plaintiff, according to the testimony of a man on defendant's ranch. Indeed, defendant does not deny that he delivered and offered to deliver these prunes to plaintiff, the only real question between the parties being whether or not these particular prunes were grown on the McKagney ranch or upon the Berryessa ranch. The trial court has evidently concluded that they were not grown on the McKagney ranch. There is much to be said in support of this conclusion. After plaintiff investigated the matter and after it had located the expressman who had hauled the prunes to defendant's ranch from the Berryessa ranch, plaintiff's representative charged defendant with stocking his ranch with prunes grown elsewhere, and asked from where they had been obtained. According to the testimony of two witnesses, defendant first stated that he had not stolen the prunes, but had bought them. Later, when informed that he was not privileged to buy prunes for delivery under his contract, and after what was evidently a warning from one speaking his native language, he denied that he had bought any prunes and insisted that they had all been grown on his ranch.

To meet this very persuasive testimony defendant and his brother testified that the prunes in question were actually grown on defendant's ranch, but explained that they had been hauled to the Berryessa ranch, a distance of twelve miles, to be dried there; that this hauling was done by an employee on the ranch of defendant; that after the prunes were dried they were hauled by the draymen who testified for plaintiff, back to the McKagney place for delivery to the plaintiff. This testimony failed to carry conviction to the mind of the trial judge, which is not surprising, in view of the additional fact that defendant's brother was under contract to deliver to O. A. Harlan Company all the prunes grown on the Berryessa ranch, estimated at 45 tons, at a price of 12 cents a pound. Upon this contract he delivered only about 15 tons and secured a release from said company. The trial court was at liberty to disbelieve the testimony of the defendant under the facts recited herein and also in view of other matters in the record which are strongly persuasive and which tend to support the view which the trial judge took of the evidence.

[2] It is unnecessary for us to discuss the evidence further, except to say that the record discloses, as in most cases, conflicting testimony, and there is much circumstantial evidence and evidence from which ultimate facts must be deduced or inferred. But where conflicting inferences may be drawn from testimony, this court is bound by the findings of the trial court as conclusively as in other cases of conflict. Rice v. Carey, 170 Cal. 748, 754, 151 Pac. 135. It is impossible to read the entire record in this case and to say that the findings of the trial court are not supported by the evidence.

[3] Another point for reversal is urged by appellant because of the fact that the complaint alleges an offer and delivery of "French prunes" not grown on the ranch, and the findings are that the defendant delivered and offered to deliver to plaintiff "dried prunes" which were not grown on the McKagney ranch and which were not a part of the crop mentioned in the contract. Appellant urges that this is a variance between the allegations of the complaint and the findings of the court which necessitates a reversal of this judgment. We are of a different opinion, under the special facts shown in this case, because if error was committed it could not possibly be prejudicial to defendant. Had there been an allowance of damages made by the trial court predicated upon the delivery to plaintiff of "French prunes" not grown on the defendant's ranch and based upon the market price of "French prunes," there might be cause of complaint on the part of defendant because of the general finding of the delivery of "dried prunes." But it is to be observed that only nominal damages were allowed to plaintiff for defendant's breach of contract. Defendant cannot complain, therefore, that damages were allowed for the wrongful delivery of "French prunes" upon a finding merely that "dried prunes" had been wrongfully delivered. The only recovery by the plaintiff was for money which it had prepaid to the defendant upon the contract with him. This money was recovered back upon the theory of the rescission of the contract by the plaintiff because of the wrongful acts of defendant. Under the provisions of the contract which was attached to the complaint, the plaintiff was entitled to cancel the contract if the defendant delivered or offered to deliver "fruit" not a part of said crop. The finding that the defendant delivered and offered to deliver "dried prunes" which were not grown on his ranch and were not a part of the crop purchased by plaintiff assuredly meets this provision of the contract, as it is obvious that, if the defendant delivered "dried prunes" not grown on the ranch, he delivered "fruit" not grown on the ranch. Under the findings and the record before the court it is beyond dispute, then, that the defendant breached his contract and that the plaintiff was entitled to cancel the same and to recover back the amount paid thereunder, in advance of the delivery of fruit. Under these circumstances, defendant is in no way prejudiced by the fact that the finding on this point is somewhat broader than the allegation of the complaint. The complaint

could have been amended to conform to the proof had the matter been called to the attention of the plaintiff or the court.

We find no error in the record which would warrant a reversal of this judgment, and the same is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(56 Cal. App. 325)

DALEY v. IRWIN. (Civ. 4159.)

(District Court of Appeal, First District, Division 1, California. Jan. 27, 1922. Hearing Denied by Supreme Court March 27, 1922.)

1. Frauds, statute of 🔑84—Contract for barley over $200 in value, to be delivered and paid for as needed, held to be within statute.

In view of Code Civ. Proc. § 1973, subd. 4 (Civ. Code, § 1624, subd. 4, and section 1739), an oral agreement to buy barley of the value of over $200, to be delivered as plaintiff should need it, to be paid for at the market price when he got it, was unenforceable; none of the barley being delivered at the time in pursuance thereof.

2. Principal and agent 🔑177(4)—Principal charged with knowledge of agent of defects in seed.

In an action for damages for breach of warranty in supplying defective seed, where plaintiff contracted to buy recleaned barley seed, and left the supervision of receiving and planting the seed to his foreman, plaintiff is charged with the knowledge of the foreman that the seed supplied was not recleaned.

3. Sales 🔑442(11)—Instructions as to measure of damages for breach of warranty of seeds held error.

In an action for breach of warranty in supplying defective seed, instructions permitting a jury to assess damages based on the character of the crop resulting from the sowing of the seed were erroneous, since the measure of damages should be confined to the excess, if any, of the value which the seed would have had if it had complied with the warranty over its actual value.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by George R. Daley against I. Isaac Irwin, doing business under the fictitious name of Irwin & Co. From judgment for plaintiff, defendant appeals. Reversed.

J. C. Hizar and Wm. G. Mirow, both of San Diego, for appellant.

Charles E. Crouch, of San Diego, for respondent.

KERRIGAN, J. Action to recover damages for breach of warranty in the sale of barley seed. Plaintiff recovered judgment for the sum of $6,723, which was based upon the difference in value of the crop grown from the seed, and that which would have been grown had the warranty been complied with. The defendant appeals.

[1] The facts of the case, either as claimed by the respondent or as established by the uncontradicted evidence, so far as they are necessary to be stated for the purpose of the decision, are as follows: The plaintiff, intending to plant to barley for the purpose of raising a crop of hay, about 900 acres of land situated about 18 miles from the city of San Diego, called upon the defendant at his place of business in that city. He there saw the defendant's manager, and stated to him that he desired to purchase 1,000 sacks of recleaned barley for seed. He was shown barley of this character, and told that it would cost $3 per ton more than barley of ordinary quality. He was informed that the price would be that prevailing at the time the barley should be called for, and that if he desired any particular lot he would have to have it set aside for him. This the plaintiff declined to do, but stated that the price was satisfactory; that he would send for the barley when needed, and that every time he came into town he would pay for whatever had been supplied in the meantime, which arrangement the defendant stated would be acceptable. Plaintiff then left the establishment of the defendant, having given no order in writing, having paid no part of the price, and having received or accepted no part of the barley, so that it is clear that, under the statute of frauds, the value of 1,000 sacks of barley being admittedly over $200, at this moment no valid or enforceable contract had been entered into. Code Civ. Proc. § 1973, subd. 4; Civ. Code, § 1624, subd. 4, and section 1739.

[2] Shortly thereafter the plaintiff, having business in the Imperial valley, went to that region, but before doing so instructed one Valeriano Ramos who had been working for him for seven years, and who acted as foreman over the other employees of the ranch, to plow and plant to barley the said 900 acres, and to procure from the defendant from time to time as he needed it recleaned barley for that purpose. In carrying out these instructions Ramos ordered various lots of recleaned barley from the defendant, sending the plaintiff's teams therefor. Each of said lots was separately billed to the plaintiff at the prevailing (and varying) market price. The barley supplied, although claimed by the defendant to be recleaned, was full of weed seeds, radish seeds, chaff, and trash, which was apparent upon the most casual inspection, notwithstanding which Ramos, with the aid of his workmen, and in spite of their repeated complaints that the operation of the seeders was delayed by the large amount of foreign matter in the seed, proceeded to sow this barley, and continued to do so until the

return of the plaintiff to the ranch, who immediately ordered its planting to be discontinued, and procured from other sources the remaining seed necessary to complete the sowing of the ranch.

It is conceded by the respondent (as indeed it must be) that the plaintiff could not enhance his damages arising from the breach of warranty as to the quality of the seed by sowing it, with knowledge of its true character, and charging to the defendant the difference in value between the crop realized and that which would in all probability have been realized had the seed been of the quality sold, but is confined to the difference in value between the seed as warranted and that actually delivered; but, in support of the judgment, it is the contention of the respondent that he was entitled to rely upon the warranty arising from a sale of seed of specified quality or variety, that he had no personal knowledge of the inferior character of the seed actually supplied until after the bulk of it had been sown upon his land, and that he is not chargeable with the knowledge of the true character of the seed possessed by his agent, Ramos, since, according to the plaintiff, Ramos was a mere menial or farm hand, without authority to represent his employer in the acceptance or rejection of the barley ordered from the defendant. As we have already said, there is no conflict in the evidence of the authority of Ramos, in spite of his employer's belated attempt to belittle it.

Under the most favorable view of the case as regards the plaintiff, the contract alleged in the complaint only came into existence when the first delivery of the barley was made, the demand for and receipt of which were made by or under the direction of Ramos. At this time the plaintiff had departed from his ranch, and had instructed Ramos to demand from the defendant such quantities of recleaned barley as might be required to sow the 900 acres. On the other hand, if (as seems to us more likely) the transaction with the defendant consisted of a series of purchases, and not of one under a single contract, these purchases were made through Ramos upon his instructions from the plaintiff to procure the necessary quantities of recleaned barley. In either event there was imposed upon Ramos the duty of taking an essential step in the consummation of whatever contract or contracts were entered into between the plaintiff and the defendant. It seems idle to pretend, as seems to be the claim of the respondent, that a person can employ an agent to do specific things, and, while receiving the benefits of his agency, attempt to escape its burdens by denying that the agent possessed the very authority which it was essential he should have in order properly to perform his duties.

A similar contention to that now advanced by the respondent was made by the defendant in the case of Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645. There the defendant was the owner of horses which it rented out for teaming purposes. It maintained in convenient parts of the city stables where the horses were kept. It had a foreman or overseer of its stables and horses, who frequently made the rounds of the stables, but was not permanently at any one of them. Each stable was in charge of one or more stablemen—"stable bucks," they are called. Touching the powers and duties of these stable bucks, the uncontradicted evidence in the case showed that they were confined to feeding the animals, and at times to hooking them up. One of these horses was rented out, and, being hitched to a wagon, started while the driver was in the act of mounting his seat, with the result that he was thrown under the wheels and injured. Evidence was admitted touching the dangerous character of the horse. This evidence consisted of statements made by other drivers of the horse to one or more of the stable bucks to the effect that the horse was dangerous, and would "kill somebody some day," and was restive and high-spirited, and not fitted for the work. The injured driver recovered judgment against the defendant, and one of the contentions made by the latter upon appeal was that these statements as to the dangerous character of the horse were not made to any officer or agent of the company under such circumstances as to carry actual or imputed knowledge to the defendant itself, and the limited duties of the stable bucks in the matter of the horses were pointed out. In disposing of this contention the Supreme Court said:

> "The knowledge of a servant to whom is intrusted the care of the animal is knowledge of the master sufficient to render the latter liable. Bearing in mind that defendant kept in charge of its stables no responsible person and no person at all other than the stable bucks, * * * it results that there was no representative of the defendant with whom the drivers could lodge their complaints * * * excepting the stable bucks themselves. It would be unreasonable to say that these drivers must go in pursuit of some representative of the defendant in higher authority for this purpose. Thus it comes about that under the situation created by the defendant, the stable bucks were placed sufficiently in charge of the animals to warrant the lodging of complaints with them as representatives of their employer, and knowledge of the complaints thus lodged is imputable to that employer."

[3] It seems clear to us that in the case at bar the plaintiff, as a matter of law, was charged with the knowledge acquired by Ramos as to the character of the seed supplied by the defendant, and that the instructions of the court to the jury on the question of damages should have excluded all loss arising from the sowing of the barley, and been confined to what the court in its charge

termed "general damages," i. e., the excess if any, of value which the barley would have had if it had complied with the warranty over its actual value. This they did not do, but permitted the jury to find damages based upon the character of the crop resulting from the sowing of the seed.

The judgment is therefore reversed, and the cause remanded for a new trial.

We concur: TYLER, P. J.; RICHARDS, J.

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56 Cal. App. 353

BIXLER v. HICKLING. (Civ. 4097.)

(District Court of Appeal, First District, Division 2, California. Jan. 31, 1922.)

Judgment 🔑199(3)—Where presumption does not exist or is rebutted, court may render judgment notwithstanding a verdict based on presumption.

In an action to set aside a deed where the plaintiff relied solely upon the presumption growing out of the marriage relation and the defendant abunaantly rebutted the presumption, *held* that, if the presumption applied, it merely created a conflict in the evidence, and, if not, the entire proof was with the defendant, and in either event it was not error for the court to reject a verdict for the plaintiff and render judgment for defendant.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by L. B. Bixler against Cecil Vivian Hickling. From a judgment for defendant, plaintiff appeals. Affirmed.

Short, Lindsay & Woolley, of Fresno, for appellant.

William T. Satterwhite, of Oakland, for respondent.

NOURSE, J. Plaintiff sued to set aside a deed executed by his mother to defendant, who was the husband of the grantor by a second marriage. The deed was executed about one month after the marriage of the grantor and defendant and was put in escrow under her instructions and delivered to defendant at the time of her death about two years later. The cause was tried by a special jury which rendered a verdict that the deed had been executed through the undue influence of the defendant. The trial court rejected the verdict and gave judgment for the defendant.

The only point raised on the appeal is that the trial court erred in rejecting the appellant's theory of the case as to the application of the presumption of undue influence growing out of the marriage relation. The appellant relied solely upon that presumption, while the respondent offered abundant evidence to prove that no undue influence had been used. Thus, if the presumption applies, it merely creates a conflict in the evidence; if it does not apply, the entire proof is on the side of the respondent. In either event the trial court might reject the verdict.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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56 Cal. App. 112

KENDALL v. BUNNELL. (Civ. 3556.)

(District Court of Appeal, Second District, Division 2, California. Jan. 11, 1922. Hearing Denied by Supreme Court March 13, 1922.)

1. Public lands 🔑96—Department cannot place surveyed lands in category of unsurveyed.

Unless an original survey of public lands was abrogated by an Act of Congress, such as Act July 1, 1902, providing for resurvey of the lands in the Imperial Valley, a declaration by the land department placing the lands in the category of unsurveyed lands is ineffective, for that department, though intrusted with the administration of the public land system, and given wide discretionary authority, cannot override the express will of Congress.

2. Public lands 🔑24—Do not become surveyed until approval of survey.

There is no official survey of government lands until the plat of the survey has been approved by the Surveyor General.

3. Public lands 🔑128—Plaintiff must show superior title to have patentee declared trustee for him.

In an action to have a patentee of public lands declared a trustee for plaintiff, plaintiff can succeed only on the strength of his own title, and not on the weakness of defendant's title, so that defendant can rely on any defect in plaintiff's title even though it was not considered by the officials of the land office.

4. Public lands 🔑32, 101—Rejected application for entry does not initiate any right.

An application for entry of public lands which is rejected by the land officers does not initiate any inchoate right to the lands, so that a conflicting entry made pending an appeal from the rejection of an entry was properly suspended only, and not rejected.

5. Public lands 🔑104—Withdrawal of appeal from rejection of entry by local land officers makes that decision final.

Where an applicant for entry of public lands appealed from a decision of the local land officers rejecting his entry, a subsequent withdrawal by him of his appeal made the land office decision final, so as to preclude the initiation of any rights under that application.

6. Public lands 🔑104—Conflicting entry pending appeal from rejected entry is not void.

Though an application made for entry of lands which are covered by a record entry is void, an entry made pending an appeal from a decision of the local land officers rejecting an entry, and which was suspended until the determination of the appeal, was not void, but became effective from its date upon withdrawal of the pending appeal.

7. Public lands 🔑103(1)—Rejected applicant has no standing to question allowance of subsequent application.

An applicant for entry of public lands, whose application was rejected by a decision which became final on the withdrawal of his appeal therefrom, has no standing to question the validity of a subsequent entry by another covering the same land.

8. Public lands 🔑37—Description prior to approval of resurvey refers only to original survey.

The description of lands in an application for desert entry in the Imperial Valley made before the resurvey was approved by the Surveyor General could only be construed to refer to the lines established by the original survey.

9. Public lands 🔑37—Original application for entry held not to refer to lands in controversy.

An original application for entry of desert lands in the Imperial Valley, made before the resurvey was approved, which described the lands by subdivisions covering the land in controversy under the resurvey as subsequently approved, but not under the original survey, does not cover the lands in controversy.

10. Public lands 🔑32—Application conflicting with existing entries initiates no rights.

An application for entry, which was rejected by the land office officials because it conflicted with an existing entry of the same lands, initiates no rights to the lands, since the existing entry had segregated them from the public domain.

11. Public lands 🔑97—Department may make regulations not inconsistent with statute.

The land department may make any regulation not inconsistent with the statute which is suitable to the execution of the land system with which Congress has intrusted it.

12. Public lands 🔑37—Application violating rule requiring description by original survey held void.

Where a rule of the land department required applications for entry of land in the Imperial Valley prior to the resurvey of the lands to describe the lands according to the original survey, an application made before the approval of the resurvey, but which described the lands desired in accordance with that survey as then made on the ground, is invalid.

13. Public lands 🔑98—Second application for entry held not continuation of original application.

Where an application for entry of public lands had been rejected for conflict with existing entries, and applicant had appealed, a second application, made on withdrawing the appeal, and after a resurvey of the lands, affected different land, the subdivisions in resurvey being different; hence the second application cannot be considered as a mere continuation of the first but is a new and independent proceeding.

14. Public lands 🔑37—"Reclaiming" desert land means conducting water thereto.

Within Desert Land Act March 3, 1877 (U. S. Comp. St. §§ 4674–4676), as amended by Act March 3, 1891 (U. S. Comp. St. §§ 4677, 4678, 4679, 4680), authorizing the patent of desert lands to one reclaiming them by conducting water upon the same, and Act March 28, 1908 (U. S. Comp. St. §§ 4681–4683), prohibiting desert entries on unsurveyed lands but giving to those who had commenced reclamation before the survey a preference right to enter it, necessary work of reclaiming is only that preparatory to conducting the water upon the land.

15. Public lands 🔑40—Relinquishment of desert entry does not transfer to purchaser benefit of reclamation undertaking.

Even if the preference right to enter land under the Desert Land Act March 3, 1877 (U. S. Comp. St. §§ 4674–4676), as amended by Act March 28, 1908 (U. S. Comp. St. §§ 4681-4683), after survey, according to an entryman by work of reclaiming prior thereto, is a right which can be transferred, it is not transferred to the purchaser of a relinquishment of the entry, since such relinquishment is in no sense a transfer to the purchaser, but merely a release to the government.

16. Public lands 🔑37—Placing posts and notice on desert land is not "commencement of reclamation."

The placing of posts at the corners of an intended desert land entry, with notices thereon stating an intention to reclaim, is not the commencement of the work of reclamation within Act March 28, 1908 (U. S. Comp. St. §§ 4681–4683), giving a preference right to entry to one who had commenced the work of reclaiming before the lands were surveyed.

17. Public lands 🔑37—Work done on portion of tract then segregated does not give preference right.

The commencement of work of reclaiming desert land done upon a portion of the tract the applicant desired to enter, which was then covered by an existing entry, so as to be segregated from the public domain, does not give the applicant a preference right to enter the land after the approval of the survey under Act March 28, 1908 (U. S. Comp. St. §§ 4681–4683), though the conflicting entry was thereafter canceled by his contest.

18. Public lands 🔑37—Work done after survey gives no preference right.

Under Act March 28, 1908 (U. S. Comp. St. §§ 4681–4683), prohibiting desert entries on unsurveyed lands, but giving any person who has, prior to survey, taken possession of a tract of unsurveyed land, and commenced reclamation thereof, a preference right to enter such lands after the survey, work done by an applicant for entry after the approval of the survey gives no preference right.

19. Public lands ⚷37—Knowledge of possession and claim by another held not to estop acquisition of title.

The fact that an applicant for a desert land entry knew when he made his application that another was in possession of the land, intending to reclaim it and secure title thereto, does not estop the applicant from making a valid entry where the application for entry by the party in possession had been rejected, and the appeal therefrom was subsequently dismissed, and the work done upon the land was not such as to give the party in possession a preference right to enter.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Ramer O. Kendall against Schuyler U. Bunnell, to have a trust declared in plaintiff's favor on land patented to the defendant. Judgment for plaintiff, and defendant appeals. Reversed.

A. Haines and Haines & Haines, all of San Diego, and Conkling & Brown, of El Centro, for appellant.

J. S. Larew, of El Centro, for respondent.

FINLAYSON, P. J. On June 1, 1915, a patent was issued to defendant for the land in controversy—a parcel containing almost 160 acres. According to the plat of the resurvey of certain lands in the Imperial Valley filed in the Los Angeles land office February 23, 1909, the land in controversy is the S. E. ¼ of the N. W. ¼ and the N. E. ¼ of the S. W. ¼ and lots 8 and 12 of section 7, township 16 south, range 16 east, San Bernardino base and meridian. Claiming that the patent was mistakenly issued to defendant by reason of certain alleged erroneous legal conclusions on the part of the land department, plaintiff brought this action to charge defendant as trustee of the legal title for his benefit. Judgment passed for plaintiff, and defendant appeals.

The patent was issued under, and each party bases his claim to the land upon, what is known as the "Desert Land Act," approved March 3, 1877 (19 Stats. at Large, p. 377 [U. S. Comp. St. §§ 4674–4676]), as amended by the acts of March 3, 1891 (26 Stats. at Large, p. 1096 [U. S. Comp. St. §§ 4677, 4678, 4679, 4680]), and March 28, 1908 (35 Stats. at Large, p. 52 [U. S. Comp. St. §§ 4681–4683]). The original act of 1877, as amended by the act of 1891, provides that a qualified person, on payment of 25 cents per acre, may file with the register and receiver of the local land office a declaration under oath—

> "that he intends to reclaim a tract of desert land not exceeding [320 acres], by conducting water upon the same within the period of three years thereafter. * * * Said declaration shall describe particularly said [320 acres] if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding [320 acres] to any one person, a patent for the same shall be issued to him. Provided, that no person shall be permitted to enter more than one tract of land and not to exceed [320 acres] which shall be in compact form."

It will be noticed that, according to the provisions of the original act of 1877, as amended by the act of 1891, it was permissible to enter unsurveyed as well as surveyed land, the act providing that, if the land be surveyed, the applicant's declaration shall "particularly" describe it—meaning, we have no doubt, that the declaration shall describe the land according to the lines of the government survey—and, if the land be unsurveyed, the declaration "shall describe the same as nearly as possible without survey." By the amendatory act of March 28, 1908 (35 Stats. at Large, p. 52 [section 4681]), it is provided that, from and after the passage of that act—

> "the right to make entry of desert lands * * * shall be restricted to surveyed public lands, * * * and no such entries of unsurveyed lands shall be allowed or made of record."

This act of 1908 gives a preference right to bona fide settlers who have reclaimed or commenced the work of reclaiming unsurveyed desert land prior to the survey thereof. The provision for this preference right is as follows:

> "Any individual qualified to make entry of desert lands under said acts [the original act of 1877 and the amendatory act of 1891] who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry on such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

The land in controversy, located in what is known as the Imperial Valley, is a part of a large tract of desert land which, until comparatively recent times, was a barren waste that had originally been surveyed under the authority of the United States government in 1855. That survey was approved in 1856, and the approved plat thereof filed in the Department of the Interior and in the local land office in 1889. It is a matter of common knowledge that the lands embraced in this original survey of 1856, or the greater part thereof, remained unoccupied for many years. When, however, it was discovered that these apparently barren lands could be rendered exceedingly productive by means of irrigation, an extensive settlement of the valley began. By that time the monuments referred to in the field notes of the 1856 survey had been almost entirely obliterated, and it was difficult, and, in fact, in many cases impossible, to trace upon the ground the boundaries of the government subdivisions as established by that survey. These conditions resulted in the making of several private surveys in an effort to define, in terms of the original government survey, claims to public lands. Many applicants to make entry of these lands under the Desert Land Law, erroneously assuming that the lines of these private surveys coincided with the lost lines of the 1856 government survey, made unavailing efforts to enter public lands under descriptions obtained from the private surveys. In the case of Herman H. Peterson et al., 40 Land Dec. 562, there may be found a graphic description of these deplorable conditions.

Moved, no doubt, by these unfortunate embarrassments and chaotic conditions in the Imerial Valley, Congress, in 1902, passed an act entitled:

> "An act providing for the resurvey of certain townships in San Diego county, California." 32 Stat. 728.

This was prior to the creation of Imperial county, and at a time when the lands were in San Diego county. By this act, which was approved July 1, 1902, it was enacted:

> "That the secretary of the interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego county, in the state of California, embraced in and consisting of the tier of townships thirteen, fourteen, fifteen, and sixteen south, of ranges eleven, twelve, thirteen, fourteen, fifteen, and sixteen east, and the fractional township seventeen south, of ranges fifteen and sixteen east, all of San Bernardino base and meridian * * *; provided, that nothing herein contained shall be so construed as to impair the present bona fide claim of any actual occupant of any of said lands to the lands so occupied."

Pursuant to this act of July 1, 1902, resurveys of the townships described were ordered, among others township 16 south, range 16 east—the township wherein is located the land in controversy. The resurvey of the township was made by United States Surveyor Henderson in 1904, the plat thereof was approved by the United States Surveyor General on November 4, 1908, and, as we have stated, was filed in the land office at Los Angeles on February 23, 1909.

The United States Circuit Court of Appeals, in the case of Cox v. Hart (C. C. A.; decided January 3, 1921) 270 Fed. 51, held that this act of July 1, 1902, was a legislative declaration that, until the resurvey should be made as authority thereby, the lands were to be regarded as unsurveyed lands, the court saying:

> "We are of the opinion that the court below properly held that at the time when the claims of the parties hereto were initiated the land was unsurveyed land. * * * The act of 1902 authorizing a resurvey was a legislative declaration that the lands were to be regarded as unsurveyed lands, that a new survey was to be substituted for the old, and that by the new survey the future disposition of the lands was to be regulated."

That case, we are informed, has been taken to the United States Supreme Court, where it is now pending. Until the question shall have been decided by that tribunal, it cannot confidently be asserted that the act whereby Congress authorized such resurvey was or was not a legislative declaration that these lands should be regarded as unsurveyed lands until the new survey should be substituted for the old. It is earnestly contended by the respondent that the law is as declared by the United States Circuit Court of Appeals, and that, from the date of the passage of the act of July 1, 1902, until the plat of the resurvey was duly approved, the land in controversy had the status of unsurveyed land for all purposes, and that for that reason he possessed, for 90 days after the filing of the approved plat of the resurvey, the preference right given by the act of March 28, 1908. Just as earnestly is it contended by appellant that the land has been "surveyed" land at all times since the plat of the original survey of 1856 was approved by the authorized Department officers. It must be conceded that the argument advanced by appellant to sustain this contention possesses much cogency and persuasive force. However, as the sequel will show, the case can be decided without undertaking to pass upon this interesting question; and we therefore shall assume, for the purpose of this decision only, that from the date of the passage of the act authorizing the resurvey until the approval of the plat of the resurvey these lands had the status of unsurveyed lands, as held by the Circuit Court of Appeals in the Cox Case.

[1] Unless the original survey of 1856 was abrogated by some act of Congress, such, for instance, as this act of July 1, 1902, so that, by congressional enactment, the lands resumed their original status of unsurveyed lands, no declaration to that effect by the officers of the Land Department could operate to place them in the category of unsurveyed lands; for, though the administration of the public land system of the United States is intrusted to the Land Department, and the officers thereof, in the discharge of their official duties involving judgment or

discretion, possess a wide latitude of discretionary authority, the department, nevertheless, cannot override the express will of Congress, and cannot convey or refuse to convey public lands in disregard or in defiance of congressional enactment. Burfenning v. Chicago, etc., R. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175.

On March 30, 1906, which was before either party to this action had made any attempt to enter the lands in controversy, the Commissioner of the General Land Office directed the register and receiver of the local land office "to suspend entries" in the townships the resurvey of which was directed by the act of July 1, 1902. On May 24, 1907, this order of suspension was modified by the General Land Office so as "to permit desert land entry thereof the same as though the lands were unsurveyed." It was further ordered by the Commissioner of the General Land Office in these instructions of May 24, 1907, that—

> "All applications for entries filed subsequent to March 31, 1906, must describe the land with reference to the established lines of the original survey, to be adjusted by legal subdivisions to the lines of the resurvey when established; and after resurvey, the entryman will be required to make proof in the form of an affidavit, corroborated, showing the legal subdivisions of this claim."

That is, under the terms of the Commissioner's instructions of May 24, 1907, every desert land entry was to be initiated in precisely the same manner as before the passage of the Resurvey Act of 1902, i. e., by an application describing the land by reference to the lines of the original survey, and, after being so initiated, the entry was to take the same course that it would have taken prior to the Resurvey Act of 1902, down to and including the final proof of reclamation, when, instead of issuing a patent describing the land in terms of the 1856 survey, and as described by the entryman in his application to enter, it was intended that the Land Department at Washington, in order to adapt the final allowance of the entry and the description in the patent to the resurvey when completed, should withhold the issuance of the patent until the resurvey should be made and the plat thereof approved and filed, and then, when that was done, the Department would adjust the description in the entry to the lines of the resurvey and direct the issuance of a final receipt and patent describing the land according to such readjustment. Under date of August 8, 1907, the General Land Office, in a letter addressed to the register and receiver of the local land office, advised the latter that—

> "These lands occupy the status of unsurveyed lands, for which reason you have been authorized to accept desert land entries therefor."

This was prior to the passage of the act of March 28, 1908, whereby Congress declared that—

> "No desert land entries of unsurveyed lands shall be allowed or made of record."

On March 20, 1909, defendant filed his desert land application for the land in controversy, describing it according to the resurvey, the approved plat whereof had been duly filed February 23, 1909. This application was allowed by the local land officers on May 31, 1910. On May 20, 1909, plaintiff filed a desert land application whereby he sought to make entry of the land in controversy, together with an adjoining parcel of approximately 160 acres designated on the plat of the resurvey as "Tract 87." This application, in so far as it related to the lands in controversy, was rejected by the local land officers for conflict with the application filed by defendant on the 20th day of March preceding.

If the foregoing statement narrated all the facts, there would be no question as to defendant's priority and his right to a patent. But, by reason of facts that we now are about to state, plaintiff claims that he has the prior right, and that therefore a patent should have been issued to him upon the completion of the acts required of him by the desert land law.

The facts which are determinative of the respective claims of the parties are substantially as follows: About March 1, 1908, plaintiff first examined the land in controversy, and found it uncultivated and unoccupied desert land claimed by one George T. Hammond, who, it seems, had plowed furrows around it and had cleared a small quantity of brush from the northeast corner. Hammond, whose application to enter the land had been rejected by the local land officers, and who had taken an appeal from this decision of the register and receiver, executed and delivered to plaintiff, on March 3, 1908, in consideration of the payment of the sum of $500, a relinquishment, which, plaintiff testified, was made out on the regular form of relinquishment furnished by the land office. On March 4, 1908, plaintiff set redwood posts at the corners of the land in controversy, and posted thereon notices that he intended to reclaim it from its desert state.

On March 8, 1908, plaintiff filed his first desert land application—application No. 01487—wherein he described as follows the land of which he desired to make entry:

> "The land which I intend to reclaim is desert land and is described as follows: S. E. ¼ of N. W. ¼, N. E. ¼ of S. W. ¼, N. W. ¼ of S. E. ¼ and S. ½ of N. E. ¼ and N. E. ¼ of N. E. ¼, Sec. 7, and W. ½ of N. W. ¼, section 8, township 16 south, range 16 east, San Bernardino meridian, containing 320 acres, situated in Imperial county, state of California."

[2] At the time when plaintiff filed this application No. 01487, the plat of the resurvey had not been approved. At that time, therefore, there was no resurvey. Until the plat of a survey has been approved by the United States Surveyor General, there is no official survey, the date of the Department's approval of the plat being treated as the date of the survey. Medley v. Robertson, 55 Cal. 396; Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620; United States v. Curtner (C. C.) 38 Fed. 1.

> "There is, in fact, no such tract of land as that described in the petition until it has been located within the congressional township, by an actual survey and establishment of the lines, under the authority of the United States, *and the survey has been approved by the proper United States Surveyor General.* A person may approximate to the lines that may be run—may surmise the precise lines—but the tract has no separate legal identity until the survey is made *and approved* under the authority of Congress." Middleton v. Low, 30 Cal. 605. (Italics ours.)

There is nothing on the face of plaintiff's application No. 01487, filed by him March 8, 1908, to indicate that the description therein was intended to refer to any survey other than an official government survey. The only official survey that theretofore had been made was the original survey of 1856. In the absence of anything in the application itself to indicate a contrary intention, it should be assumed, as evidently it was by the local land officers, that the application was made in compliance with the instruction theretofore promulgated by the Commissioner of the General Land Office that—

> "All applications for entries filed subsequent to March 31, 1906, must describe the land with reference to the established lines of the original survey."
>
> "When the resurvey of the Imperial Valley was undertaken by the government, desert land entries were permitted therein as for unsurveyed land, but applicants were required to describe the tracts desired by them according to the original survey." Stephenson v. Pashgian, 42 Land Dec. 115.

It is manifest that the register and receiver of the local land office construed plaintiff's application of March 8, 1908, as describing the land according to the original survey of 1856—the only construction of which it was properly susceptible in view of the fact that at that time the original survey of 1856 was the only official survey that ever had existed. So, construing plaintiff's application No. 01487, the local land officers rejected it on March 10, 1908, upon the ground that the land office records showed that each subdivision referred to in plaintiff's application was covered by a prior uncanceled desert land entry with which plaintiff's application conflicted. On the trial in the court below, the records of the local land office were introduced in evidence. They showed that such prior desert land entries had been made and that the same were uncanceled at the date of plaintiff's application No. 01487. In rejecting plaintiff's application, the register and receiver also notified plaintiff that—

> "The relinquishment of George T. Hammond to lands described by metes and bounds does not clear the record in any respect, as such applications cannot be accepted, under instructions from the General Land Office, and therefore have no standing on our records."

On April 9, 1908, plaintiff appealed to the Commissioner of the General Land Office from the decision of the local land officers rejecting his application 01487. In this appeal plaintiff, after referring to the fact that the work of sectionizing the townships in the field, under the congressional authority for the resurvey, had been in progress for several months, and was then completed, says:

> "The land applied for by appellant is properly described by the new official survey which shortly will be established as the official correct government survey of the lands in this district."

So far as is disclosed by anything of record in the Land Department, this is the first intimation that plaintiff's application was intended by him to describe the lands applied for according to the resurvey, which, though then in progress, was not completed, for the reason that at that time no plat of the resurvey had been approved by the United States Surveyor General. If the description in plaintiff's application were read as though the township and section lines therein mentioned were the same as the correspondingly numbered township and section lines of the resurvey, the plat whereof was subsequently approved and filed in the local land office, then plaintiff's application of March 8, 1908, would include the land in controversy and also the adjoining tract of approximately 160 acres designated on the plat of the resurvey as "Tract 87."

At the time when plaintiff filed his application of March 8, 1908, the 160 acres comprising the land known under the resurvey as tract 87 were covered by a prior desert land entry made by one Mary E. Gray. This tract of land, lying to the east of and adjoining the land in controversy, was described in Mary E. Gray's entry as the northwest quarter of section 12. It seems that, in her application to make entry of this adjoining tract, Mary E. Gray described the land, or at least attempted to describe it, according to the established lines of the original survey, as required by the instructions issued by the Commissioner on May 24, 1907. On June 16, 1908, plaintiff filed in the local land office a contest of the entry that Mary E. Gray had made of this tract of 160 acres adjoining the land in controversy. This contest was made by plaintiff upon the ground that no reclamation work had been done by Mrs. Gray or her heirs during the first year succeeding her entry. Plaintiff made the contest for the purpose of clearing the record, so that he could file on the entire 320 acres, i. e., the land in controversy, containing approximately 160 acres, and the 160 acres comprising what is now known as tract 87. As the result of this contest, the Gray entry was canceled April 30, 1909. In the court below plaintiff testified, in substance and effect, that he knew, when he filed his desert land application 01487 on March 8, 1908, that approximately one-half of the land that he applied for, namely, the 160 acres contained in what is now described as tract 87 on the plat of the resurvey, was covered by Mrs. Gray's prior entry; that he expected that, as to this part of the entire 320 acres, his application would be rejected, and that in that event he would take an appeal, intending during the pendency of the appeal to contest Mary E. Gray's prior entry, and, if successful in that contest, to eventually have his application allowed for the two tracts, viz., the land in controversy and the 160 acres now known as tract 87.

As already stated, the plat of the resurvey was approved by the United States Surveyor General on November 4, 1908, and was filed in the local land office February 23, 1909. Thereafter, to wit, on March 20, 1909, and during the pendency of the appeal to the Commissioner of the General Land Office from the decision of the local land officers rejecting plaintiff's application of March 8, 1908, defendant, as we have stated, filed his application to make a desert land entry of the lands in controversy. All action upon defendant's application was suspended until after plaintiff had withdrawn his appeal from the rejection of his application of March 8, 1908.

It was on March 3, 1909, that defendant first inspected the land in controversy. At that time he saw plaintiff's notices on the northeast corner of the land. He also, on March 16, 1909, saw plaintiff's employee doing some leveling work with a two-horse team and a Fresno scraper. So that when, on March 20, 1909, he made application to enter the land in controversy, defendant knew that plaintiff was making some claim thereto.

Plaintiff's contest of the Gray entry having been decided in his favor on April 30, 1909, and the land covered by that prior entry—the land designated on the resurvey plat as tract 87—being then clear on the record, plaintiff, on May 20, 1909, filed a new application—application No. 06233—whereby he sought to make a desert land entry covering the lands in controversy and tract 87. In this application of May 20, 1909, plaintiff asks a dismissal of his appeal from the decision of the local land officers rejecting his prior application of March 8, 1908. Plaintiff's second application contains the following:

> "I made an application for entry on this same land March 9, 1908 [should be March 8, 1908], which was rejected on account of survey, from which ruling I appealed. I now desire said appeal dismissed and said application of March 9 [sic], 1908, withdrawn."

Plaintiff accompanied his new application with a document, duly signed and filed, which, after referring to his attempted entry of March 8, 1908, and his appeal from the decision of the local land officers rejecting his first application, concludes by stating that he—

> "now desires to have said appeal dismissed, and said application of March 9th [*sic*], 1908, withdrawn, *and does hereby withdraw said application, and respectfully asks that the said appeal be dismissed.*" (Italics ours.)

During the course of the trial in the court below defendant put in evidence Serial Register No. 1 of the local land office at Los Angeles, showing entries under the number 01487—the number of plaintiff's first application, the application that was made by him on March 8, 1908. One of these entries reads:

> "1909. May 20. Application and appeal withdrawn."

The register and receiver of the local land office evidently considered that plaintiff's new application, 06233, filed May 20, 1909, and its accompanying document, constituted a voluntary dismissal of the appeal that he had taken from the rejection of his original application of March 8, 1908. For, on May 31, 1910, defendant's application, action whereon had been suspended pending plaintiff's appeal, was allowed by the local land office.

On October 12, 1910, the Commissioner of the General Land Office at Washington wrote to the register and receiver of the local land office at Los Angeles, advising the latter that on May 20, 1909, plaintiff had filed in the local land office—

> "A statement signed by the applicant, dated May 18, 1909, wherein he requests 'to have said appeal dismissed and said application of March 9 [8], 1908, withdrawn.' In view of this statement of the claimant, which is now on file in this office, the application is hereby finally rejected, the appeal dismissed, and the case closed. You will make proper notations on your records."

Upon the foregoing state of facts a hearing before the register and receiver of the local land office was ordered by the Commissioner of the General Land Office to determine the rights of the respective claimants—the litigants in the present action. A trial was had before the register and receiver, resulting in a decision by those officers recommending that defendant's entry be canceled and plaintiff's application to enter be allowed. On an appeal by defendant to the Commissioner of the General Land Office, the decision of the local land officers was affirmed. Whereupon defendant took an appeal to the Secretary of the Interior. For the reasons set forth in a written opinion handed down by the First Assistant Secretary, the decision of the Commissioner affirming that of the local land officers was reversed, and it was adjudged that defendant's entry of the lands in controversy should remain intact, without prejudice to plaintiff's right to complete his claim for the adjoining 160 acres in tract 87. Thereafter the patent was issued to defendant, and in due time this action was commenced to have it declared that, as patentee, defendant holds the legal title in trust for plaintiff.

From the written opinion of the First Assistant Secretary it appears that plaintiff, in his contest in the Land Department, contended: (1) That on the date of the filing of defendant's application, a previous application by plaintiff for the land in controversy, together with tract 87, was pending on an appeal from its rejection by the local land officers; (2) that plaintiff acquired a preference right of entry by virtue of work performed on the land prior to the filing of the plat of the resurvey on February 23, 1909; and (3) that defendant was chargeable with knowledge of plaintiff's claim to the land based upon his alleged purchase of the rights of Hammond and the performance of work, subsequent to the filing of the plat of the resurvey, looking to the reclamation of the land. For reasons set forth in his opinion, the Secretary decided adversely to plaintiff upon each of these three contentions, and the latter now claims that, in so deciding, errors of law were committed by the Secretary entitling plaintiff to the relief that he seeks by this action. These three points are the ultimate questions of law presented for our determination by this appeal; and if none of them be tenable, then the judgment of the court below adjudging that defendant holds the legal title in trust for plaintiff must be reversed.

[3] Before proceeding to a discussion of the three propositions which plaintiff claims were erroneously decided against him by the Secretary of the Interior, there is a further question that needs consideration. Plaintiff claims that, because the Secretary of the Interior, in deciding against his contentions, gave his reasons therefor in a written opinion, no objection to his application to enter the land may be urged by defendant in this action that the Land Department itself did not make. In support of this proposition plaintiff cites us to Northern Pacific R. Co. v. Trodick, 221 U. S. 208, 31 Sup. Ct. 607, 55 L. Ed. 704, where it was said:

"It is not for the railway company, to which was wrongfully issued a patent, to make an objection to Trodick's claim which the land office would not make."

In that case the appellants claimed under a patent that had been issued to the railway company under a railway land grant. On behalf of Trodick, the appellee, it was shown that, while the land was unsurveyed, and prior to the filing of the railroad company's map of definite location, Trodick's grantor had occupied the land with the bona fide intent to acquire title from the United States under the homestead laws just as soon as a government survey should be made. By the terms of the Land Grant Act it was provided, in effect, that land within the limits of the grant should not pass to the railway company if, when the map of definite location should be filed, it was occupied by a homestead settler who, in good faith, intended to acquire title under the federal laws. For this reason the United States Supreme Court held that, because of the occupancy of the land by Trodick's grantor, the title did not pass by the congressional grant to the railway company, but was excepted from its operation, and the railway company did not acquire and could not acquire any interest whatever in or to this particular tract of land by reason of the definite location of its line of railway. In other words, the railway company was at all times a total stranger to the land, and, of course, as such stranger had no right to object to any action that might be taken by the land department in recognition of Trodick's right to acquire the title from the United States under the homestead laws. That case has no application here. There neither the railroad company nor its grantees possessed any right that could intervene between the government and Trodick's claim to title. Here, if defendant's position be tenable, he did initiate a right that intervened between the completion of the resurvey and plaintiff's second application. Defendant, to whom the patent was issued, initiated an inceptive right to the land on March 20, 1909, when he filed his application to make entry under the Desert Land Act, unless prior thereto plaintiff had initiated a prior and superior right which he is now in a position to assert. The burden is upon plaintiff to show that he did acquire such prior and superior right. For it is the settled rule that in actions of this character the plaintiff must succeed, not upon the weakness of his adversary's title, but upon the strength of his own; and unless he shows affirmatively that he is entitled to the land, he cannot prevail. Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570. In Bohall v. Dilla, supra, the court said:

> "To charge the holder of the legal title to land under a patent of the United States as a trustee for another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant."

Turning now to the three questions respecting which respondent claims that the Secretary of the Interior erred: The first contention advanced by respondent to support the judgment of the lower court is that the Land Department fell into an error of law when it held that the appellant here could acquire a superior right to the land by filing an application therefor pending respondent's appeal to the Commissioner from the rejection of his first application—his application No. 01487, presented for approval March 8, 1908, and rejected by the local land officers on March 10, 1908.

[4] If, as respondent claims, his first application was improperly rejected by the local land officers, then his appeal to the Commissioner of the general land office operated to protect him from the intervention of any subsequent entry pending his appeal from the adverse decision of the local land officers. But if, as we think is the case, plaintiff's first application—his application of March 8, 1908—was properly rejected by the local land officers, so that no inceptive right was initiated thereby, then his appeal to the Commissioner did not affect defendant's right to make application to enter the land. That is, if for any reason whatever plaintiff's first application failed to initiate any inchoate right, then it was proper for the Land Department to pursue the course that it did, namely, receive defendant's application, suspend it pending plaintiff's appeal, and, upon plaintiff's voluntary withdrawal of his appeal, allow defendant's application.

[5] It will be recalled that on May 20, 1909, when he filed his second application, plaintiff incorporated into the documents then signed by him and filed in the local land office these words: "I made application for entry on this same land March 9, 1908 [should be March 8, 1908], which was rejected on account of survey, from which ruling I appealed. I now desire said appeal dismissed and said application of March 9 [sic], 1908, withdrawn"; also that he "does hereby withdraw said application, and respectfully asks that the said appeal be dismissed." Having thus voluntarily withdrawn his first application, and having asked that his appeal from the judgment of the register and receiver be dismissed, the decision of those officers became final, the same as if no appeal had been taken, the appellate jurisdiction of the Commissioner ceased, and, even if plaintiff had initiated any claim by his original application, such claim would have been abated by his own act. Smith v. Lovell, 4 Land Dec. 267; Spratt v. Edwards, 15 Land Dec. 290; Hughey v. Dougherty, 9 Land Dec. 29.

[6] The notion that an appeal from a decision that properly rejects an application to make entry bars the right of any other qualified person to file an application pending such appeal was vigorously repudiated by the Land Department in an opinion filed in Miller v. Robertson, 35 Land Dec. 136, where it was said:

> "It is the existence of a record entry which prevents the acceptance of an application for the same land and not the mere filing of a prior application. Berry v. Towner, 21 Land Dec. 434. Any other practice would open the door to sharp practice and possible injustice. If all applications presented after the offering of a prior pending one were to be unqualifiedly rejected, any person, though totally disqualified, by being first in time would be able to tie up the disposition of the land until final action was taken on his application and thereby be afforded opportunity to speculate upon a right to which in equity and justice he was not entitled. The Department will never adopt a rule or sanction a practice tending to create or protect a mere claim of right not capable of perfection, in order that it may be made the subject of speculative traffic, to the possible injury of those who in good faith are seeking to exercise a valid right."

[7] It is suggested that, because plaintiff's appeal from the decision of the local register and receiver rejecting his first application was not formally dismissed by the Commissioner of the General Land Office until October 12, 1910, the allowance by the local land officers, on May 31, 1910, of defendant's suspended application was premature. The answer to this is that, if plaintiff's first application initiated no inceptive right whatever, then, as a stranger to the title at the time of the allowance of defendant's application, he is in no position to challenge the action of the Land Department allowing defendant's application to enter the land, even should we concede, which we do not, that plaintiff's appeal was not completely terminated when he asked for its dismissal and voluntarily withdrew the sole basis for the appeal—his original application to make entry. Respondent cites us to Germania Iron Co. v. James (C. C.) 89 Fed. 811, where it was said that, after the Secretary of the Interior has decided that "a former *entry* was void and should be canceled, no subsequent entry of the land could be made until that decision was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records." (Italics ours.) That case has no application here.

In the instant case plaintiff had made no entry prior to defendant's application. Plaintiff's application to enter the land had been rejected, and, as we think, properly rejected. The land, therefore, had not been segregated from the mass of public lands when defendant made his application. It was then a part of the public domain. In the Germania Iron Company Case the prior entry, until set aside by the Secretary on the appeal from the local land officers, was an appropriation of land which, by reason of the existence of the uncanceled entry took on the character of private property until the decision on appeal became effective by being communicated to the local officers and noted by them on their records. Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363. There is no such situation here. Plaintiff had made no prior entry; and unless his rejected application initiated some inchoate right, he is in no position to challenge the allowance of defendant's application to enter the land.

In holding that plaintiff's appeal from the decision of the local land officers did not prevent the filing of defendant's application, nor prevent its acceptance by the local land officers when plaintiff voluntarily withdrew his original application, we have proceeded upon the hypothesis that plaintiff's first application was wholly futile and ineffective to initiate any inchoate right whatever. The next question, therefore, is: "Did plaintiff's original application initiate any inceptive right? If it did not, then, for the reasons already stated, the Secretary of the Interior did not fall into error when he held that defendant acquired a superior right notwithstanding his application to enter the land was filed pending the appeal from the rejection of plaintiff's original application.

[8] As we already have pointed out, on March 8, 1908, when plaintiff presented his first application to the local land officers—application No. 01487—no resurvey of these Imperial Valley lands had been made. It was not until some time later that the plat of the resurvey was approved by the United States Surveyor General. And, as we have shown, a government survey dates from the approval of the plat. Until then there is no official survey. Moreover, by a duly promulgated regulation of the Department, in force at the date of plaintiff's first application, all applications to make desert land entries of these lands were required to "describe the land with reference to the established lines of the original [1856] survey." There was nothing on the face of plaintiff's application of March 8, 1908, to suggest that the land therein mentioned was not described according to the old survey, as required by the Department regulation. The local land officers, therefore, were justified in treating the description as referring to the 1856 survey. Indeed, under the circumstances no other construction would have been warranted. The land is described in the application with reference to the lines of the 1856 survey, or it is not described at all.

[9] If we treat plaintiff's first application as describing the land according to the 1856 survey—and no other construction is permissible—then, for two reasons at least, the application failed to initiate any right to the lands in controversy. One reason is that plaintiff's first application, if it be read as intending to describe the lands applied for according to the lines of the old survey, does not describe the land in controversy. The description in plaintiff's first application can be made to fit the land in controversy only by treating it as referring to the lines of the subsequently approved resurvey, the plat whereof was not filed until February 23, 1909. But that, for the reasons stated, we may not do. The application must be read as though the section and township lines therein referred to are the section and township lines delineated on the plat of the 1856 survey. It is common knowledge that, in so far as it has been possible to locate on the ground any of the lines of the original survey, those lines have generally been found to be far apart from the correspondingly numbered township and section lines of the new survey. Indeed, in the instant case we have some evidence, though it may not be of the most satisfactory character, that the lands in controversy are not located in either of the sections referred to in plaintiff's original application—sections 7 and 8—if that application be taken as referring to the 1856 survey—the only survey to which it may properly be deemed to refer. The land in controversy lies immediately west of the 160 acres which, on the plat of the resurvey, are now known as tract 87. Tract 87, according to the resurvey, is partly in section 7 and partly in section 8. Mary E. Gray's application, which described the land that is now known as tract 87, described it as being in section 12. It is conceded that her application described, or at any rate attempted to describe, the land according to the lines of the 1856 survey. It thus will be seen that tract 87, which lies in sections 7 and 8, according to the resurvey, was in section 12, according to the 1856 survey, if we assume that Mrs. Gray's application gave the correct township and section lines according to the original survey. If it did, then manifestly plaintiff's first application did not describe the land in controversy if it be deemed to describe the lands applied for according to the lines of the old survey.

[10] But, entirely apart from this consideration, there is, as we have said, a second and a conclusive reason why plaintiff's first application initiated no inceptive right, if we regard the description therein as referring

to the 1856 survey. That reason is this: All the lands described in plaintiff's first application, if the description therein be tied to the 1856 survey, were covered by uncanceled entries that previously had been allowed by the local land officers. It was upon this ground that the local land officers rejected plaintiff's original application. So long as these prior entries remained subsisting entries on the record, no subsequent entry could be made of any subdivision covered by any of such prior entries. Each of these prior entries was, on its face, a valid entry, and while it remained uncanceled no subsequent applicant to make entry could acquire any inceptive right whatever. Hastings & D. R. Co. v. Whitney, supra; Hodges v. Colcord, 193 U. S. 192, 24 Sup. Ct. 433, 48 L. Ed. 677; McMichael v. Murphy, 197 U. S. 304, 25 Sup. Ct. 460, 49 L. Ed. 766.

[11] If it were permissible to read plaintiff's original application in the light of his then undisclosed intention to describe the land according to the resurvey that then was in progress, and if, so reading the application, it were permissible to hold that it was intended to and does describe the lands by reference to the lines of the subsequently approved resurvey, nevertheless such application would not create any inceptive right in plaintiff. For, so construed, the application would violate the then existing Department regulation that all applications to make desert land entries of any of the lands that were to be resurveyed "must describe the land with reference to the established lines of the original survey." The Land Department may make any regulation, not inconsistent with the law, which is suitable to the execution of the land system with which Congress has intrusted it. Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; United States v. Smull, 236 U. S. 405, 35 Sup. Ct. 349, 59 L. Ed. 641; United States v. Hearing (C. C.) 26 Fed. 744.

[12] That the regulation requiring the lands to be described with reference to the established lines of the original survey, pending the completion of the new survey, is in harmony with the statutes, and is such as is reasonably necessary and proper to be observed in the administration of the system that Congress has established for the disposition of public lands, cannot admit of doubt. At that time there were few, if any, natural monuments on these desert wastes whereby the land that an applicant might desire to reclaim could be identified for the purpose of making an entry in the land office. Therefore the only practicable means for identifying the land was to make reference to some survey. There was no resurvey then in existence, nor could there have been until the plat of the resurvey should be approved by the duly empowered government official. It was not practicable for the government to rely upon a private survey. Unless, therefore, the Department should entirely suspend all right to make application to enter these lands under the Desert Land Act until the resurvey should be made and approved by the proper United States Surveyor, the only practicable means for identifying any land for the purposes of a desert land entry was to pursue the course that was prescribed by this Department regulation, that is, to describe the land that the applicant desired to reclaim by a reference, as nearly accurate as the circumstances might permit, to the lines of the only official survey that ever had any existence prior to the resurvey, viz. the 1856 survey, and then, when the resurvey should be made, adjust the entry to the lines of the new survey. For these reasons the regulation was a reasonable and suitable regulation, and as such it had all the force of a law. United States v. Thurston, 143 Fed. 287, 291, 74 C. C. A. 425; Peters v. United States, 2 Okl. 116, 33 Pac. 1031. This being so, any claim by plaintiff that his original application describes the lands according to the lines of the resurvey that then was in progress is self-destructive. It is a claim that at once negatives the creation of any inceptive right to the land by disclosing a willful and fatal disregard of a binding and valid regulation of the Land Department that had all the force of law.

> "If the applicant was guilty of any violation of the law, such violation vitiated the proceeding in toto. * * * Here there was a distinct violation of law on the part of the entryman, and one which vitiated the application as a whole." Hyde v. Bishop Iron Co., 177 U. S. 281, 288, 289, 20 Sup. Ct. 592, 594 (44 L. Ed. 771).

[13] Respondent contends that his second application—application No. 06233, presented to the local land officers May 20, 1909, and subsequently to defendant's application—was not a voluntary withdrawal of his first application, but was ancillary thereto, and a continuation thereof. Any attempt thus to tie respondent's second application to his first, and, by so doing, create an inceptive right to the land in controversy as of the date of the filing of the first application—an application that was rejected, and properly rejected, by the local land officers within a day or so after its presentation—must meet with failure. Respondent's second application, filed after the approval of the plat of the resurvey, describes the lands in controversy by reference to the township and section lines of the new survey. Whereas, as we have shown, the description in respondent's first application must be held to be according to the lines of the original, or 1856 survey. The result is that the two applications describe different lands—if the local land officers properly allowed Mrs. Gray's

application as correctly describing the 160 acres adjoining the lands in controversy on the east. Respondent's second application was therefore an independent transaction, and an attempt to secure other and different land after the intervening of appellant's right thereto.

For the foregoing reasons it must be held that the Secretary of the Interior did not err in holding that defendant could acquire a superior right to the land in controversy notwithstanding plaintiff's appeal from the decision of the local land officers rejecting his first application.

Respondent's next claim is that the Secretary of the Interior erred in holding that he did not acquire a preference right under the act of March 28, 1908. That act, it will be recalled, provides that any qualified individual—

> "who has, prior to the survey, taken possession of a tract of unsurveyed desert land, not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract * * * within ninety days after the filing of the approved plat of survey in the district land office."

Respondent's first application to enter the land, filed March 8, 1908, was filed prior to the approval of the resurvey, and at a time when, according to respondent's theory, the lands were unsurveyed lands. At the time when respondent filed his first application—March 8, 1908—there was no act of Congress giving a preference right. The act that gives such right to one who conforms to the prescribed requirements, the act of March 28, 1908, was not passed until 20 days after plaintiff made his first application. So that, if he ever exercised the preference right which he claims was accorded him by this act of March 28, 1908, it was when he filed his second application on May 20, 1909, and not when he filed his first on March 8, 1908.

Respondent's argument runs substantially as follows: The act of July 1, 1902, the act providing for the resurvey, was a legislative declaration that the lands to be resurveyed are to be regarded as unsurveyed lands until they shall have been resurveyed and the plat of the resurvey duly approved—invoking in support of this position the decision of the United States Circuit Court of Appeals in Cox v. Hart, supra; beginning with his purchase of the Hammond relinquishment on March 3, 1908, and until he made his second application on May 20, 1909, he was in possession of the land in controversy, and, so he claims, had commenced in good faith the work of reclaiming the land prior to the resurvey, and while the lands were still in the category of unsurveyed lands; therefore, so his argument runs, he had a preference right to make entry at any time within 90 days after the filing of the approved plat of the resurvey—that is, until May 24, 1909; and, since his second application was filed on May 20, 1909, or 4 days before the expiration of the 90 days, he thereby, in the due exercise of his preference right, so it is claimed, initiated an inchoate right superior to any that might have accrued to appellant under the application that the latter filed March 20, 1909.

For the purposes of this decision we shall assume that the land had the status of unsurveyed land from the date of the passage of the resurvey act of 1902 and until the filing of the approved plat of the resurvey on February 23, 1909, or at least until the resurvey was approved by the United States Surveyor General on November 4, 1908. We shall also assume that respondent had taken possession of the land in controversy prior to the resurvey. It is not claimed, and cannot successfully be claimed, that respondent has ever reclaimed the land. With these premises conceded, the sole remaining question is: Did respondent, in good faith, "commence the work of reclaiming" the land in controversy prior to the resurvey? If he did not, then he never acquired he preference right accorded by the act of March 28, 1908.

[14] To entitle plaintiff to such preference right as he claims, it is not sufficient to show that he took possession and subjected the land to his dominion. He must go further and show that he at least "commenced" the work of "reclaiming" the land. If we turn to the original Desert Land Act of 1877, as amended by the act of March 3, 1891, we shall there find the statutory definition of the word "reclaim." Section 1 of the act (section 4674) provides that a qualified person, upon paying 25 cents per acre, may file a declaration that "he intends to reclaim a tract of desert land * * * by conducting water upon the same." By section 5 (section 4678) it is provided that—

> "No land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented."

To commence the work of reclaiming the land means, therefore, to commence the work of "conducting water upon the same." In construing this act, the Circuit Court of Appeals, in United States v. Mackintosh, 85 Fed. 337, 29 C. C. A. 176, 179, says:

> "In the search after fraud, the inquiry must be limited to such matters as the statute requires to be established in making the final proof. This proof is 'satisfactory proof to the register and receiver of the reclamation of said

tract of land in the manner aforesaid.' 'The manner aforesaid' evidently refers back to the first clause, and to the words 'by conducting water upon the same.'

"This statute, of course, in all its provisions, should receive such construction as will reasonably carry out and effectuate the legislative intent. It was the manifest purpose of Congress to hold out to the citizens of the United States an inducement to reclaim the waste and desert lands of the public domain, and thus render them subservient to the uses of husbandry by process of irrigation. This was to be accomplished by such a system of ditches as would carry to the subdivisions of the land, capable of being reached by the surface flow, a supply of water such as, when let out of the ditches by draw gates or small ditches, might spread over the accessible parts, and stimulate vegetable life."

There is nothing in the amendatory act of March 3, 1891, that changes the character of the reclamation work required by the act of 1877, except that under the amendment an expenditure of $3 per acre must be shown and one-eighth of the land embraced in the entry must be cultivated. Connor v. United States, 214 Fed. 522, 536, 131 C. C. A. 68, citing the Case of Cole, 38 Land Dec. 420.

With the foregoing definition of "reclamation" in mind, the question is: Do the acts relied upon by respondent show that he had "commenced the work of reclaiming" the land in controversy during any part of the period when its status was that of unsurveyed land? That is, did he, prior to the resurvey of this land, commence the work of "conducting water upon the same"?

Turning now to the acts relied upon by respondent to support his claim that there had been commenced on the land such reclamation work as was sufficient to create the preference right accorded by the act of March 28, 1908: The first of the acts so relied upon by him are (1) his purchase of Hammond's relinquishment on March 3, 1908, and (2) the setting of redwood posts by him on March 4, 1908.

[15] Hammond, it will be recalled, had "plowed around the claim and cleared a small quantity of brush from the northwest corner thereof." Assuming, for the purposes of this decision only, that such work did constitute the commencement of the work of reclaiming the land, i. e., the commencement of the work of conducting water upon the land, and further assuming that any preference right to enter the land that may have accrued to Hammond by reason of his work was not personal to him but could be transferred to another (as to which, however, see Dameron v. Dingee, 1 Colo. App. 436, 29 Pac. 305; Welch v. Duncan, 7 Land Dec. 186; and Mayers v. Dyer, 21 Land Dec. 187), the fact remains that all that plaintiff received from Hammond was a "relinquishment," which, he testified, was on the regular form of relinquishment furnished by the land office. Such a document did not transfer to plaintiff any right whatever in or to the land. Hammond was not an entryman. His application had been rejected. But, even had he been an entryman, his relinquishment would not have vested plaintiff with any of his rights. A relinquishment is not a contract of the entryman with the purchaser. It is only, when filed, a release to the United States of the claim of the entryman, and turns back to the United States, as the owner of the land, every right and claim that the author of the relinquishment had formerly enjoyed. Fain v. United States, 209 Fed. 525, 126 C. C. A. 347. In Robertson v. Messent's Heirs, 18 Land Dec. 301, the Secretary of the Interior held that, if a relinquishment be given to the purchaser to file, there is created only a special agency, which expires with the death of the entryman who gave the relinquishment, and, if it be not presented to the land office until after the death of the entryman, it is ineffective, and should be rejected. In Hemphill v. Moy, 31 Idaho, 66, 169 Pac. 288, the court said:

"The contention of appellant, that he could tack Wallace's possession onto his own for the purpose of making up the period of the statute, is based upon a misconception of the legal effect of a relinquishment. * * * A relinquishment turns the land back to the United States, and with it every right, possessory or otherwise, that the entryman enjoyed. Moss v. Dowman, 176 U. S. 413, 20 Sup. Ct. 429, 44 L. Ed. 526. It therefore follows that whatever rights Moy obtained in or to the land were initiated when he filed his homestead entry and went into possession. Without the aid of the alleged adverse possession of Wallace, Moy has concededly fallen far short of the statutory time."

Obviously Hammond's relinquishment did not clothe respondent with any preference right which the former may have possessed.

[16] Placing the redwood posts at the corners of the land in controversy, with notices thereon that plaintiff intended to reclaim the land from its desert state may have constituted an act of possession, but by no stretch of imagination can such conduct be deemed the commencement of the work of reclaiming the land by conducting water thereon. The act of March 28, 1908, does not give a preference right to one who takes possession and merely intends to reclaim the land, however much he may advertise that intention. His intention, however deep-seated, must be translated into deeds—deeds which constitute the actual bona fide commencement of the work of reclaiming the land, i. e., the commencement of the work of "conducting water upon the same."

[17] The conduct next relied upon by respondent to sustain his contention that he actually had commenced reclamation work is this: In April or May, 1908, he caused work to be done on the tract of 160 acres lying east of the lands in controversy, and which now is known as tract 87. This work was of the value of $85, and consisted of clearing and rough-leveling and the construction of borders covering about 30 acres along the east side of the tract. At that time the tract of 160 acres upon which this work was done was known as, or was supposed to be, the northwest quarter of section 12, according to the 1856 survey. It is the 160 acres upon which Mrs. Gray had previously made her desert land entry. It was not until April 30, 1909, or about a year after this work was done, that plaintiff's contest of the Gray entry was decided in his favor. Meanwhile this tract of 160 acres adjoining the land in controversy on the easterly side thereof—designated in the Gray entry as the northwest quarter of section 12, and on the plat of the resurvey as tract 87—was segregated from the public domain. Lands originally public cease to be public when they have been entered at the land office. While the entry subsists of record, "the land entered," says the court in Hastings & D. R. Co. v. Whitney, supra, 132 U. S. 361, 10 Sup. Ct. 114, 33 L. Ed. 363, "thereby becomes segregated from the mass of public lands, *and takes the character of private property.*" (Italics ours.) We think it clear that work done on an adjoining tract of land that had the character of private property cannot be treated as reclamation work done upon the land in controversy. We quite agree with what is said in the opinion handed down by the First Assistant Secretary of the Interior when passing upon the respective claims of these parties:

> "Obviously, a preference right of entry to public lands cannot be acquired by work performed on a tract segregated from the public domain."

[18] Between the 1st and the 21st of March, 1909, plaintiff caused an employee to do work on the land in controversy with a two-horse team and a Fresno scraper. Precisely what this work was is not made clear by the record. But, assuming that it was work done in preparing the land for irrigation by conducting water thereon, still, since the work was done after the approval of the plat of the resurvey, it gave to plaintiff no preference right under the act of March 28, 1908. That act gives the preference right to a qualified individual—

> "who has, prior to the survey, taken possession of a tract of unsurveyed land * * * and * * * has in good faith commenced the work of reclaiming it."

What is said by the First Assistant Secretary of the Interior in his opinion is apposite here:

> "Congress has seen fit to limit the acquisition of a preference right by virtue of improvement under the desert land law to unsurveyed land, and for the Department to hold that the placing of improvements upon surveyed land operated to segregate the same from the public domain would be an unwarranted extension to surveyed lands of a law that has been limited in its terms to unsurveyed lands."

All the other work relied upon by respondent to establish his claim to a preference right is work that was performed not only after the approval of the plat of the resurvey, but subsequently to the allowance of defendant's application to make entry of the land. Obviously such work cannot possibly give any color to respondent's claim to a preference right.

For the foregoing reasons we conclude that plaintiff never, "prior to survey, * * * in good faith commenced the work of reclaiming" the land in controversy, and therefore never acquired a preference right under the act of March 28, 1908.

[19] Finally, respondent claims that the Secretary of the Interior erred in holding that appellant's knowledge that the former was in possession of the land, and had done work thereon, did not estop appellant from making application to enter the land. For reasons already stated, it must be held that respondent's appeal to the Commissioner of the General Land Office from the decision of the local land officers rejecting his first application afforded no reason why appellant's application should not be received pending such appeal and be allowed just as soon as the appeal was terminated by respondent's voluntary withdrawal of his original application and his request for the dismissal of his appeal to the Commissioner. Also, for reasons already stated, it must be held that respondent did not acquire any preference right under the act of March 28, 1908, he never having commenced such reclamation as is contemplated by that act during the time that the lands were unsurveyed, and his purchase of Hammond's so-called relinquishment not transferring to him any right or interest in the land whatever. We have, therefore, as a ground for respondent's claim that appellant is estopped, only these bare facts: At the time when appellant made his application to enter, respondent was in possession of the land in controversy, claiming a right thereto; he had placed redwood posts at the corners thereof, and, after the resurvey, had caused some leveling and clearing to be done. These facts present no element of estoppel against appellant. The title was in the United States. Occupation of the land did not, and could not, initiate any right thereto. A rightful claim under the Desert Land Act could be initiated only by filing a sufficient application to make entry. Wilson v. Carson, 43 Land Dec. 346. This

the plaintiff did not do. He did not, prior to defendant's application, file such an application as would give him any right to enter the land under the Desert Land Act. His first application, filed shortly prior to the passage of the act of March 28, 1908, whereby the right to make a desert land entry was restricted to surveyed lands, conflicted with prior, uncanceled entries. This alone was sufficient to deprive the application of any efficacy as the foundation of an inchoate right. Plaintiff was charged with knowledge of the law. He was bound to know that the title, which was in the United States, could be acquired by him only by initiating a right thereto by making a proper and legal application to make entry in accordance with the acts of Congress and the lawful regulations of the Land Department. Neither the defendant nor any officer of the Land Department has ever done anything to justify a claim on plaintiff's part that he has been deceived or misled. Whatever plaintiff did upon the land or expended for improvements must be held to have been done and expended with knowledge that the title was in the United States, and that he could acquire it only in the manner that we have stated. With this imputed knowledge, plaintiff is not in a position to urge an estoppel against the defendant. Every element of estoppel is lacking. He could not, by simply taking possession, claiming the land as his own, and doing things that gave him no preference right, estop the defendant from acquiring title in the manner provided by the acts of Congress and the regulations of the Land Department.

Our conclusion is that the Secretary of the Interior did not err in any of his legal conclusions, and that therefore the judgment should be reversed.

It is so ordered.

We concur: WORKS, J.; CRAIG, J.

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56 Cal. App. 313

FIRST NAT. BANK OF PORTERVILLE v. DE MOULIN et ux. (Civ. 3406.)

(District Court of Appeal, Second District, Division 2, California. Jan. 27, 1922. Hearing Denied by Supreme Court March 27, 1922.)

1. Corporations 🔑241½—A "stockholder's" liability attaches to every owner of stock.

Civ. Code, § 322, providing, relative to stockholders' liability, that the term "stockholder" applies not only to persons appearing by the books to be such, but also to every equitable owner, was intended to enlarge, and not to limit the meaning of, such term, and the liability attaches to every owner of stock, in view of Const. art. 12, § 3, imposing such liability, and Civ. Code, § 298, defining stockholders.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Stockholder.]

2. Corporations 🔑268(1) — In enforcing a stockholder's liability, allegation that defendant was owner is sufficient.

Under Civ. Code, §§ 298, 322, and Const. art. 12, § 3, it is sufficient in an action to enforce a stockholder's liability for the corporation's debts to allege that defendant was the owner of a designated number of shares when the indebtedness was contracted.

3. Corporations 🔑269(3)—Evidence held to warrant finding that defendant was a stockholder.

In an action to enforce a stockholder's liability, evidence tending to show that a transfer of stock was not made at the date shown by the corporation's books *held* sufficient to support a finding that defendant was the owner of the stock when the debt was contracted.

4. Evidence 🔑158(28)—Letter best evidence of contents.

A letter is the best evidence of its own contents.

5. Evidence 🔑318(2)—Husband's letter inadmissible against wife as hearsay.

A letter written by a husband, stating the number of shares of stock owned by his wife, was hearsay and inadmissible against the wife.

6. Witnesses 🔑379(5) — Letter contradicting testimony admissible as impeachment.

Where a husband testified that an entry in a corporation's stock book purporting to show a transfer of stock by the wife was made on its date, a letter subsequently written by him, stating the number of shares owned by the wife, was admissible to impeach him.

7. Witnesses 🔑380(5)—Contradictory statement held admissible to impeach party's own witness.

Under Code Civ. Proc. § 2049, authorizing the party producing a witness to impeach him by showing inconsistent statements, where plaintiff, suing to enforce a stockholder's liability, claimed that her husband in charge of the stock book made a false and fraudulent entry to enable her to escape liability, and necessarily called him to identify the book, and asked him questions which, if answered in accordance with plaintiff's theory, would have shown fraud, a letter written by him, stating the amount of stock owned by the wife, was admissible to impeach him, though plaintiff did not claim to be surprised by his testimony denying the fraud.

8. Witnesses 🔑380(5)—Party may impeach his own witness when he gives injurious testimony.

Evidence of a prior contradictory statement by a party's own witness is admissible to discredit the witness if he does not simply fail to give favorable testimony, but gives testimony that is positively injurious to the cause of the party calling him.

9. Witnesses 🔑380(5, 7) — Party may impeach own witness called to prove his own fraud, or when compelled to produce such witness.

A party may impeach his own witness by proof of contradictory statements when put on the stand to prove his own fraud or when he was a witness that the party was bound by law to produce.

10. Witnesses 🔑219(2) — Letter written by husband not inadmissible against wife where she did not object to husband's testimony laying foundation.

A letter written by a husband to a third person was not inadmissible against the wife, under Code Civ. Proc. § 1881, subd. 1, making communications between a husband and wife inadmissible, no objection having been made to the husband's testimony laying the necessary foundation for the introduction of the letter, and she is presumed to have consented.

11. Trial 🔑397(1)—Failure to find on affirmative averment, which was only an indirect denial, not error.

In an action to enforce a stockholder's liability, in which plaintiff alleged defendant was the owner of 1,065 shares, defendant's averment that she owned only 24 shares was but an indirect denial, and the court's failure to find thereon was not error.

12. Husband and wife 🔑235(4)—Failure to find relationship not error.

Where a husband was made a party defendant in an action against the wife on her liability as stockholder, the court's failure to find that they were husband and wife as alleged in the answer was immaterial.

13. Appeal and error 🔑889(2)—Amendment for which leave granted considered as made.

Where the complaint alleged defendant owned 1,065 shares of stock, and the evidence showed she owned 1,089 shares, and the court gave leave to amend by interlineation to conform to the proof, and found in accordance with the evidence, the case will be considered on appeal as though the amendment was made.

14. Appeal and error 🔑1144 — Lower court may be directed to make amendment as of date prior to judgment.

Where leave to amend the complaint by interlineation to conform to the proof was granted, the lower court may be directed to cause the amendment to be made as of a date prior to the judgment, if not already made, instead of granting a new trial.

15. Appeal and error 🔑231(8)—Contention that findings not sustained by evidence not considered when insufficiency not pointed out.

The appellant's assertion that designated parts of the findings are not sustained by the evidence, without attempting to point out wherein the evidence is insufficient, or even referring to the transcript, will not be considered.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the First National Bank of Porterville, against Edward De Moulin and wife. From a judgment for plaintiff, the last-named defendant appeals. Affirmed, with directions.

William H. Fuller and Chas. W. Hackler, both of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, and Guy Knupp, of Porterville, for respondent.

FINLAYSON, P. J. This is an action to recover from defendants upon their stockholder's statutory liability for an indebtedness contracted by the Magnesite Refractories Company, a corporation. The complaint alleges that at the times therein mentioned all of the corporation's capital stock, 2,000 shares, had been subscribed; that at all the times mentioned, the defendants, who, it seems, are husband and wife "were the subscribers of and the owners of" the number of shares set opposite their respective names. The number of shares set opposite the name of the defendant Edward De Moulin is 724 and 1,065 shares is the number set opposite the name of the defendant and appellant, Anna J. De Moulin. The court found all the allegations of the complaint to be true, except that the defendant Edward is the owner and holder of but 10 shares and the defendant Anna is the owner of 1,089 shares, which is 24 shares more than the number alleged in the complaint. Judgment for plaintiff was entered accordingly, and the defendant Anna J. De Moulin appeals.

[1, 2] Appellant objects to the sufficiency of the complaint because it does not allege that she "appears by the books" of the corporation to be a stockholder. As we have stated, the complaint alleges that, at the time when the indebtedness was contracted by the corporation, appellant and her husband "were the subscribers of and the owners of" the number of shares set opposite their respective names. Appellant's contention is based upon the definition of a stockholder as given in section 322 of the Civil Code. That Code section, after providing that each stockholder of a corporation is individually and personally liable for his proportion of all the debts and liabilities contracted or incurred by the corporation during the time he was a stockholder, declares:

> "The term 'stockholder,' as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another."

From this it is argued that the statutory liability exists only against one who "appears by the books of the corporation" to be a stockholder, or who is the "equitable" owner of stock. The contention is devoid of even the semblance of merit. In this Code definition of the word "stockholder," the Legislature intended to *enlarge*, not to limit, the meaning of the term. Western Pac. Ry. Co. v. Godfrey, 166 Cal. 351, 136 Pac. 284, Ann. Cas. 1915B, 825. In its definition of what is generally referred to as the statutory liability of stockholders, our Constitution declares:

> "Each *stockholder* of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association." Sec. 3, art. 12. (Italics ours.)

At the time of the adoption of this constitutional provision the Civil Code defined "stockholders" to be the "owners of shares in a corporation which has a capital stock." Civ. Code, § 298. In view of this contemporaneous definition of the word "stockholder," it must be held that the liability which is fastened upon each "stockholder" by the organic law of the state attaches to every "owner" of stock. Shean v. Cook, 180 Cal. 95, 179 Pac. 185, 5 A. L. R. 1042. That it is sufficient to allege that the defendant was "the owner" of a designated number of shares at the time when the indebtedness was contracted by the corporation is no longer an open question in this state. In Duke v. Huntington, 130 Cal. 274, 62 Pac. 511, the court said:

> "Section 322 of the Civil Code makes the appellant liable for his proportionate amount of the indebtedness of the corporation, not only for the stock standing in his name upon its books, but also for all the stock of which he is the owner standing upon the books in the name of another."

And in Hughes Mfg. Co. v. Wilcox, 13 Cal. App. 27, 28, 108 Pac. 871, 873, the court says:

> "The term 'stockholder' or 'owner,' as used in the statute, is not confined to one who appears upon the books of the corporation as such, but to the *real* owner, notwithstanding the fact that the stock as shown by the books appears in the name of another." (Italics ours.)

[3] The complaint alleges in substance and effect, and the trial court finds that the Magnesite Refractories Company became indebted to plaintiff between July 1, 1917, and October 1, 1917. The evidence discloses that all of this indebtedness was contracted subsequently to the 9th day of July, 1917, but prior to the 1st day of October of that year. The lower court also found that at all times between the 1st of July, 1917, and the 1st of October following, appellant was the owner and holder of 1,089 shares of the capital stock of the Magnesite Refractories Company. Appellant claims that the evidence is insufficient to support the finding that she was the owner of that number of shares between those dates. On April 6, 1917, certificate No. 14 for 24 shares was issued to her. It is conceded that she has owned this block of 24 shares at all times since their issuance; but it is claimed that the evidence is insufficient to justify a finding that she has owned the balance of the 1,089 shares, viz. 1,065 shares, at any time since July 9, 1917, her claim being that on that date she transferred the 1,065 shares to one Charles Oliver Potthast, and that the name of her alleged transferee has ever since then appeared on the books of the corporation as the owner of the stock. It seems that on June 27, 1917, certificate No. 22 for 1,065 shares was issued to appellant, which fact duly appears from the only book in which the corporation kept a record of its stock transfers—a book which on its cover bears the title "Combined Ledger and Journal." Appellant concedes that she owned the 1,065 shares from June 27, 1917, the date of their issuance to her, until July 9, 1917; but, as we have stated, her claim is that on the latter date she transferred the shares to Potthast.

In order to prove its case by showing the issuance of the 1,065 shares to appellant, respondent was obliged to and did put in evidence the book in which the corporation kept a record of its stock transactions—the "Combined Ledger and Journal." That book not only contains an entry showing that certificate No. 22 for 1,065 shares had been issued to Mrs. De Moulin on June 27, 1917, but contains also an entry to the effect that, on July 9, 1917, certificate No. 22 was canceled, and a new certificate issued to Potthast for the 1,065 shares—certificate No. 23. The entry showing this purported transfer and the issuance of the stock to Potthast is the last entry in the book. In order to identify the book as that in which the corporation kept the record of its stock, plaintiff made the defendant Edward De Moulin its witness. De Moulin testified that he has been connected with the Magnesite Refractories Company since the date of its incorporation (he was its president); that some of the entries in the book are in his handwriting, and that the remainder are in the handwriting of the secretary, one E. W. Skinner; that he, Edward De Moulin, wrote the last two entries, viz. the entry which shows the issuance of the 1,065 shares to his wife on June 27, 1917, evidenced by certificate No. 22, and the entry which purports to show the transfer of those shares to Potthast on July 9, 1917, and the issuance of certificate No. 23 therefor. It is the theory of respondent that the last entry in the book, the entry which purports to show the transfer of the 1,065 shares to Potthast, was a false entry made by De Moulin to conceal his wife's ownership of the stock during the period when the indebtedness was being contracted by the corporation. That is, it is respondent's theory that the entry in question was not made until some time after May 1, 1918, at the earliest, and that, as a matter of fact, Mrs. De Moulin appeared on the books of the corporation as the owner of the stock during all of the period that the indebtedness was being contracted by the corporation, namely, between July 27, 1917, and August 3, 1917. To maintain this theory in the court below, plaintiff put on the witness stand W. W. Middlecoff, Esq., who had been the attorney for this plaintiff in two cases previously pending in the superior court for Tulare county. Mr. Middlecoff testified that the first of these cases was tried in May, 1918, and the second in December, 1918; that during the trial of one of those cases—he could not remember which—he had seen the book which the witness Edward De Moulin identified as the combined ledger and journal of the Magnesite Refractories Company; that at that time he (Middlecoff) prepared a statement, the items whereof were taken from the book which Edward De Moulin had identified as the book wherein the corporation kept a record of its stock; and that the statement which he thus took from the book correctly shows the names of the stockholders and the number of shares owned by each, as shown by the book at the time when he saw it and made up the statement therefrom. The last item on the statement so made by Mr. Middlecoff reads: "June 27. Anna J. De Moulin. 22. 1065." This is a copy of the entry showing the issuance of the stock to appellant on June 27, 1917. Mr. Middlecoff further testified that at the time when he saw the book—the book which the witness Edward De Moulin had identified as the only stock book kept by the corporation—it did not contain the item that now appears as the last entry therein, viz., the entry reading: "July 9. Charles Oliver Potthast. 62. 23. 1065," i. e., the entry purporting to show a transfer of the stock from appellant to Potthast. Since this book was seen by Mr. Middlecoff either in May or December of 1918, it necessarily follows that, if his testimony be true—and as such it was accepted by the learned trial judge—the entry purporting to show the transfer of the stock from appellant to Potthast was not made until after May 1, 1918, at the earliest, which was about nine months after all of the indebtedness had been contracted by the corporation. For these reasons we are satisfied that the evidence is sufficient to justify the finding that at all times between July 1, 1917, and October 1, 1917, and while the indebtedness was being contracted by the corporation, appellant was "the owner and holder of 1,089 shares of the capital stock of said Magnesite Refractories Company"—that is, that she was, during all of that period, the owner of the 24 shares that were issued to her on April 6, 1917, and of the 1,065 shares that were issued to her on June 27, 1917.

Some time prior to December 19, 1918, plaintiff's vice president and general manager, H. C. Carr, asked Edward De Moulin, who, as we have stated, was the president of the Magnesite Refractories Company and is a defendant herein, to furnish a list of the stockholders of his corporation. In response to this request Mr. De Moulin, on December 19, 1918, wrote Carr a letter giving the desired information. Plaintiff proved by De Moulin that the signature to the letter was his. In this letter De Moulin states that his wife, the appellant here, is the owner of 1,089 shares. While testifying as a witness for plaintiff, De Moulin stated that the entry in the stock book which purports to show a transfer of the 1,065 shares to Potthast on July 9, 1917, was made by him on the date that it bears—July 9, 1917. Thereupon plaintiff offered in evidence the letter which De Moulin had written to plaintiff's vice president, Mr. Carr, and in which the former states that, at the date of his letter, December 19, 1918, his wife owned 1,089 shares. Defendant's counsel objected to the offer, saying:

> "I object to the introduction of the letter upon the ground that it is incompetent, not the best of evidence; it is inadmissible and privileged, and prohibited by subsection 1 of section 1881 of the Code of Civil Procedure, which provides that the husband cannot be examined for or against the wife in any action without her consent."

The objection was overruled, and the letter received in evidence.

[4, 5] Obviously, the letter was the best evidence of its own contents, and there is no force in the objection that the document was "not the best of evidence," unless by that expression counsel meant that the letter was not the "best evidence" of the fact that Mrs. De Moulin was the owner of 1,089 shares at the date when it was written. If that is what counsel meant by this particular ground of objection, then it must freely be conceded that the letter, not only was not the "best" evidence of that fact, but that it was not any kind of admissible evidence whatever of appellant's ownership of the stock. The letter was not material as evidence of an admission by the defendant Edward De Moulin against his interest; for, as to his stockholdings, it contains nothing contrary to the conceded facts. And it was not admissible against appellant as evidence that she did in fact own 1,089 shares, or any number of shares, at the date when the letter was written; for, as to her, it would, if received to prove her ownership, be rank hearsay.

[6-9] But though not admissible to prove that Mrs. De Moulin did in fact own 1,089 shares, it was, we think, admissible for the purpose, and solely for the purpose, of impeaching the witness Edward De Moulin, the author of the letter, whose evidence that he had made in the book of the corporation an entry showing a transfer of the stock to Potthast on July 9, 1917, was directly contradicted by his statement in the letter that Mrs. De Moulin owned the 1,089 shares on December 19, 1918. And we think the letter was admissible for the purpose of impeaching Mr. De Moulin, notwithstanding the fact that plaintiff had made him its own witness. It is not true, as an absolute proposition of law, that parties may not impeach their own witnesses. Evidence of a prior contradictory statement by a party's own witness is admissible, not to establish the truth of the statement, but to discredit the witness, if the latter, not simply failing to give favorable testimony for the party producing him, has given *adverse* testimony—testimony that is positively injurious to the cause of the party by whom he is called. In this state we have a statutory declaration that such contradictory statements by a party's witness are admissible for the purpose of impeachment. Code Civ. Proc. § 2049. In the instant case there was not a mere failure on the part of the witness De Moulin to give testimony favorable to plaintiff. His testimony that he had made the entry in question on July 9, 1917, was adverse testimony, and positively injurious to plaintiff's cause. Generally speaking, the element of surprise is a condition precedent to the introduction of such impeaching evidence. Zipperlen v. Southern Pacific Co., 7 Cal. App. 206, 216, 93 Pac. 1049. We do not understand that respondent claims that it was surprised by De Moulin's testimony. But surprise is not always a necessary element. Such impeaching evidence may be given when the witness to be discredited was put on the stand to prove his own fraud. 30 Am. & Eng. Ency. of Law (2d Ed.) 1128; Luzzadder v. McCall (Mo. App.) 198 S. W. 1144. Also, what are called "instrumental witnesses," i. e., witnesses that a party is bound by law to produce, such as subscribing witnesses to a will, deed, or other paper, may be impeached by showing that they had previously made contradictory statements. A party is not deemed to vouch for the credibility of a witness that the law requires him to produce. 30 Am. & Eng. Ency. of Law (2d Ed.) 1132; People v. Elco, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069; State v. Slack, 69 Vt. 486, 38 Atl. 311. Here, if Middlecoff's testimony be true—and as such it evidently was considered by the trial court, and therefore must be so considered by us—a gross fraud was perpetrated by the president of the Magnesite Refractories Company, the witness Edward De Moulin. It was the theory of plaintiff that De Moulin had made a false and fraudulent entry for the purpose of enabling his wife to escape a just liability for her share of the corporation's indebtedness. Not only was it necessary to call De Moulin in order to identify the book which showed the issuance of the stock to Mrs. De Moulin (he had charge of the book, and the secretary, a traveling salesman, had not been heard of by the witness for six months or more), but, as to this alleged false entry, he was asked qusetions which, if answered in accordance with the plaintiff's theory of the case, would have shown him to have been guilty of grossly fraudulent conduct. We think that under these circumstances the letter was admissible in evidence, not for the purpose of establishing the truth of its statements, but that the trial court might view the witness' testimony at its real worth. And we may not assume that the learned trial judge considered the letter for any purpose other than impeachment.

[10] There is no merit in the claim that the introduction of the letter contravenes subdivision 1 of section 1881 of the Code of Civil Procedure. The letter was not a communication made by one spouse to the other. It was a communication made by the husband to a third person. The wife did not withhold her consent to the examination of her husband respecting the circumstances attending the writing of the letter and his signature thereto. Appellant was present in court, and every particle of testimony that was necessary to lay the foundation for the introduction of the letter was allowed to go in without objection to the competency of her husband to testify as a witness in the case. She, therefore, is presumed to have given her consent to his being made a witness to testify to all of those facts. The proper foundation for the introduction of the letter having thus been duly laid without objection to the competency of the husband to testify as a witness for plaintiff, and, therefore, with the wife's implied consent, the letter was admissible for the purpose of impeaching De Moulin. After the foundation had thus been laid without the interposition of objection to the competency of the witness, any objection to the introduction of the letter necessarily would be an objection addressed to the competency of *that document* as evidence in the case, and not to the competency of the husband as a *witness*. Save as to privileged communications passing between the spouses, the inhibition of section 1881 affects the competency of a husband or wife as a *witness*, not the competency of the *testimony* that he or she may give. People v. Singh, 182 Cal. 457, 483, 188 Pac. 987. By making a husband or wife incompetent as a *witness* against the other, the Code does not render inadmissible an extrajudicial statement that either may have made to a third party, if such statement be otherwise admissible. People v. Chadwick, 4 Cal. App. 63, 72, 87 Pac. 384, 389.

[11, 12] Appellant asserts that the trial court failed to find upon affirmative matters set up in her answer. No affirmative defense of new matter is pleaded. It is true that, commingled with her denials, certain affirmations appear in defendant's answer. For example, in her denial of plaintiff's allegation that she is the owner of 1,065 shares, appellant couples with the denial an averment that she owns but 24 shares. This affirmative averment is but an indirect denial that she owns 1,065 shares, or more than 24 shares. An objection based upon a failure to find specifically upon such an affirmation does not rise to the level of puerility. The answer also alleges that the defendants are husband and wife. But even so, since appellant's husband was made a party defendant, it is of no moment that the court failed to find that he is her husband.

[13, 14] The complaint alleges that appellant was the owner of 1,065 shares. The entries in the book in which the corporation kept a record of its stock, considered in connection with Mr. Middlecoff's testimony, show that appellant owned 1,089 shares. At the conclusion of the trial plaintiff was given permission to amend its complaint "by interlineation" to conform to the proof, by changing the figures from 1,065 to 1,089. Though the court found in conformity with the evidence, it does not appear from the record before us that plaintiff availed itself of the permission thus given to amend its complaint "by interlineation." But, leave having been given to amend, and the court having found the fact in accordance with the evidence and in conformity with the amendment that would have been made had plaintiff availed itself of the permission granted, we think that we should consider the case as though the amendment had in fact been made. Carpenter v. Sheldon, 22 Ind. 259. There is no necessity for subjecting the parties to a new trial on account of a failure to amend the complaint in this particular. The lower court may be directed to cause the amendment to be made as of a date prior to the judgment, if, in fact, the complaint has not already been amended in accordance with the permission granted to plaintiff. Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766.

[15] Finally, appellant makes the bald assertion that certain designated portions of the findings are not sustained by the evidence, without attempting to point out wherein the evidence is insufficient. She has not even made any reference to the transcript for that purpose. This being so, we will not examine points thus perfunctorily made. We cannot be expected to go through the record on an independent voyage of discovery. If counsel will not discuss their points, neither shall we. Kyle v. Craig, 125 Cal. 107, 116, 57 Pac. 791; Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416; Tait v. McInnes, 3 Cal. App. 155, 84 Pac. 674.

The judgment is affirmed, and if the complaint has not already been amended by interlineation so as to allege that the defendant Anna J. De Moulin was the owner of 1,089 shares, the court below is directed to cause such amendment to be made as of a date prior to the judgment.

We concur: WORKS, J.; CRAIG, J.

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56 Cal. App. 341

TEHAMA COUNTY v. WINTER.

(Civ. 2406.)

(District Court of Appeal, Third District, California. Jan. 31, 1922.)

Counties 🔑24—Charter provision as to salary of assessor held valid and to prevail over statute.

The provision of County of Tehama's Charter, art. 4, § 3, and article 9, § 5, that the salary of the assessor should be $2,000 and that fees and commissions allowed by law should be paid over to the county treasurer, is constitutional and prevails over Pol. Code, § 4266, fixing the salary of assessor at $3,600 and providing that he may retain for his own use four per cent. on personal property tax collected.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the County of Tehama against Louis Winter. Judgment for plaintiff, and defendant appeals. Affirmed.

H. D. Jerrett, of Red Bluff, for appellant.

M. J. Cheatham, of Red Bluff, for respondent.

PREWETT, Presiding Justice pro tem. The county of Tehama, respondent herein, brought suit against the appellant, its county assessor, to recover the sum of $1,506.60 retained as compensation for the collection of certain personal property taxes collected by him in his official capacity as such assessor. The county prevailed in the action, and appellant brings this appeal from the judgment. He bases his claim to this percentage upon the provisions of subdivision 7 of section 4266 of the Political Code, which subdivision, it is admitted, deals with the compensation of the assessor of said county. Said subdivision reads as follows:

> "The assessor, $3,600 per annum; provided that the assessor shall be entitled to receive and retain for his own use, four per cent. only on personal property tax collected by him," etc.

The respondent county is governed by a charter regularly adopted in the manner provided by law. This charter is in conflict with the terms of said subdivision with reference to the compensation of the assessor, and especially as to said percentage. Whether the charter or the Political Code is paramount is the only question presented on this appeal. This question, however, is shorn of any uncertainty by several very recent decisions of the Supreme Court and of this court construing the particular provisions now under examination. It will be found convenient to quote in full such provisions of the charter as relate to this controversy. One section reads as follows:

> "The salary of the assessor shall be $2,000 per annum, and he shall be allowed $1,000 per annum for deputy hire," etc. Section 3, art. 4.

Another section of the charter deals with the disposition by the various county officers of such fees and commissions as are allowed by law. It reads as follows:

> "In all cases in which an officer is to receive a fixed salary, whether such salary be fixed by this charter or by the board of supervisors, such salary shall be in full compensation for all services by such officer; and in all cases in which such officer is, by general law, entitled to charge and receive any fees or commissions it shall be the duty of such officer to charge, collect and receive such fees or commissions and to pay the same monthly to the county treasurer." Section 5, art. 9.

The constitutionality of the above-quoted provision of the charter fixing the annual salary of the assessor at $2,000 was distinctly upheld by this court in the case of Winter v. De Shields (No. 2127) 189 Pac. 703. While no application was made for a hearing of the case in the Supreme Court, that tribunal, in Jones v. De Shields (No. 3233) 202 Pac. 137, made quotations therefrom with approval. These quotations cover the identical point now under consideration, to wit, the point whether or not the charter provision fixing the salary of the assessor at two thousand dollars per annum is constitutional. That his salary is fixed at $2,000 may therefore be treated as a closed question. This conclusion renders it unnecessary to examine at length the contention of the appellant that the provisions of the charter in question are unconstitutional.

Section 5, above quoted, provides that all fees and commissions now authorized by law must be collected by the respective officers whose salaries are fixed by the charter and paid monthly into the county treasury. This disposes of the single issue in the case.

Judgment affirmed.

We concur: HART, J.; BURNETT, J.

(56 Cal. App. 372)

McGRANAHAN v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO.

In re CONNER.

(Civ. 4167; Cr. 1027.)

(District Court of Appeal, First District, Division 2, California. Feb. 10, 1922. Hearing Denied by Supreme Court April 8, 1922.)

1. Criminal law 🔑207(4)—San Francisco police court held authorized to act as committing magistrate under charter.

Under Const. art. 11, §§ 8 and 8½, relative to freeholders' charters, and San Francisco Charter, art. 5, c. 8, § 2, giving the police court the power in criminal cases of justices of the peace, such police court may hold an examination and hold one charged with a misdemeanor, the punishment for which may exceed a fine of $500, six months in jail, or both, for trial in the superior court, notwithstanding St. 1893, p. 9, authorizing the police court to try such misdemeanors.

2. Statutes 🔑161(1)—All embracing law repeals earlier law on the same subject whether there is a repealing clause or not.

Any law embracing all that was intended to be preserved of the old law, and omitting what was not so intended, is complete in itself and repeals all other law on the subject embraced within it, whether it contains a repealing clause or not.

3. Criminal law 🔑84(1)—Grant of power to cities to regulate police courts by freeholders' charters not limited to municipal affairs.

Const. art. 11, § 8½, authorizing freeholders' charters to regulate the jurisdiction, etc., of police courts, does not limit such grant of power to municipal affairs, especially as, to so hold, it would be necessary to interpolate language to that effect and strike out provisions of the San Francisco Charter, neither of which should be done except for cogent reasons.

Original applications by M. J. McGrananan for a writ of prohibition directed to the Police Court of the City and County of San Francisco, and by William E. Conner for a writ of habeas corpus. Writs denied, and petitioner remanded.

Theodore A. Bell and Sidney Rhein, both of San Francisco, for petitioner.

Harry A. Encell, of San Francisco, and Frank M. Smith, of Los Angeles, for respondent.

R. M. J. Armstrong, of San Francisco, for Sheriff of City and County of San Francisco.

STURTEVANT, J. The first case sounds in prohibition and the second is an application for a writ of habeas corpus. Both proceedings were instituted for the purpose of determining the jurisdiction of the police court of the city and county of San Francisco over misdemeanors, the punishment for which may exceed a fine of $500 or six months in the county jail, or both. In the interest of clarity of expression, we will specially refer to the facts as presented in the prohibition proceeding, and the conclusion reached will rule both cases.

[1, 2] The petitioner William E. Conner, was charged, in a verified complaint, with having violated certain provisions of the Medical Practice Act (Stats. 1913, c. 354). By section 17 of that act the punishment may be a fine of $600 or imprisonment in the county jail for six months, or both. The petitioner was, after his arrest, taken before the police court and that court set the case down for examination and threatens to proceed and hold an examination, and, if the proof adduced at the examination is sufficient, to hold the petitioner to appear before the superior court for trial. If the jurisdiction of the police court in such a case is as broad as the jurisdiction of a justice of the peace, the writ should be denied. Ex parte Anear, 114 Cal. 370, 46 Pac. 172. If special powers have been conferred on the police court authorizing that court to try high misdemeanors, the police court should not hold an examination, but should proceed to try the petitioner; and, in that event, the writ should issue. As defining the powers of the police court, the petitioner cites and relies upon chapter 15 of the statutes of 1893. An examination of that statute will disclose that it provides for the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which, the judges of such courts shall be elected or appointed and for the compensation of such judges, and of their clerks and attachés. By an amendment to the Constitution on November 3, 1896, the identical power above defined was tendered to any freeholder convention called for the purpose of compiling a freeholder charter. Const. art. 11, § 8½. After the Constitution had been so amended, a freeholder convention was called in San Francisco which prepared a charter which was approved by the Legislature and took effect January 8, 1900. Under chapter 8 of article 5 the authority tendered by article 11, § 8½, of the Constitution, was accepted. The subject-matter of the act of 1893 thereupon became the subject-matter of the charter. Section 2 of said chapter, among other things, provided as follows:

> "The police court of the city and county of San Francisco shall have jurisdiction: * * * (4) Said court or any judge thereof shall have the same powers in all criminal actions, cases, examinations, and proceedings as are now or are hereafter conferred by law upon justices of the peace."

In section 8 of article 11 of the Constitution, it is provided that a charter so adopted "shall become the organic law thereof, and supersede any existing charter and all amendments thereof, and all laws inconsistent with such charter." In the leading case entitled Murdock v. City of Memphis, 20 Wall. 590, 617 (22 L. Ed. 429), the Supreme Court of the United States said:

> "We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on this subject embraced within it."

That rule obtains in California whether the latter law contains a repealing clause or otherwise. Hanley v. Sixteen Horses, etc., 97 Cal. 182, 183, 32 Pac. 10. We are not concerned in this case as to whether a repeal of the act of 1893 resulted from the enactment of the charter. Let us assume that the police court created by the act of 1893 is still in existence. Nevertheless, it is quite clear that such entity is not the entity created by the charter and it is the police court that was created by the charter that is a party to this proceeding. If any one would contend that the police court created by the act of 1893 is in existence and should take jurisdiction of any certain matter, that question might be examined into in an appropriate proceeding, but cannot be examined into in this proceeding. People v. Williamson, 135 Cal. 415, 419, 67 Pac. 504.

[3] The petitioner claims that the grant of power concerning police courts, conveyed to the freeholder convention, was intended to be limited to "municipal affairs." The first answer to that claim is that the language of section 8½ of article 11 of the Constitution which we have cited above is presumed to be correct and exact. Again, the limited meaning contended for is not suggested by any words written in the section which we are called upon to construe. To rule with the petitioner, we must write the words in. Furthermore, if we so hold, we must strike out of the charter subdivision 3, § 2, c. 8, art. 5, which reads as follows:

> "Said court, or any judge thereof, shall have the same powers in all criminal actions, cases, examinations and proceedings as are now or may hereafter be conferred by law upon justices of the peace."

We have no right under the law to interpolate the words mentioned or to strike out the provision just quoted except for most cogent reasons. In Boca Mills Co. v. Curry, 154 Cal. 326, at page 338, 97 Pac. 1117, 1123, the court said:

> "If the language used plainly and unequivocally shows a certain and definite purpose to be accomplished thereby, it is the duty of the

courts to so construe it as to carry that purpose into effect."

The petitioner argues that if his contention is not conceded that then there is no law authorizing the police court to either examine or to try a defendant for any offense except to try a charge of having violated an ordinance enacted by the board of supervisors. Not so. The charter expressly imposes such duties upon the police courts. If the charter did not do so, then there is, and was at all times, in San Francisco, a full set of officers holding offices created by the Legislature and on whom the Legislature has imposed the duty of making arrests, holding examinations, and conducting trials. In other words, San Francisco has every single officer that any outside county has with the exception of the township office of constable; and, if the charter machinery is not sufficient to provide for enforcing the criminal laws, the legislative machinery is sufficient. Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; In re Mitchell, 120 Cal. 384, 390, 52 Pac. 799; Ex parte Anear, 114 Cal. 370, 46 Pac. 172. Robert v. Police Court, 148 Cal. 131, 82 Pac. 838, in effect, held that the police court should do as the respondent is about to do, examine the charge and leave the trial thereof to be had in the superior court. Matter of Application of Westenberg, 167 Cal. 309, 139 Pac. 674, had to do with the law applicable to the city of Oakland. That city is governed by a freeholder charter. Stats. 1911, p. 1551. By section 199 of its charter:

> "The existing police court of the city shall continue as it now exists until otherwise provided by law. Said police court shall have exclusive jurisdiction of all misdemeanors punishable by fine or imprisonment or by both said fine and imprisonment, committed in the city where said police court is held; and in all such cases to hear, try and determine the same, convict or acquit, pass and enter judgment and carry such judgment into execution as the case may require, according to law."

By section 2 of chapter 164 of the statutes of 1885:

> "The police court (of Oakland) shall have exclusive jurisdiction of the following public offenses committed in the city: * * * (3) * * * All misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment."

It will thus be observed that, before the charter, the Legislature had conferred on the police court of Oakland powers to try high misdemeanors, and that by its charter that police court was continued in existence with the powers so conferred upon it. When, therefore, Westenberg was charged with having committed a criminal libel in the city of Oakland, it was held that the police court had jurisdiction to try the charge, and upon his conviction to sentence him in the manner provided by law. In People v. Cory, 26 Cal. App. 735, 148 Pac. 532, the defendant was charged with the crime of conspiracy, a high misdemeanor. Los Angeles was organized under a freeholder charter before section 8½ of article 11 of the Constitution was adopted. The provision contained in the charter of Los Angeles organizing and establishing a police court was, in 1890, adjudged invalid as being the exercise of a power not conferred. That city stands, therefore, in the position as though it never had provided for a police court. Not having provided for a police court, it is subject to general laws. Fragley v. Phelan, 126 Cal. 383, 395, 58 Pac. 923. By act of the Legislature (Stats. 1901, p. 95) the police court of the city of Los Angeles was given exclusive jurisdiction of all misdemeanors punishable by fine or imprisonment when the offense was committed in the city where such police court is held. The conspiracy as charged was ripened into a crime by reason of an overt act which was committed in the city of Pasadena. Accordingly, the court held that the police court of Los Angeles had not been given power to try the case and that the jurisdiction to try the case rested in the superior court. It was also held that, as the police court of Pasadena was given only such jurisdiction as is vested in a justice's court, the police court of Pasadena had no jurisdiction to try a high misdemeanor. People v. Fortch, 13 Cal. App. 770, 110 Pac. 823, is more nearly in point. The defendant was charged with a high misdemeanor, namely, the violation of the Dentistry Act (Stats. 1909, p. 800). The charge was examined by the police court of San Francisco and the defendant was held to answer in the superior court, and in that court he was convicted and from the judgment of conviction he appealed. On appeal he made the point that the superior court had no jurisdiction to try him. It was held that the superior court had not exceeded its jurisdiction. The case fully supports the views we have expressed above.

The application for a writ of prohibition is denied, and the application for a writ of habeas corpus is denied, and the petitioner is remanded.

We concur: LANGDON, P. J.; NOURSE, J.

56 Cal. App. 637

Ex parte SEVERIN. (Cr. 1043.)

(District Court of Appeal, First District, Division 2, California. Feb. 24, 1922.)

Habeas corpus 🔑111(1)—Discharge from custody denied, on the ground of sufficient evidence on preliminary examination.

Discharge from custody of sheriff, to which, after preliminary examination, petitioner was committed, denied, on the ground that the corpus delicti was sufficiently established by circumstantial evidence to permit the admission of petitioner's extrajudicial statements and admissions.

Habeas corpus proceeding by Gustave Severin to secure release from custody of the Sheriff of the City and County of San Francisco, to which petitioner was committed after a preliminary examination on the charge of embezzlement, and a holding of him to answer therefor. Application for writ denied.

See, also, 205 Pac. 101.

Marcel E. Cerf, C. H. Sooy, and Edwin V. McKenzie, all of San Francisco, for petitioner.

Leo R. Friedman, Deputy Dist. Atty., of San Francisco, for respondent.

LANGDON, P. J. After an examination of the entire record, we are satisfied that the corpus delicti has been sufficiently established by circumstantial evidence to permit the admission in evidence of the extrajudicial statements and admissions of the petitioner.

The application for a writ of habeas corpus is denied.

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188 Cal. 348

Ex parte SEVERIN. (Cr. 2442.)

(Supreme Court of California. March 6, 1922.)

Habeas corpus 🔑111(1) — No discharge though evidence on preliminary examination shows probable cause of a crime other than charged.

In view of Pen. Code, § 1489, as to disposition of petitioner in habeas corpus, one held to answer after a preliminary examination on a complaint charging embezzlement will not be discharged on habeas corpus, the evidence showing probable cause to believe him guilty of larceny by trick or device, or of obtaining money by false pretenses (of which, under section 954, he might be charged in the same complaint), though perhaps not of embezzlement.

In Bank.

Habeas corpus proceeding by Gustave Severin. Petitioner remanded to custody.

See, also, 205 Pac. 101.

Marcel E. Cerf, C. H. Sooy, and Edwin V. McKenzie, all of San Francisco, for petitioner.

Leo Friedman, of San Francisco, for respondent.

SHAW, C. J. After a preliminary examination upon a complaint charging the petitioner with the crime of embezzlement, he was held to answer therefor, and committed to the custody of the sheriff. He seeks release on habeas corpus on the ground that the order holding him to answer was made without reasonable or probable cause.

The evidence taken on the preliminary examination is set forth in the petition. It shows that the petitioner obtained from the complaining witness the sum of $600 upon representations made by him to said witness that he (the petitioner) had formed a partnership to carry on a certain business, and that for that sum of money he would admit the witness as a member of said firm. Apparently the witness delivered to him the money with the intent that it should be applied to that purpose, and to pass the title thereto to the firm of which the witness was to become a member. The evidence also tends strongly to show that the representations were wholly false, that no such firm had been formed or was in existence, and that the petitioner, having received the money as above stated, converted it to his own use. It is extremely doubtful if this establishes the petitioner's guilt of the crime of embezzlement. Perhaps an argument could be framed, based on similar reasoning to that upon which the crime of larceny by trick and device is upheld, which would lead to the conclusion that the petitioner had obtained possession of the money by fraud, and that the title thereto had not passed, notwithstanding the intent of the witness that it should pass. But we are not disposed on this hearing to enter upon this inquiry. We have no cases in this state which would be a precedent for holding that this would constitute embezzlement, or, at all events, none of which we are advised. The evidence shows probable cause to believe that the petitioner is guilty of either one or the other of three distinct crimes: (1) larceny by trick and device, under the reasoning above stated; (2) embezzlement of money obtained by trick and device, under the same reasoning; or (3) obtaining money by false pretenses. Assuming, therefore, that the complaint charging embezzlement is not sustained, it is clear that there was ample cause for holding the petitioner for the commission of a crime. It would therefore be improper for this court to discharge him until the proper authorities have had an opportunity to make the correct charge. The language of the late Chief Justice Beatty in Ex parte Nicholas, 91 Cal. 643, 28 Pac. 48, is applicable here:

> "He has been examined upon a charge which the committing magistrate has denominated

larceny, but it may well be that the depositions prove embezzlement. It not unfrequently happens that the facts of a particular case leave it extremely doubtful under which definition the offense falls—that of larceny or embezzlement; and if the committing magistrate should give it a wrong designation in his order of commitment, that would not prevent the district attorney from charging it correctly in the information."

It is never the duty of the court to discharge a petitioner on habeas corpus where it appears, notwithstanding the defects in the form of the charge against him, that he is probably guilty of a criminal offense. Ex parte Branigan, 19 Cal. 133; Ex parte Keil, 85 Cal. 309, 24 Pac. 742; Ex parte Nicholas, supra; and Pen. Code, § 1489. Under section 954 of the Penal Code a defendant may be charged with two or more different offenses, connected together in their commission, or of the same class of crimes, under separate counts. When the petitioner is remanded the prosecuting officers may prefer new charges against him upon a complaint charging under separate counts the different offenses above mentioned, including the present charge, if deemed advisable, whereupon he may be again examined and recommitted and convicted of the offense which the evidence may ultimately prove that he has committed.

Let the petitioner be remanded to the custody of the sheriff.

We concur: LAWLOR, J.; WILBUR, J; SLOANE, J.; SHURTLEFF, J.; WASTE, J.; RICHARDS, Justice pro tem.

(188 Cal. 321)

LA FLEUR v. M. A. BURNS LUMBER CO.

(Sac. 3157.)

(Supreme Court of California. March 1, 1922.)

1. Appeal and error 🔑1223—Position of surety on appeal bond similar to that of surety on obligation made a party defendant.

The position of a surety on an undertaking on appeal is similar to that of an ordinary surety on an obligation, who has been joined as a party defendant.

2. Principal and surety 🔑198—Surety on appeal bond may have remedy against principal by paying and taking assignment of affirmed judgment before entry against surety.

The surety on appeal bond of defendant may, on affirmance of the judgment before entry of judgment against it, anticipate such entry, pay the amount of the judgment, and take an assignment of it, instead of claiming the benefit of it, under Code Civ. Proc. § 709, as to a surety against whom, with his principal, judgment has been rendered, on paying it, compelling repayment from the principal.

3. Judgment 🔑894—Evidence held to show judgment not satisfied as regards right to entry of satisfaction.

Evidence *held* to show that a judgment affirmed on appeal was not satisfied, but was paid by, and assigned to, the surety on the undertaking on appeal of the judgment debtor, so that defendant was not entitled to entry of order of satisfaction.

4. Trusts 🔑25(1)—The purpose held expressed in a declaration of trust.

The declaration of trust, that a certain judgment is held in trust for H. or his assigns, as required by Civ. Code, § 2221, expresses the purpose of the trust, namely, to acknowledge that the whole interest in the judgment is in H. as beneficiary.

5. Appeal and error 🔑330(1)—Where judgment was assigned, appeal from order of entry of satisfaction may be in plaintiff's name.

A proceeding to have satisfaction of judgment entered under Code Civ. Proc. § 675, is but part of the original action, so that one to whom the judgment was assigned before the motion for such entry is such an assignee as can, under section 385, have the appeal from order of entry taken in the name of the original plaintiff.

In Bank.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by E. La Fleur against the M. A. Burns Lumber Company. From order directing entry of satisfaction of judgment, plaintiff appeals. Reversed.

See, also, 38 Cal. App. 279, 176 Pac. 58.

Jesse W. Carter, of Redding, and John Ralph Wilson, of San Francisco, for appellant.

F. A. Cutler, of Eureka, for respondent.

LAWLOR, J. This is an appeal by the plaintiff, from an order of the court granting a motion by the defendant, to direct the clerk to enter satisfaction of a judgment rendered in favor of the plaintiff and against the defendant.

On January 23, 1915, plaintiff, E. La Fleur, brought an action against the defendant, the M. A. Burns Lumber Company, a corporation, to recover damages for personal injuries received by him while in defendant's employ, the injuries being caused by the negligent operation of defective machinery in defendant's mill. The case was tried by the court sitting without a jury. On July 3, 1915, judgment was rendered in favor of plaintiff for the sum of $3,000, from which judgment defendant appealed. On September 26, 1918, the judgment was affirmed by the District Court of Appeal for the Third Appellate District (38 Cal. App. 279, 176 Pac. 58), and this judgment has become final.

When the appeal from the judgment was taken, the Massachusetts Bonding & Insurance Company became surety for respondent, and gave an appeal bond, in accordance with section 942 of the Code of Civil Procedure. On February 6, 1918, while the case was pending in the appellate court, appellant executed the following assignment of the judgment to his attorney, Jesse W. Carter, for a consideration of $1,000:

> "Know all men by these presents: That I, E. La Fleur, of the town of Aberdeen, state of Washington, the party of the first part herein, in consideration of the sum of one thousand dollars ($1,000), gold coin of the United States of America, to me in hand paid by Jesse W. Carter, of the city of Redding, county of Shasta, state of California, the party of the second part herein, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer, and set over unto the said party of the second part, and his assigns, all my right, title and interest in and to that certain judgment recovered by me as plaintiff in the above entitled action on the 3d day of July, A. D. 1915, in the superior court of the state of California, in and for the county of Shasta, against M. A. Burns Lumber Company, a corporation, as defendant, together with all sums of money that may be had or obtained by means of said judgment, or any proceedings to be had thereon. * * *"

On December 31, 1918, the amount of the judgment, about $3,900, was paid to Carter, and he executed in favor of E. T. Hall, one of the attorneys for the bonding company, the following declaration of trust:

> "Know all men by these presents: That that certain judgment assigned and set over to me by E. La Fleur on the 6th day of February, 1918, which said judgment was rendered in a certain action entitled 'In the Superior Court of the State of California in and for the County of Shasta, E. La Fleur, Plaintiff, v. Burns Lumber Company, Defendant,' numbered therein No. 4850, is held by me in trust for E. T. Hall, or his assigns."

The evidence does not show the manner of payment of the $3,900, but it is not disputed that the money was furnished by the bonding company.

On October 9, 1919, notice of its intention to move the court to order entry of satisfaction of the judgment in accordance with the terms of section 675 of the Code of Civil Procedure, was served by respondent on Carter, on John R. Wilson, another attorney for the bonding company, on Hall, and on the bonding company. On October 28, 1919, the motion was made, under the provisions of said section 675, which reads in part:

> "Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment [of satisfaction] or make such indorsement, and upon motion, the court may compel it, or may order the entry of satisfaction to be made without it."

Both appellant and the bonding company appeared by their attorneys at the hearing of the motion, and evidence concerning the satisfaction of the judgment was received. The motion was granted, and the entry of satisfaction ordered. From that order this appeal is taken.

Appellant's position is thus stated:

> "It is the appellant's contention that, inasmuch as the satisfaction of the judgment, as far as it was satisfied, was made by the payment to the assignee of the plaintiff by the surety of the sum required by the plaintiff and his assignee in consideration of the settlement of their claims against the defendant, the surety had the right to keep the judgment unsatisfied of record, in order that it may proceed by subrogation against the defendant judgment debtor. In other words, inasmuch as the surety has paid the judgment, as far as the plaintiff and his assignee are concerned, it now stands in the shoes of the plaintiff, and has the right to proceed, under and by virtue of the judgment to collect from the defendant the amount which the surety paid in the settlement of plaintiff's claims under the judgment."

It is asserted in this behalf that the appeal is for the benefit of the bonding company, which is entitled to maintain it in the name of appellant, under the provisions of section 385 of the Code of Civil Procedure, which declares:

> "In the case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

Respondent has interposed a motion to dismiss the appeal on the grounds that "1. The appellant is not an aggrieved party within the provisions of section 938, C. C. P. 2. The right of subrogation is not involved in this appeal." Respondent further contends that "there is no evidence of any assignment of the attempted trust to the insurance company by Hall," and it is insisted that this is a special proceeding, independent of the main case, which involves a procedure and a hearing wherein all parties interested are served with process and brought before the court where the question at issue is tried, and a judgment or order rendered on the merits of the case; and that, inasmuch as it is a special proceeding, the transfer of the judgment to the bonding company was made before the action was begun, although while the original action was pending, and that therefore the bonding company would have no right to continue the action in the name of appellant.

[1] In Meredith v. Santa Clara Mining Association of Baltimore, 60 Cal. 617, the court, considering the nature of the liability of a surety on an appeal bond, declared:

"When the sureties to the undertaking on appeal agreed that, in case of the affirmance of the judgment, or of any part of it, by the appellate court, and of its nonpayment by the judgment debtor, judgment might be entered also against them, in the court from whose judgment the appeal was taken, according to the law under which the appeal was taken, they, in legal effect, voluntarily made themselves parties to the action, and submitted themselves to the jurisdiction of the court."

The position of a surety on an undertaking on appeal is therefore similar to that of an ordinary surety on an obligation, who has been regularly joined as a party defendant.

[2] In Williams v. Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60, the defendants against whom judgment was rendered were a guardian and the seven sureties on his bond. Three of the sureties paid the judgment, took an assignment of it from the plaintiff, and caused execution to be levied under it on the goods of the cosureties. One of the cosureties objected that, in availing themselves of the judgment, the sureties had not conformed to the provisions of section 709 of the Code of Civil Procedure, which provides that—

"When a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment."

The court said:

"Respondents do not claim to have complied with the said section as to filing with the clerk of the court the notice as therein provided, or as to having an entry made in the margin of the docket, but they claim that, independent of said section, by virtue of the written assignment to them of the judgment, they have the right to an execution to enforce contribution from the appellant. We think the contention of respondents as to this point correct. * * * The section was, no doubt, enacted for the benefit of sureties and joint judgment debtors in order to enable them, without bringing an action, to use the judgment and the writs of the court for the purpose of compelling, in the case of sureties, the repayment from their principal, or contribution from cosureties, and, in case of joint judgment debtors, contribution from their codebtors.

"The Legislature evidently did not have in mind a case where the parties paying the judgment procured a written assignment of it. The plaintiff, being the owner of the judgment, had the right to assign it to any one upon payment of the amount authorized by the order of the court in which the estate was pending. The fact that the parties paying it were some of the judgment debtors would not prevent them from taking an assignment of it."

In National Bank v. Los Angeles Iron & Steel Co., 2 Cal. App. 659, 84 Pac. 466, 468, the appellate court reversed an order of the trial court for the enforcement of a judgment by a defendant who had paid the amount to the plaintiff, against his codefendants. The court said:

"In this connection, it should be observed that, assuming the validity of an assignment of a judgment to one of the defendants (Williams v. Riehl, 127 Cal. 365 [78 Am. St. Rep. 60, 59 Pac. 762]; Freeman on Judgments, § 472), yet the right of the assignee to the judgment in such case is rather an equitable than a legal right, and extends no further than to the use of the judgment as a security for the payment of the amounts properly due from other parties. It, therefore, would seem to be a right that can be exercised only after an affirmative showing to the court and a determination of the indebtedness of the other defendants; by which we mean, not that a new suit is required, but that, at least, application should in all cases be made to the court."

Inasmuch as the position of a surety on an appeal bond is similar to that of any surety who is jointly liable with the principal, these cases are pertinent to a determination of the rights of the bonding company in the case at bar. No judgment has been entered against that company, but there is no reason why it might not anticipate such entry, pay the amount of the judgment, and take an assignment of it, instead of claiming the benefit of it under section 709 of the Code of Civil Procedure.

[3] We think it clear from the record that the implied finding of the trial court that the judgment was satisfied was erroneous. As pointed out, there was an absolute assignment of the judgment from La Fleur to Carter, and a declaration of trust of the judgment by Carter in favor of Hall. That the payment from Hall to Carter was for the purpose of purchasing the judgment and not of satisfying it is shown by the following testimony of Carter:

"Q. Well, it [the money] was sufficient to satisfy you, was it, in payment of the judgment which had been assigned to you? A. Certainly; I agreed to transfer the judgment for that amount. * * * Why, yes, we were satisfied to take that amount and transfer the judgment; we didn't care what became of the judgment. * * * Q. Was the execution of that paper the consideration for the sum of money paid to you? A. It was"

—and his further testimony:

"I would say that the transfer of the judgment, or my interest in the judgment, was the consideration."

It also appears that, in taking the transfer, Hall was acting as agent for the bonding company. Thus Carter testified:

"Well, I don't know who purchased it [the judgment], the money was paid into the bank.

Q. By whom? A. I don't know. I left instructions to the bank that when a certain amount of money was paid there, to forward those papers."

It was also admitted by attorney Wilson that Hall was one of the local attorneys for the bonding company, and that the "money, so far as that is concerned, came from the Massachusetts Bonding & Insurance Company, directly or indirectly, as the case might be." Therefore, the bonding company, as the assignee of the judgment, is entitled to the benefit of it to collect the amount due, and hence the order that satisfaction be entered was erroneous.

[4] Respondent makes the further contention that the declaration of trust is invalid, under section 2221 of the Civil Code, because no purpose is expressed in it. This position cannot be maintained. In Lynch v. Rooney, 112 Cal. 279, 284, 44 Pac. 565, 566, the following declaration was held to be a valid declaration of trust:

> "Some time after Uncle Bryan's property was deeded to me I heard that Uncle Patrick was still living, and I resolved that he should have half of the estate, though the laws does not compel the division. Still I feel that, in justice, it belongs to both of them."

Of this the court said:

> "Upon a careful consideration of this letter, we are satisfied that an intention upon the part of Mary Rooney to create and declare a trust appears therefrom with reasonable certainty. The subject of the trust is disclosed by the letter to be the land. The purpose is to acknowledge an undivided interest therein in fee in the beneficiaries, and the beneficiaries are the heirs of Patrick Lynch, deceased. The only matter left in any uncertainty is as to the interest the heirs take under the trust."

In the case at bar an intention to create a trust is clearly shown in the declaration, and the purpose of the trust, as in Lynch v. Rooney, supra, is to acknowledge that the whole interest in fee is in Hall as beneficiary.

[5] With reference to respondent's last point, that the bonding company is not entitled to maintain this appeal in La Fleur's name, this proceeding cannot be considered a special proceeding, under section 23 of the Code of Civil Procedure, or as an independent action. In Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 Pac. 464, it was said:

> "Indeed, there is abundant authority to the effect that, when the prevailing party with a judgment in its favor has accepted the fruits of such judgment, satisfaction thereof, either voluntary or under the compulsion authorized by section 675 of the Code of Civil Procedure, is 'the last act and end of the proceeding.' Estate of Baby, 87 Cal. 200."

It follows from that case that this proceeding is but a part of the original action. Therefore, respondent's contention that the transfer of the judgment was made before this proceeding was commenced and that consequently the bonding company is not such an assignee as is contemplated by section 385, is without merit. The appeal was properly taken in La Fleur's name.

Order reversed.

We concur: SHAW, C. J.; WILBUR, J.; SHURTLEFF, J.; WASTE, J.; SLOANE, J.; RICHARDS, Justice pro tem.

(188 Cal. 210)

HUGHES v. PACIFIC WHARF & STORAGE CO. (L. A. 6408.)

(Supreme Court of California. Feb. 17, 1922.)

1. Work and labor 🔑11—Reasonable value of services recoverable in absence of agreement.

One employed to superintend the doing of work is entitled to the reasonable value of his services, in the absence of a contract fixing the amount of his compensation.

2. Contracts 🔑143—Rules of construction resorted to only where meaning is in doubt.

Rules of construction are resorted to for the purpose of ascertaining what a contract really was; and, if that is not in doubt, it is unnecessary to rely upon the conduct of the parties for its construction.

3. Evidence 🔑378(1)—Carbon copy of letter admissible on proof of custom of mailing.

A sufficient foundation was laid for the introduction of a carbon copy of a letter when a witness stated that he mailed the letter to the addressee thereof, and based such testimony upon his invariable habit of mailing all such letters.

4. Appeal and error 🔑1058(1)—Exclusion of letter held not prejudicial error in view of other evidence admitted.

In an action to recover commission for services rendered as superintendent, exclusion of a letter from a subordinate officer of the employer corporation to the plaintiff *held* not prejudicial error, where resolutions of the board of directors, of which plaintiff was a member, which were passed in plaintiff's presence, were introduced in evidence, and accomplished all that could have resulted from the introduction of the letter.

5. Master and servant 🔑70(1)—Declaration in letter as to amount due held not binding on addressee as a construction of contract.

A declaration in a letter by the secretary of employer corporation that amount due under a contract was actually $3,000 less than that really due was not binding upon the addressee as a construction of the contract, nor was the acceptance of a payment accompanying such a declaration binding upon him as such construction; there being no defense of payment alleged.

6. Stipulations 🔑18(7)—Party not asking to be relieved from stipulation bound thereby on appeal.

In an action to recover commission for services rendered in superintending the construction of a wharf and dredging of a slip and approach, where the parties stipulated that a certain amount of money was expended for dredging, the court did not err in refusing to permit defendant to introduce evidence to show that a certain part of such stipulated amount was expended for the construction of the dredge used, where defendant did not ask to be relieved from the stipulation.

7. Master and servant 🔑70(2)—Contract for commissions for superintending work construed.

In an action for a commission of 5 per cent. for services in superintending the construction of a wharf and dredging of a slip, court *held* justified in construing stipulation that a certain sum was expended as a stipulation that the total amount thereof was made upon the work superintended by the plaintiff, though it was further stipulated that certain amounts thereof were expended for construction of a dredge, pile driver, launch sheds, board walk, launch expenses, etc.

8. Appeal and error 🔑1151(2)—Inclusion of item in account held palpable inadvertence, curable by modification.

In an action by a superintendent working for 5 per cent. commission on the amount expended, where the commission already paid was included in a stipulation as to total expenditures, the Supreme Court could cure the error by modification.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Thomas Hughes against the Pacific Wharf & Storage Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

W. N. Goodwin and Goodwin & Morgrage, all of Los Angeles, for appellant.

George P. Adams, of Los Angeles, for respondent.

WILBUR, J. Plaintiff recovered judgment in the lower court, and defendant appealed. The judgment was affirmed in department, and defendant's petition for rehearing was granted. We accept and adopt the defendant's statements with reference to the issues and evidence with certain exceptions to be hereafter noted. The statement is as follows:

"The action is to recover an agreed commission of 5 per cent. on expenditures made by defendant in constructing a wharf and dredging a slip and its approach at Wilmington, in Los Angeles county. Plaintiff alleges that he was employed by defendant to superintend and oversee said work at an agreed compensation of 5 per cent. of the money expended therefor; that such expenditures amounted to $236,830.59; that his commission was $11,841.53, of which $8,741.89 and no more had been paid. The prayer is for $3,099.64 and interest from October 8, 1912. Defendant answered, admitting the employment of plaintiff to superintend the construction of the wharf, slip, and approach; denied that it agreed to pay plaintiff 5 per cent. upon expenditures made by it other than in dredging a slip, the approach thereto, and constructing a wharf alongside of said slip. Denied that it expended in dredging said slip and approach and in constructing said wharf the sum of $236,830.21, or any other sum in excess of the sum of $140,249.21; or that it expended any sum of money whatever in excess of said last-mentioned sum upon which it was understood or agreed that plaintiff should have or receive 5 per cent. thereof as salary or commission. Denied that the sum of $3,099.64 or any other sum was due or owing to plaintiff.

"Defendant affirmatively alleged the passage of certain resolutions by its board of directors on June 21, 1910; that at the time said resolutions were passed plaintiff was a director and large stockholder in defendant corporation; that the formal contract referred to in said resolutions was never executed, but immediately after its passage Thomas Hughes took charge of the dredging of said slip, its approach, and the construction of the wharf, and continued in charge until October 8, 1912; that after the passage of said resolutions and up to October 8, 1912, defendant expended in dredging said slip, its approach, and in constructing said wharf the sum of $140,249.21 and no more; that defendant has paid plaintiff 5 per cent. of all expenditures made by it in said work between June 21, 1910, and October 8, 1912.

"Under these pleadings it rested upon plaintiff to establish that the contract covered all expenditures made by defendant up to October 8, 1912, or that $236,830.59 was expended in dredging the slip, its approach, and constructing the wharf.

"The court found as a fact that defendant expended said sum for that purpose, and under the supervision and direction of plaintiff, and awarded him a commission on that basis. These findings are attacked as unsupported by the evidence.

"The only evidence of a contract offered by plaintiff is found in the record at folio 35 et seq. He testified that the conversations were principally with Mr. Bastable, but that there were conversations at the meetings when all the members of the board of directors were present. He says he told them that the regular commission was 10 per cent., and that he would do it for half. This he says was immediately after the dredge was completed, but he does not attempt to fix the date. There is no testimony that the corporation accepted his proposition other than the inference to be drawn from the fact that he thereafter superintended the dredging and building of the wharf and the corporation paid him money.

"Defendant introduced the resolution of the board of directors passed June 21, 1910, in words as follows: 'It was moved by Director Blankenhorn, seconded by Director Epstein and unanimously passed that the president and secretary be and they are hereby authorized and directed for and on behalf of this corporation to execute a contract with Thomas Hughes for the payment by this corporation to said Thomas Hughes of 5 per cent. of the money expended in dredging of slip No. 2 and the approach thereto, and the construction of the wharf alongside said slip No. 2.' Thomas Hughes was then a director of the corporation, and was present at that meeting. * * *"

During the trial the following stipulation with reference to the facts was entered into between the parties:

"It is stipulated that the defendant expended from the commencement of its work at San Pedro to October 8, 1912, the following sums of money for the following designated purposes: Dredging, $59,857.75; wharf No. 1, $85,319.30; electric energy, $24,555.78; warehouse No. 1, $6,699.65; earth filling, $40,248.65; engineering, $11,541.24; pile driver, $4,266.47; launch, $2,758.81; sheds, $817.21; board walk, $278.35; launch expenses, $317.66; tools, $176.70; wharf insurance $72.50. Total, $236,810.07.

"It is stipulated that of this total of $236,810.07 there was expended by the company before June 21, 1910, the following amounts for the following purposes: Dredging, $3,375.47; wharf No. 1, $16,871.12; electric energy, $10,000; earth filling, $39,526.18; engineering, $2,658.75. Total, $72,431.52.

"It is also stipulated that the expenditures for engineering after June 21, 1910, to October 8, 1912, were $8,782.49, and of this amount $8,741.99 was commissions on expenditures paid to plaintiff and charged to 'Engineering Account.'

"It is also stipulated that of the expenditures after June 21, 1910, to October 8, 1912, $6,699.65 was expended in the construction of 'Warehouse No. 1.'"

In addition to the summary thereof contained in the above statement, plaintiff testified as follows:

"Q. How did you come to commence work for them? A. They had no one to run the dredge, and wanted a proposition from me. I told them the regular commission for such work was 10 per cent., and I would do it for half, as I would have to employ a man to take my place in the Hughes Manufacturing Company, and that would just about pay my expenses. * * *

"Q. When did you commence work, Mr. Hughes? A. The dates I have not got, but that should show in the minutes. It was immediately after the dredge was completed, and I think the day after. * * *

"Q. Mr. Hughes, was any work done there except under your supervision? A. None whatever.

"Q. You prepared the plans for the wharf? A. Yes, sir. Q. And for the dredging? A. Yes, sir.

"Q. And they were all done under your supervision? A. And the warehouse.

"Q. And the warehouse—all done under your supervision? A. Yes, sir."

The appellant asserts that the plaintiff was present at the meeting of June 21, 1910, and voted for the above resolution. Plaintiff stated that he had no recollection of the passage of the resolution, and knew nothing whatever about it. The minutes recite that he was present at the meeting, and that the resolution was passed unanimously. Under this evidence, of course, the trial court could have taken the view that the plaintiff retired from the meeting before the passage of the resolution.

[1] The fundamental question upon appeal is whether or not there has been a miscarriage of justice. In considering that question in the case at bar we have the following situation: Plaintiff was employed by defendant to superintend and oversee the construction of a wharf and the dredging of a slip and approach, as is admitted in the pleadings. In the performance of this work it is stipulated that $236,830.21 was expended for certain specified purposes. It is shown by the testimony of the plaintiff that the agreed compensation was 5 per cent. upon the expenditures, and the resolution of the board of directors stated that plaintiff's compensation was to be "five per cent. of the money expended in dredging of slip No. 2 and the approach thereto, and the construction of the wharf alongside said slip No. 2." There is no contradiction or denial of plaintiff's statement that 10 per cent. was the usual commission for such work. Under such circumstances the defendant was bound to pay the reasonable value of such services in the absence of a contract fixing the amount of his compensation. Bassett et al. v. Fairchild, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611. If it be conceded that the express contract to pay 5 per cent. commission only related to expenditures made after June 21, 1910, the date of the resolution, the obligation to pay the reasonable value of the services theretofore rendered would remain, and the result would either be the same or more favorable to the plaintiff.

It seems clear that there has been no miscarriage of justice in this case, but we will nevertheless further consider the questions presented by the appellant. Appellant's answer "denies that it expended in dredging said slip and approach thereto, and in constructing said wharf, the sum of $236,830.59, or any other sum in excess of the sum of $140,249.21, or that it expended any sum of money whatever in excess of said last-mentioned sum upon which it was understood or agreed plaintiff should have or receive 5 per cent. thereof, as salary or commission, for superintending the work for which plaintiff was employed by defendant."

In the second count of the answer, after alleging the passage of the resolution of June 21, 1910, and that "immediately following the passage of said resolution said Thomas Hughes took charge of the dredging of said slip, the approach thereto, and the construction of the wharf referred to in said resolution, and continued in charge thereof and directing the same up to the 8th day of October, 1912, with the consent and acquiescence of said defendant," alleges, that after the passage of the resolution and before October 8, 1912, defendant expended $140,249.21 and no more. Thus, according to the defendant's answer, its defense to the plaintiff's claim was merely that his work began June 21, 1910, and that only $140,249.21 was expended under his supervision. It was stipulated, however, that the cost of the work was as claimed by plaintiff, $236,830.59, and his testimony that it was all done under his supervision was uncontradicted. The trial court found as a fact that the entire work was done under plaintiff's direction for an agreed compensation to him of 5 per cent.

We will, however, not determine the appeal upon these broad considerations, but enter into an examination of the specific points urged by appellant for a reversal for the purpose of ascertaining whether or not there has been a miscarriage of justice, either in the conclusion of the court or in the rejection of evidence which might have substantially changed the result.

At the outset it should be observed that the appellant's contention is simply this: That by the dealings between the parties from and after the 21st day of June, 1910, including the resolutions of the board of directors thereafter adopted and the statements rendered by the appellant to the plaintiff, the parties construed the contract as beginning June 21, 1910, and as applying only to expenditures thereafter incurred. From these considerations it is urged that this construction of the agreement by the parties should control. Before discussing the evidence in detail it should be observed that the defendant does not plead payment, accord, and satisfaction, estoppel, or an account stated, but relies upon the fundamental proposition that by the contract between the parties as originally made the plaintiff is only entitled to recover a percentage upon expenditures incurred after June 21, 1910.

[2] In the first place, if the contract is definite and certain it is neither necessary nor proper to rely upon the conduct of the parties for its construction. Rules of construction are resorted to for the purpose of ascertaining what the contract really was, and, if that matter is not in doubt, it is unnecessary to rely upon those considerations which obtain where the construction of the contract is in doubt. It is not contended by either party that the resolution of June 21, 1910, was a contract. Plaintiff is not relying upon that resolution as the contract, but upon the arrangement he had entered into informally with the directors of the company. These directors knew that he was performing the work, and that they had asked him to do it and had agreed with him upon the amount of his compensation. With that knowledge on his part and on theirs they passed a resolution authorizing the execution of a formal contract for the supervision of the entire work. This resolution, coupled with the previous knowledge and consent of the directors and their subsequent retention of the services of the plaintiff and the payment to him for those services, must be deemed a ratification of the previous informal arrangement between the officers of the corporation and the plaintiff. It would seem that this resolution justified, if it did not require, the finding of the trial court that all this work was done under an agreement by which the plaintiff was to receive 5 per cent. commission.

Let us assume the truth of all the facts that the appellant relies upon to justify a different construction of the agreement, namely, that the account books of the defendant corporation were kept upon the theory that the plaintiff was only entitled to compensation for expenditures made after June 21, 1910; that statements were rendered to the plaintiff upon that basis; that he accepted the payment accompanying such statements, and executed receipts in full from time to time based upon such statements: Is there anything in this situation that requires a finding that the original intention of the parties was to confine the agreement for compensation to a percentage upon work done after June 21, 1910, where the directors had made an informal agreement long before that date, and it had been acted upon by both parties before that time, and the resolution of June 21, 1910, is broad enough to cover all work done before as well as after the date of its passage? We think not. It might tend to show a subsequent implied agreement to accept less than was originally agreed, but no such agreement is pleaded or relied upon.

But the circumstances relied upon by the appellant do not all tend to show such a course of dealings as is claimed by appellant, for, if we assume that the subsequent dealings between the plaintiff and the defendant point to the conclusion that the plaintiff was to receive nothing for expenditures made previous to June 21st, we are at once met by the proposition that if that is true he has been already overpaid $522.99. This fact alone might have been sufficient in the view of the trial court to overcome the inference derived from the balance of the testimony which appellant so strongly relies upon as showing the contemporaneous construction of the contract.

The appellant strongly relies upon an alleged error of the trial court in rejecting the carbon copy of a letter offered by appellant, produced from the records of the defendant corporation, dated April 28, 1911, and addressed to the plaintiff at the place of business of the Hughes Manufacturing Company. The letter is in the following words and figures:

"April 28th, 1.

"Mr. Thomas Hughes, 1430 So. Alameda St., Los Angeles, Calif.—Dear Sir: We inclose you herewith schedule showing the expenditures made under your directions on behalf of this corporation during the period of June 21, 1910, to April 28, 1911, inclusive, on which amount ($37,946.61) 5 per cent. commission amounts to $1,897.33.

"The total amount of our indebtedness to the Hughes Mfg. & Lbr. Company aggregates the sum of $1,326.23, which amount, plus your commission, makes a total credit to you of $3,223.56.

"There is still a balance due on your underwriting account of $2,173.00 which amount, plus accrued interest as per inclosed statement, makes a total of $2,206.36, or amount due us.

"Totally liquidating the Hughes Mfg. & Lbr. Co.'s account, there shows a balance of $1,017.20, credit to your commission account. We are preparing to deliver you $4,000.00 first mortgage 6 per cent. sinking fund gold bonds of this corporation, together with 20 shares of stock representing your underwriting. Yours very truly, Pacific Wharf & Storage Co., by ——, Secretary."

The witness testified that he wrote the letter under the dictation of the secretary; that to the best of his recollection it was mailed to the plaintiff at the address stated. Upon cross-examination as to this statement, preliminary to the introduction of the letter, he stated that he remembered this letter, although he did not remember any other letter written to Mr. Hughes or to any one else that month. He was asked as follows:

"Q. And you remember that it was mailed out? A. All our letters were mailed out.

"Q. I am asking you as to your recollection, not your custom. Do you recollect at all that this letter, the original, was ever mailed out? A. I don't remember of mailing the letter, but I know it was mailed.

"The Court: How do you know it was mailed? A. Because all the mail was mailed out.

"Q. You are just assuming, then, that it was mailed, because all your letters were mailed after they were written? A. Yes, sir.

"Q. You don't remember whether it was mailed or not? A. I am sure it was mailed.

"Q. No; I am asking you whether you remember whether it was mailed or not—not as to drawing a deduction as to its being mailed from custom or anything, but have you any recollection of having dropped that letter in the mail box, or in any other receptacle for mailing? A. I don't remember putting it in the box; no sir.

"Q. By Mr. Adams: Then all you are testifying in regard to this letter and writing this letter and mailing this letter is from custom and from the fact that you have a carbon copy of it? A. Yes, sir. * * *

"The Court: Mr. Shonts, at that time did you mail all the letters of Pacific Wharf & Storage Company? A. Yes, sir; I put all of them in the mail myself.

"Q. All that went? A. Yes, sir.

"Q. By Mr. Adams: Do you mean to say that nobody else ever mailed a letter out from the office but you? A. I was the only person in there besides the secretary, and he never had anything to do with mailing the letters.

"Q. Sometimes he would mail them, would he not? A. No, sir; not to my recollection, unless it was personal letters.

"The Court: You, then, took all the mail that went from the company's office, either to a post box or the post office and dropped them personally in the mail? A. Yes, sir.

"Q. By Mr. Goodwin: Are you positive that that letter, the original of which this is a copy, was either mailed by you to Mr. Hughes or delivered personally to him?"

This was objected to on the ground that there was no foundation laid, as incompetent, immaterial, and that—

"You cannot prove the mailing of the letter by merely showing the custom in the office that letters were mailed.

"The Court: It seems to me, Mr. Goodwin, that from this statement that all you will be asking for will be his knowledge from custom, and he has been answering from that right along, not drawing a distinction between his personal knowledge and what the custom was. I will overrule the objection, but I will instruct the witness that he is to answer from his own recollection. (To witness:) That means what you remember from having done specifically yourself, not from what somebody else may have told you was done, and not from any custom; not from your supposition or conclusion that it was done because of custom."

The court thereupon asked the following questions:

"Have you any recollection, leaving aside the question of custom, and what you ordinarily did with reference to letters of Pacific Wharf & Storage Company, and leaving aside the question of the copy you have found among its files, have you any independent recollection or remembrance of your own that you yourself mailed that letter by dropping it into a receptacle belonging to the post office department? A. I cannot say that I have.

"Q. Now, have you, aside from the matters I have mentioned in the last question, an independent recollection of your own of having personally handed the letter to Mr. Hughes? A. Not that particular one.

"The Court: Now, that seems to clear it up, Mr. Goodwin. I do not see any escape. I will sustain the objection to the offer of the letter."

In the case of Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403, it was held that the trial court improperly admitted a letter in evidence. The court there stated:

"The witness stated that he had no personal knowledge that the communications addressed to Cunningham & Co. were mailed, except that copies thereof appeared in the plaintiff's copy book, and that it was a general custom of his firm to place letters in a box in the store, from which they were taken to the post office. No foundation, therefore, was laid for the introduction of the evidence."

The case was retried. The letter was again received in evidence upon the additional proof being made that it was the business of one of the employees to take the letters out of the box in which they had been placed and deposit them in the post office, and this employee, called as a witness, testified that if any letter was addressed and put in the box at the store during the time he was so employed he took it to the post office. The court, in passing upon the matter, said:

> "We think this sufficient proof of the fact of mailing." Sanborn et al. v. Cunningham et al., 4 Cal. Unrep. 95, 100, 33 Pac. 894.

The first decision in Ford v. Cunningham, supra, was based upon the case of Brailsford v. Williams, 15 Md. 150, 74 Am. Dec. 559. In that case the Supreme Court of Maryland said:

> "The fact was to be found by the jury from the custom prevailing in the counting room of the writer; but compliance with the custom had not been fully proved. *The person whose duty it was to deposit letters in the post office should have been called, or his absence accounted for.* A similar question arose in Bell v. Hagerstown Bank, 7 Gill, 216, where the law was fully discussed." (Italics ours.)

In the case thus referred to, Bell v. Hagerstown Bank, 7 Gill (Md.) 216, proof of the mailing of the letter was held sufficient, although the bank messenger whose duty it was to mail letters had no independent recollection of the mailing of the particular letter in question, but testified that it was his invariable custom to take all the letters to the post office, and that he had no recollection of any failure to do so, with a single exception which had nothing to do with the letter involved. The matter is discussed at length in a very recent case by the Supreme Court of Wisconsin (Federal Asbestos Co. v. Zimmermann, 171 Wis. 594, 177 N. W. 881. The court there stated:

> "We know of no decided case which holds that mere dictation or writing of a letter, coupled with evidence of an office custom with reference to the mailing of letters, is sufficient to constitute proof of the mailing of such letter, in the absence of some proof or corroborating circumstance that the letter was at least placed where, in the ordinary course of business, it would be taken to the post office.
>
> "An examination of the reported cases * * * where proof of custom has been held sufficient to establish the fact of mailing will show that there was testimony from which it might be inferred that the custom in the particular instance had in fact been followed. * * * While we do not attempt to lay down any hard and fast rule with reference to the proof necessary to constitute mailing where custom or usage of an office is relied upon as a contributing element to such proof, we do hold that the proof of the dictation of a letter, coupled only with proof of the custom of the office with reference to the mailing of letters, without any proof from which it may be inferred that in the particular instance the custom was complied with, does not constitute proof of mailing."

The court in that case quoted the rule from 16 Cyc. 1068, note 50, as stating the rule as strongly as the authorities warrant:

> "Proof of custom in the sender's office whereby letters deposited in a particular place are taken by an employee and mailed by him, in connection with proof that the letter was so deposited and probably taken and mailed as usual, may support a presumption of due receipt."

This rule is also stated in 22 Corpus Juris, 99, note 14. The rule, however, as stated in the text, is as follows:

> "In order to support a presumption of receipt of a letter, there must be satisfactory proof that it was duly mailed, although such proof need not consist of direct and positive testimony to the ultimate fact of mailing." 22 Corpus Juris, p. 99, § 40.

These general conclusions are sustained by other decisions. McKay v. Myers, 168 Mass. 312, 47 N. E. 98; Swampscott Machine Co. v. Rice, 159 Mass. 404, 34 N. E. 520; Commercial Bank of Albany v. Strong, 28 Vt. 316, 67 Am. Dec. 714; Whitaker v. Morrison, 1 Fla. 25, 44 Am. Dec. 627; Ball v. Bank of Alabama, 8 Ala. 590, 42 Am. Dec. 649; Sheldon v. Benham, 4 Hill, 129, 40 Am. Dec. 271. In Swampscott Machine Co. v. Rice, supra, the court said:

> "The plaintiff's bookkeeper received it at the date of the maturity of the note, and at once put it into a box in the office, stamped, and with a direction for return if not delivered in five days. It was the regular course of business for an office boy to carry the letters from this box to the post office. The letter never was returned. This was evidence that the notice was sent and received. Dana v. Kemble, 19 Pick. 112, Skilbeck v. Garbett, 7 Q. B. 846."

In Wigmore on Evidence, volume 1, page 169, section 95, it is said that upon proof of the custom of a business house with reference to mailing letters and upon the presumption that a letter mailed is received, the mere writing of a letter may be sufficient evidence of its receipt. The author announces his conclusion in the following language:

> "A consequence of the combination of these two applications of the principle is that, upon proper evidence of the habit of an individual commercial house as to addressing and mailing, the mere writing of a letter in the usual course of business may be evidence of its subsequent receipt by the addressee."

In the case at bar the witness testified that he mailed the letter in question. Upon cross-examination he admitted that his testimony was based upon his invariable custom so to do, but this does not render his evidence unworthy of belief. It only goes to the weight of the evidence. This character of testimony, based upon the custom of the witness rather than his recollection, is discussed in Moore on Facts, volume 1, p. 519, § 547, in which discussion he quotes from Evison v. Chicago, etc., R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434:

> "While a witness can only testify to that which is within his personal knowledge, yet, if from his invariable and long-continued habit to perform a certain act in the line of his work, or from any other facts which aid or refresh his memory, he is able to testify of his own knowledge that he did the act on a particular occasion, the evidence is competent, although he may not have any independent recollection of the fact. If a witness is truthful, this is usually the only testimony which he can give in such cases, where there was nothing to particularly impress the particular occasion upon his mind; and it is well known that the almost unconscious and automatic action resulting from the constant and long-continued habit of doing a particular act under like circumstances in the line of any particular occupation, furnishes not only strong moral proof that it was done, but also the principal assurance, in many things involving the safety of the public, that it will be done in the future."

[3] In the case at bar we are only required to determine whether or not a sufficient foundation is laid for the introduction of a carbon copy of a letter when a witness states that he mailed the letter to the addressee thereof, and bases such testimony upon his invariable habit of mailing all such letters. We think that sufficient foundation was laid for its introduction. But it was also objected that the letter was incompetent.

The letter was a self-serving declaration. There is a serious question whether this self-serving declaration could be admitted in the absence of an answer. Some of the authorities hold that the mere failure to answer a letter or other written statement does not amount to an admission or an acquiescence in the truth of the facts contained in it. 1 Encyclopedia of Evidence, 378, and authorities cited therein, and in the supplement thereto. The letter was not offered to prove an account stated, but in connection with a number of other letters and documentary evidence to establish the proper construction of the original contract. We may, however, concede its admissibility, as this point is not pressed by respondent, and pass to the question of whether the exclusion of this letter resulted in a miscarriage of justice. In this connection it should be observed that other evidence of greater weight upon that subject and to the same effect as the letter in question was received in evidence. It was shown that the plaintiff was present at meetings of the board of directors, held on November 9 and November 15, 1910. On November 9 the following resolution was passed:

> "It was moved by Director Blankenhorn, seconded by Bastable, and duly passed that the secretary be and he is hereby directed to prepare a statement showing the expenditures made for account of dredging operations during the period June 21, 1910, and November 1, 1910, inclusive, and present the same to the board at its next meeting for the purpose of making a settlement with Director Hughes for his services in connection with said dredging operations in accordance with a certain resolution adopted at the meeting of the board of directors held June 21, 1910."

On November 15 the following resolution was adopted:

> "It was moved by Director Bastable, seconded by Director Blankenhorn, and duly passed that a statement of expenditures made in connection with dredging operations from June 21, 1910, to November 1, 1910, be submitted to the auditing committee, and upon said committee's verification and approval of the same that Director Hughes be credited with 5 per cent. commission on the amount expended in accordance with the resolution passed by the board of directors at its meeting of June 21, 1910."

[4] This evidence, showing the transactions of the board of directors at which the plaintiff was present and in which he participated, was much more calculated to show an acquiescence of both parties in the claim that the work began June 21, 1910, than the declaration of the secretary, a subordinate officer of the corporation, communicated to plaintiff by a letter of April 28, 1911, nearly a year after the resolution of June 21, 1910, in which he merely recites the amount of commissions earned during the period from June 21, 1910, and in which the secretary states the balance due to plaintiff and to the Hughes Manufacturing Company.

The trial court must have been convinced from the evidence that the subordinate officers of the defendant corporation treated the transaction between plaintiff and defendant as having begun on the date of the resolution of June 21, 1910; that the directors of the corporation knew of this situation, and that the plaintiff also had reason to believe that the accounts were so kept. The resolutions above quoted accomplish all that could have resulted from the introduction of the letter of April 28, 1911.

[5] The only purpose for which this letter was sought to be introduced was upon the claim that it tended to show the contemporaneous construction of the contract. When this letter was written, the contract had been in effect for about a year, and according to the evidence and the letter itself, over $100,000 had been expended thereon. The mere declaration by one of the parties to the contract to the other party, to the effect that the actual amount due thereunder was an amount actually $3,000 less than the amount that was really due, would not be binding upon the other party to the contract as a construction of the contract. Nor would the acceptance of a payment accompanying such a declaration be binding upon the plaintiff as such construction. The contract established

by the plaintiff's evidence and by stipulation was for 5 per cent. commission upon all the work done under plaintiff's supervision, except the construction of the dredge. Its meaning was not in doubt. We conclude, therefore, that in view of the abundant evidence introduced by the defendant to show the character of the dealings between the parties after June 21, 1910, and the fact that the evidence of the plaintiff is uncontradicted and was evidently believed by the trial court, that upon such evidence plaintiff was justly entitled to recover the full amount claimed, and that the rulings of the court complained of were not prejudicial, even if erroneous, a point we need not determine.

[6] Appellant urges that the trial court committed error in sustaining objections to its evidence offered to prove that the stipulated total of $236,810.07 incuded an item of $40,000 for the cost of construction of the dredge. Plaintiff conceded in the trial court that he was not entitled to commission for the construction of the dredge; and it is clear that, if the cost thereof was included in the stipulated total, the judgment is for that reason too much by $2,000. The question argued here, however, is not squarely presented by the record. The ruling of which the appellant complains is not based upon a different view. The above stipulation fixed the cost of dredging before June 21, 1910, at $3,375.47 and the total amount at $59,857.75 for dredging, making the amount expended for dredging after June 21, 1910, $56,482.28. The defendant, without seeking to be relieved from these stipulations, attempted to prove that the item of $59,857.75 for dredging included $40,000, the cost of constructing the dredge. Not only was the offer inconsistent with the stipulation which gave the cost of dredging as $59,857.75, but it was also inconsistent with defendant's whole theory, which was that a large part of the work was done before the resolution of June 21, 1910, and also with the stipulation to that effect. The dredge was the first thing constructed, and it could not have been included in the expenditures after June 21, 1910, unless the whole stipulation was wrong as to the date and character of expenditures. Moreover, the question now presented to us was not squarely raised in the trial court. The defendant's bookkeeper was asked:

> "Q. I will ask you to examine the ledger account and state whether or not the cost of the dredge is included."

This was objected to on the ground that it was incompetent, irrelevant, and immaterial and called for the conclusion of the witness, that there was no proper foundation, and that it was at variance with the allegations of the complaint and of the answer. This objection was sustained. It is evident from the whole record that the court was of the opinion that the ledger account itself should be offered, rather than the witness' interpretation thereof, and that this was the basis of the last ruling. It is clear that the evidence offered was in conflict with the stipulation, and that the defendant, not having asked to be relieved from the stipulation, is bound thereby, and cannot now complain of the ruling of the trial court.

[7] Appellant also contends that certain items of expenditures specified in the stipulation are not affirmatively shown to have been expended in the construction covered by the contract. The following items are pointed out: Earth filling, $40,248.65; pile driver, $4,266.47; launch, $2,758.81; sheds, $817.21; board walk, $278.35; launch expenses, $317.66; tools, $176.70; wharf insurance, $72.50. These items aggregate $48,936.35. The questions now argued with reference to these items were not presented to the trial court. The controversy there was whether or not the plaintiff was entitled to commissions upon expenditures incurred before June 21, 1910. These expenditures amounted to $72,431.52. Appellant also contended that it was entitled to a $40,000 deduction from the expenditures incurred after June 21, 1910, being an amount, which, it was contended, was expended for the construction of the dredge. These deductions would leave only $144,399.07. The deduction for respondent's engineering fees hereinafter referred to amounted to $8,741.89. This would leave a balance of only $135,658.08, while appellant conceded in his answer that plaintiff was entitled to commissions for more than this amount, to wit, upon $140,249.21. Under these circumstances we think the trial court was justified in construing the stipulation "that the defendant expended from the commencement of its work at San Pedro to October 8, 1912" the sum of $236,810.07, as a stipulation that these expenditures were made upon the work superintended by plaintiff.

The other numerous complaints of errors all relate to the exclusion of evidence showing the correspondence of the defendant with plaintiff, and, after October 8, 1912, with his agents, and statements of account accompanied by checks in payment thereof, all offered for the sole purpose of showing contemporaneous construction of the contract. We deem it unnecessary to examine in detail the numerous assignments of error for the reason that it is apparent that, even if all the testimony had been introduced, it only tended to show the defendant's method of carrying the account and the failure of plaintiff to object thereto, which, in view of the undisputed evidence is of slight importance, if not wholly immaterial.

[8] The appellant in his petition for rehearing for the first time raised the point that the judgment of the court allows the plaintiff a commission of 5 per cent. upon his commission already paid, to wit, on the sum of $8,741.89. The court allowed 5 per

cent. upon the entire expenditures stipulated to, and these expenditures did include under the head of engineering fees the amount of commission, allowed and paid to the plaintiff, of $8,741.89. The respondent does not answer this contention, and, so far as we can see, there is no answer to be made to it. Its inclusion in the total was a palpable inadvertence which could have been avoided if the defendant had called the attention of the trial court to the point. Evidently it was not the intention of the parties to pay the plaintiff a commission upon his commission. Five per cent. on $8,741.89 would be $437.09. The judgment is too great by this amount, and it should be reduced. Inasmuch, however, as the appellant did not raise the question until the petition for rehearing was filed, he should not have his costs on appeal.

The trial court is ordered to modify the judgment by striking therefrom the sum of $437.09, and, as so modified, the judgment is affirmed, the respondent to have his costs on appeal.

We concur: SHAW, C. J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; SHURTLEFF, J.

188 Cal. 199

MICHEL v. SMITH et al. (L. A. 6291.)

(Supreme Court of California. Feb. 17, 1922.)

1. Officers 🔑118—Public officer not liable for acts of subordinate officers.

The doctrine of respondeat superior does not apply to a public officer so as to render him responsible for the acts or omissions of subordinates properly employed by or under him if they are themselves servants of the government, unless the superior officer has directed those acts to be done or has personally co-operated therein.

2. Sheriffs and constables 🔑100—Deputy sheriffs are agents of the sheriff for whose acts he is responsible.

Deputy sheriffs act in the private service of the sheriff and in his name and stead, and are public officers only through him, so that the sheriff is liable for their acts to the same extent as if they had been done by himself.

3. Municipal corporations 🔑182—Chief of police is not liable for acts of policemen.

The chief of a municipal police department is not responsible for the acts of the policemen under him, even though he is charged with the duty of selecting them, since each policeman is, like the chief, a public servant.

4. Municipal corporations 🔑182—Under Los Angeles charter chief of police not liable for acts of policemen.

Under Los Angeles charter, which places the policemen under the civil service, so that the chief of police, has not authority to appoint or remove them, and which makes him a ministerial officer who may select one or more deputies, for whose official acts he shall be responsible, the chief of police is not liable for acts of the policemen which he has neither commanded nor participated in.

5. Municipal corporations 🔑189(1)—Sergeant of police not liable for acts of men under him unless he ordered them.

The sergeant of a municipal police department in charge of the squad whose particular duty it was to arrest evaders of the draft law and deserters from the army is not liable for the acts of policemen in his squad in making an arrest which he had not ordered and of which he knew nothing until he read the report thereof after the person arrested had been discharged.

6. False imprisonment 🔑13—Existence of probable cause depends on circumstances.

Whether there is probable cause for making an arrest depends upon all the circumstances of each case, including delay which might enable the guilty person to escape, the nature of the information, the character of the person, and the extent of possible inquiry as to facts and circumstances.

7. Appeal and error 🔑842(1)—Existence of "probable cause" for arrest is question of law.

The existence of probable cause for arrest, which may be defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true, is a question of law as to which the conclusion of the trial judge is not binding on appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

8. False imprisonment 🔑31—Facts held to show probable cause for arrest of plaintiff as deserter.

Evidence *held* to show that policemen had probable cause to believe that plaintiff was a deserter whom they were authorized to arrest without warrant under Act Cong. June 16, 1890, c. 426, § 3 (U. S. Comp. St. § 2296), so that they are not liable for making the arrest.

9. False imprisonment 🔑13—Probable cause not negatived by declarations.

A declaration by plaintiff when arrested as a deserter under the Selective Service Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 2044a–2044k) that he had told the officers of his local draft board of his new post office address is not sufficient to establish want of probable cause for making the arrest, since officers cannot be required to accept the declarations of the person arrested as true.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Gerhardt C. F. Michel against C. G. Smith and others for damages for false arrest and imprisonment. Judgment for the plaintiff, and defendants appeal. Reversed.

Charles S. Burnell and Trent G. Anderson, both of Los Angeles, for appellants.

W. A. Strong, of Los Angeles, for respondent.

WASTE, J. The plaintiff brought this action to recover damages for alleged unlawful arrest and imprisonment by certain police officers of the city of Los Angeles. The defendants Butler, as chief of police, and Slaughter, as sergeant of police, were at no time connected with the arrest complained of, but are sued by reason of their being the superior officers of defendants Smith and Gross, who made the arrest. The case was tried by the court sitting without a jury. At the conclusion of the plaintiff's case the defendants Butler and Slaughter made a motion for a nonsuit as to them, which motion was denied. On findings favorable to the plaintiff, judgment was entered in his favor and against all the defendants, from which this appeal is taken.

No error of law, or in the admission of evidence, occurring during the trial, is assigned; the question to be determined on the appeal being whether or not any of the defendants can be held liable on the plain facts, which appear without substantial contradiction. The discussion of the subject naturally divides itself into three heads: First, the relation of the chief of police; second, the liability of the sergeant of police; and, third, the responsibility of the arresting officers.

The arrest and detention of the plaintiff occurred during the recent war in which the government of the United States was involved. It was made by the defendants Smith and Gross, who were members of the "war squad" of the Los Angeles police department, organized expressly for the purpose of apprehending deserters and offenders against the United States Selective Service Law (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 2044a–2044k). The defendant Slaughter, as sergeant of police, was in charge of this squad. Neither he nor defendant Butler, the chief of police, was directly concerned with the plaintiff's arrest. They were at no time personally present, did not authorize, and took no part in directing or making the arrest, and were not parties to the incarceration or detention of the plaintiff. Under these facts the judgment against these two defendants was clearly erroneous.

[1] In attempting to uphold the contrary view of the trial court, reflected in its findings and judgment, respondent relies upon the doctrine of respondeat superior; but that principle of law has no application to the facts in this case. There is a well-defined exception to the general rule which renders one responsible in a civil action for the tortious acts of those employed by or under him. A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally co-operated therein. 23 Am. & Eng. Ency. of Law, 382; Story on Agency, 319; Robertson v. Sichel, 127 U. S. 507–515, 8 Sup. Ct. 1286, 32 L. Ed. 203. See, also, note to 12 Ann. Cas. 184.

[2] In opposition to this principle of law we are cited to those instances in which a sheriff has been held responsible for the acts of his deputies, but the respondent loses sight of the distinction between the two situations, which is recognized in the decisions. A sheriff is responsible for the acts of his deputies, for they are acting in his private service and in his name and stead, and are only public officers through him. The deputy is not the agent or servant of the sheriff, but is his representative, and the sheriff is liable for his acts as if they had been done by himself. Foley v. Martin, 142 Cal. 256–260, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123.

[3] A different rule prevails in the case of the chief of a municipal police department. He may even be charged with the duty of selecting the members of the force, but he is not responsible for their acts, unless he has directed such acts to be done, or has personally co-operated in the offense, for each policeman is, like himself, a public servant. Casey v. Scott, 82 Ark. 362, 101 S. W. 1152, 118 Am. St. Rep. 80, 12 Ann. Cas. 184. The question was squarely presented and considered in this last case. An ordinance of the city of Texarkana provided for a dog tax and the manner of collecting the same. It contained a provision that the chief of police of the city should employ a dog catcher whose duty it should be to enforce the ordinance. The action was one brought against the chief of police, the dog catcher appointed by him, and the city for the negligence of the dog catcher. On an appeal by the chief of police from a verdict directed against him and the dog catcher, the court said that, in so far as the relation of the appellant to the action was concerned, the dog catcher was a public servant selected by the chief of police, just as a patrolman would be selected by him or a mayor, or other appointing power, and held "there is no liability in such case, unless the appointing officer fails to exercise reasonable care in the selection of the appointee, a question not presented." See, also, a case somewhat in point, Baisley v. Henry (Cal. App.) 204 Pac. 399.

[4] Aside from the general consideration of this principle of law, there is a very particular reason why its effect should have application in this case. Charter of the

City of Los Angeles (Stats. 1911, p. 2107) § 91, establishes a department of the government of the city, to be known as the police department, which shall be under the management and control of three commissioners to be known as the board of police commissioners. Section 93 of the charter provides that the department shall consist of the chief of police, who shall be appointed by and be subject to removal by the mayor, and as many subordinate officers, and such policemen, detectives and employees as the city council shall by ordinance determine. All appointments in tho department shall be made by the chief of police, subject to approval by the board of police commissioners, and subject to such civil service regulation as may be in force at the time the appointments are made. By other sections of the charter (229–254) all the members of the police department, excepting the chief of police and his secretary, are subject to civil service. When any appointments are to be made in the department, the chief, as head of the police force of the city, must notify the civil service commission (Charter, § 238) of the fact, and the commission thereupon certifies to him the name, and address of one or more candidates, not exceeding three, standing highest on the register for the class or grade to which the appointment is to be made. From these eligibles the chief must make the appointments. Aside from the limitations thus placed upon the chief in the selection of his subordinates, his control over the members of the force after appointment is also subject to the limitation that while he may remove members of the force for cause, such removal is subject to review by the police commission. These provisions of the charter plainly determine the status of the chief in the police department. He is a member of the department and a public servant like every other member, but by reason of his position is charged with the supervision and control of the police force of the city. Charter, § 53. In this capacity he may not be held liable in damages for the unlawful acts and omissions of the subordinates of the department, selected pursuant to the provisions of the charter, unless it can be shown that he has directed such acts or personally co-operated therein.

It is interesting to note in this connection that the framers of the charter of the city of Los Angeles recognized the line of demarkation which fixes the responsibility of the chief of police of the city for the acts of his subordinates. By section 54 of the charter the chief of police, aside from his duty to supervise and control the police force of the city, is made "the principal ministerial officer of the corporation," with certain prescribed duties relating to service of processes of the police courts, similar to those performed by constables and sheriffs. As such ministerial officer he may, with the approval of the board of police commissioners, select and appoint one or more deputies from the police force, for whose official acts the charter expressly provides he shall be responsible.

[5] What we have said disposes of the contention that the defendant Butler, as chief of police, is liable to the plaintiff in the instant case. The question as to the liability of defendant Slaughter also depends entirely upon whether he directed, or participated in, the acts complained of. As a sergeant of police he was in charge of a detail of 17 members of the force known as the "war squad," the duties of which have already been mentioned. So far as the record discloses, he gave no general or specific directions to either of the defendants Smith and Gross, who were members of the "war squad," which would lead, or led, to the apprehension and detention of the plaintiff. It appears that the arresting officers acted without any special instructions in the matter, and assumed authority to both arrest and release the plaintiff. Slaughter had no knowledge of the arrest until he read a report of the occurrence made by Smith and Gross. We fail to see how he can be held liable under such circumstances.

This brings us to a consideration of the question whether or not there was sufficient justification, under all the circumstances, to warrant the arrest and detention of the plaintiff by the defendants Smith and Gross. It occurred during the great World War. On June 5, 1918, the plaintiff, a young man 24 years of age, and unmarried, registered with local board No. 1 at Oakland. Under the provisions of the Selective Service Act he was entered as a class A1 man, which meant that he was subject to immediate call for service in the United States army at any moment. In August he went to the city of Los Angeles, where his parents resided, but failed to obtain from his local draft board any evidence that he had notified it of his change of address. On the morning of October 28th he went to an employment office and asked to be given temporary employment, stating that he was expecting to be inducted into service at any time. The man in charge questioned him as to his standing under the draft, whereupon he showed his registration and classification cards. He was told to "wait a minute," and in a short time the defendant Gross appeared. He took the plaintiff's registration cards, placed him under arrest, and conducted him to the police station, where they met the defendant Smith. The two officers took the plaintiff to the property clerk's office, where he was searched, after which he was locked up in the city jail. He was informed that he would be detained until his local board was notified by wire of his whereabouts. Such a telegram was sent the same day, and an answer was returned the next day to the effect that he had not been called, and asking that the plaintiff keep in touch with his board. The plaintiff was released to his father the day following his arrest, upon assurance being given that he would appear whenever wanted. There is no contention that the arresting officers acted with malice.

[6] Whether there is probable cause for making an arrest depends upon all the circumstances of each case, including delay which might enable the guilty person to escape, the nature of the information, the character of the person, and the extent of possible inquiry as to facts and circumstances. 19 Cyc. 352. The defendants apprehended the plaintiff as a deserter from the United States army. They had a right to make the arrest without a warrant for the purpose of delivering him "to any person in the military service entitled to receive him." U. S. Comp. Stats. § 2296; Act June, 1890, c. 426, § 3. He was registered as a class A1 man with a local board at Oakland. For him to remove from that district without notifying his local board of his new post office address would be a violation of section 92 of the selective service regulations, and consequently a misdemeanor (Act May 18, 1917, §§ 4 and 6 [Supp. of 1919 to U. S. Comp. Stats. 1916, §§ 2044d and 2044f]), and to fail to report to the local board after notice so to do had been received, with intent to evade service, constituted the registrant a deserter (Farley v. Ratliff [C. C. A.] 267 Fed. 682).

[7] The question to be decided, then, is this: Did the defendants, under the circumstances related, have reasonable ground to believe that the plaintiff was a deserter? Probable cause may be defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. Potter v. Seale, 8 Cal. 217, 221. The court must determine, as matter of law, whether the facts and circumstances as they appear, or are found to exist, constitute probable cause. McKenna v. Heinlen, 128 Cal. 97, 100, 60 Pac. 668; McCarthy v. De Armit, 99 Pa. 63. Hence we are not bound by the conclusion of the trial judge on that point.

[8] That the plaintiff was nearly 500 miles away from his local draft board is admitted. He had no evidence about him that he had notified his local board of his new address. That he failed to inform the officers that his parents lived in Los Angeles is undisputed, although there is a conflict as to a number of other matters the plaintiff testified he told the officers. When he left Oakland, August 18, 1918, he had been instructed, so he testifies, that he might be called in two weeks or two months. Both dates had passed at the time of the arrest. The police department of Los Angeles had on file hundreds of desertion cases from different boards all over the country, and some from army camps as well. Police departments the country over were warned by the government to be on constant watch to apprehend such men wherever found. Many of these reports gave no description of the men wanted. The defendants had no personal knowledge of the plaintiff, and it is obvious from all the circumstances of the case that the arrest was made in a belief that there was probable cause for the detention of the plaintiff as a deserter.

In measuring the conduct of the officers it is important to bear in mind the unusual situation at the time. The government had called millions of young men to service under the Selective Service Act. The plaintiff was of an age and class, all of whom had already been called, or were about to be. He actually received his induction papers within two weeks after his arrest, which would indicate that his call was imminent at that time. The usual presumption of innocence of crime was in a large measure overcome in this case by the age and classification of the plaintiff, and, when to this was added the fact that he was so long a distance from his place of registration without any evidence to show that his whereabouts was known to the local board, it would appear that there was clearly probable cause for believing that he was a deserter within the meaning of the Selective Service Act. He could have avoided the unpleasant situation in which he was placed by adopting either one of two simple expedients. He could have obtained from the local board in Oakland documentary evidence that he had notified it of his change of address, and was absent from its jurisdiction with leave. Being so far distant from his local board as to make it a hardship for him to respond and comply with its notices, or to perform any duty under the Selective Service Law, or the draft regulation, or expecting to be at such distance, he should have applied to the Oakland board to have his classification and all future procedure in respect of himself transferred to a local board in Los Angeles. Sel. Ser. Reg. § 144.

The war is over, and the right of a police officer to arrest a deserter is now a comparatively unimportant question, but it was a most vital matter when this occurrence took place. In view of the facts in this case, and in the light of the neglect of plaintiff to take the simple steps which he might have taken to prevent what occurred, we think it would be unjust to hold the defendants Smith and Gross liable for their action in the matter. We have been unable to find any case in which a charge of false arrest has been sustained where officers had made an arrest under such circumstances.

In the case of Boatwright v. State, 120 Miss. 883, 83 South. 311, the defendant killed the constable who sought to arrest him for desertion. He was tried for murder, and on the trial requested an instruction to the effect that the constable had no right to arrest him for such cause. In that regard the court said:

> "The testimony in the present case shows that Mr. Culpepper [the constable] knew Beeman Boatwright [the alleged deserter]; that appellant [the deserter] also knew the officer; and that the officer, at the time he undertook to arrest appellant, did not merely have a suspicion that appellant was a deserter, but was confident of the fact, and there is no dispute in the record that appellant had in fact left his post of duty at a time when our government was at war. The testimony of the state further tends to prove that appellant resisted arrest, and in so doing exhibited and used a deadly weapon. We are of the opinion that it was not only the right, but the duty, of the constable, under such state of facts, to place appellant under arrest, and his action in doing so needs no apology. The officer in this case was backed and protected by the law of the land, and surely the law cannot be defied."

In weighing the effect of this decision it should be noted that the fact of desertion is not a determining factor in the case, for the officer could not know what the fact in that regard might ultimately be shown to be. The case, in effect, holds that if an officer knew a party and was confident that he was a deserter, it was his duty to make the arrest. If we apply the principle of that decision to this case, it is clear the defendants were not guilty of a false arrest.

[9] The plaintiff testified that he told the officers at the time of his arrest that he had notified his local board of his new post office address. Both officers testified that he stated that he had not notified his local board of his change of address, and that that fact was entered upon the police blotter in stating the cause of his detention. The trial court, in order to reach the conclusion it did, must have disbelieved the testimony of the officers and accepted that of the plaintiff. Assuming, however, that the defendants were otherwise justified in the arrest of the plaintiff as a deserter, it is clear that his mere statement to them that he was not a deserter, or that he had notified the local board of his whereabouts, would neither require nor justify them to refrain from making the arrest. If the plaintiff was a deserter, he would, of course, make whatever statements would have best served his purpose in escaping arrest for that crime. If police officers had to accept the word of persons about to be arrested as to their guilt or innocence, few arrests would be made. We cannot do better in this case than to adopt the language of the Supreme Court of New York in Hawley v. Butler, 54 Barb. (N. Y.) 490, 504:

> "* * * And it is not singular that the person arrested, not being a deserter, protested his innocence in that particular; but a public officer cannot in all cases accept of that as a defense. The guiltiest of felons have made the same protest. It is a safer rule, however, for courts to follow in such cases, to decide whether probable cause is, or is not, shown, than to rely upon the protestations of innocence of the persons arrested. I have never learned before that such protestations created a liability upon the arresting officer. And where there is probable cause, whether it appear from extrinsic circumstances, or from the conduct, falsehoods or contradictions of the party arrested, the officer acting without malice or bad motive, will be protected, if acting in the line of his duty. * * *"

In that case the court was considering a charge of false imprisonment where the arrest had been made for desertion. The plaintiff had resided in Montgomery county, N. Y., and returned after an absence of several years in August, 1883, wearing a portion of a soldier's uniform. Soldiers were forbidden by the laws of the United States to sell or dispose of their military outfits. The defendants had been informed by government officers that this long absentee had returned and was in possession of government clothes and was believed to be a deserter. When questioned, he denied having been in the service and denied having any soldier's uniform, but upon further examination he admitted having a uniform and explained how he came into possession of it. Upon these conflicting statements he was arrested and it turned out that he was not a deserter and had never been in the government service. The court, in discussing the matter, made the following observations:

> "The question, whether the defendants had probable cause for the arrest upon undisputed facts, is a question for the court, not for the jury. West v. Baxendale, 9 Com. B. 141. Sutton v. Johnstone, 1 Term R. 507, 545, per Eyre, Baron. Per Lord Mansfield: 'If the facts are in conflict, the jury must find the facts, and when found, it is a question of law, whether they amount to probable cause.' Id. There is no conflict here, on the trial, as to any material fact in this case. The plaintiff's evidence in this respect agrees with that of the defendants. No point was raised or made on the trial that the arrest was made with motives of malice or oppression. The defendants were public officers. They had public duties to discharge. They were called to act in perilous, arduous and difficult times. They were invested with legal authority to act. The law of the country imposed upon them a public duty, for public purposes. They were punishable for neglect of duty, if they neglected to act in a case where there was sufficient or probable cause for acting. The safety of the government, and the discipline of the army, depended upon their fidelity, and the country was materially inter-

ested in their conduct. It was the duty of the court, in such a case, unflinchingly to come up to the standard of duty, and pass upon the questions that had been committed to, and appropriately belonged to, them. It would be a reproach to a court, under such circumstances, if through timidity or a desire to shirk responsibility, they should leave to the jury a question which, by the theory of our law, they are incompetent to try, * * * whether probable cause for arrest had been shown. It is not only proper for the court, but by the wisdom of the sages of the law the courts are directed to give great latitude in the review of the acts of such officers. In the case of Wall v. McNamara, tried by Lord Mansfield, sitting at Westminster, in Michaelmas term, 1779, he said: 'In trying the legality of acts done by military officers in the exercise of their duty, great latitude ought to be allowed; and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, as justices of the peace, for acts done by them in the exercise of their civil duty. The principal inquiry to be made by a court of justice is, how the heart stood, and if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistakes.' See also the sensible remarks of Rosekrans, J., in Colton v. Beardsley, 38 Barb. 29 and 45, and cases cited by him."

The judgment is reversed as to all the defendants.

We concur: SHAW, C. J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

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188 Cal. 329

In re RANDALL'S ESTATE. (S. F. 9942.)

(Supreme Court of California. March 2, 1922.)

1. Executors and administrators 🔑508(1)—Entering of formal order a few days after hearing on accounting held not void as amounting to order for continuance.

Where the superior court in probate determined the matter of the settling of an administratrix's account, and the attorneys were instructed to draw up a formal order which was dated on the date it was actually signed, which was a few days after the hearing, the order was not void on the ground that it amounted to a continuance of the case without an order for continuance.

2. Executors and administrators 🔑508(1)—Parties need not be present when order on final accounting is actually signed and filed.

The presence or the absence of the parties or their counsel when an order settling the final account of an executor was actually signed and filed is entirely immaterial if it embodied the action which the court had taken and its determination upon a hearing where the parties were present.

3. Executors and administrators 🔑468—Proceeding in equity to compel administrator of deceased administratrix to account not necessary, but may be had in probate court.

Under Code Civ. Proc. § 1639, the probate court has jurisdiction to require an administrator of the estate of a deceased administratrix to account to the estate which she had under her control, and a proceeding before a court of equity is not required.

4. Judgment 🔑720—Matter concluded where decided previously upon appellant's application for habeas corpus.

Where the identical question was presented to Supreme Court by the appellant upon his application for writ of habeas corpus, following a decision of the District Court of Appeal with reference to the same matter, which was decided against appellant's contention by denial of his application, the matter is no longer open to review.

5. Judgment 🔑745—Matter previously decided against appellant is no longer open for review.

Whether an executrix, having failed or neglected to present a claim against the estate of a former administratrix, since deceased, is barred from recovering, having been decided by the Supreme Court against the appellant, administrator of such administratrix's estate, by denial of his application, the question is no longer open for review.

6. Executors and administrators 🔑504(5)—Exceptions to account must be verified as a pleading or be deemed waived.

Appellant's objection that the court erred in its disallowance and reduction of certain items in administratrix's account relating to attorney's fees was waived where the original objections and exceptions were not verified; they being a pleading required by Code Civ. Proc. § 446, to be verified, in view of sections 1635 and 1713.

7. Executors and administrators 🔑504(1)—Court may on its own motion disallow or reduce items in administrator's account.

The court may upon its own motion without any objections being filed thereto disallow or reduce any of the items in the administrator's account which it may upon its own examination thereof find to have been improperly admitted.

8. Appeal and error 🔑938(4)—No presumption that bill of exceptions embraces all evidence.

There is no presumption that a bill of exceptions embraces all the evidence in the case, but only so much thereof as is material to the exceptions assigned.

9. Executors and administrators 🔑510(7)—Specification of objection to disallowance or reduction of items in administratrix's account held not available on appeal in absence of evidence.

Upon appeal from an order settling the account of a deceased administratrix, a contention that the trial court erred in its disallowance and reduction of certain items relating to attorney's fees is not available in the absence of a specification of the insufficiency of the evidence, and also absence of the evidence in the case, in view of Code Civ. Proc. § 648.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

In the matter of the estate of Humphrey A. Randall, deceased, in which Anne Bates Randall is executrix. From an order of the superior court sitting in probate settling the account of Florence E. Philbrook, as administratrix with the will annexed of the estate of Humphrey A. Randall, deceased, Horace W. Philbrook, as administrator of the estate of Florence E. Philbrook, deceased, appeals. Order affirmed.

Horace W. Philbrook, of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order of the superior court, sitting in probate, settling the account of Florence E. Philbrook, as administratrix with the will annexed of the estate of Humphrey A. Randall, deceased, presented by Horace W. Philbrook, as administrator of the estate of Florence E. Philbrook, in said estate of Randall, of which said Florence E. Philbrook, deceased, prior to her death had been such administratrix.

The facts shown by the record and as recited in said order are these: On February 15, 1915, letters of administration with the will annexed were granted and issued by the superior court of the county of Alameda, in the matter of said estate of Randall to Florence E. Philbrook. These letters of administration were subsequently revoked by said court by an order which appears to have been duly and regularly given and made on April 3, 1917, at which time Anne Bates Randall was appointed and thereafter duly qualified as the executrix of said estate. Thereafter, and on November 17, 1918, Florence E. Philbrook died without having rendered or filed a final account of her administration of said estate, whereupon Horace W. Philbrook applied for and received letters of administration of her estate in the superior court of the city and county of San Francisco, the place of her residence at the time of her death, and duly qualified as such administrator. Thereafter, and on the 14th day of June, 1920, Horace W. Philbrook, as the personal representative of said Florence E. Philbrook, deceased, and as the administrator of her said estate, presented and filed in the superior court of Alameda county, in the said matter of the estate of Randall, the final account of Florence E. Philbrook, deceased, as administratrix with the will annexed of said estate, whereupon the said court appointed the 28th day of June, 1920, as the day for the settlement of said account, notice of which time and place of said settlement of said account was duly given and made as required by law and by the order of said court, and said account came on regularly for settlement on said appointed day, whereupon Anne Bates Randall, as executrix of said estate, presented and filed her objections and exceptions to said account, whereupon the hearing upon said account and the objections thereto was by the court continued to July 8, 1920, and upon said day was further continued to the 19th day of July, 1920, on which last-named date Anne Bates Randall, as such executrix, presented and filed, by leave of the court, certain amendments to her objections and exceptions to said account. Thereupon the matter was further continued for hearing to July 26, 1920, and was then and thereafter by various minute orders of the court appearing to have been duly and regularly made continued to September 13, 1920, on which last-named date the matter of the settlement of said account and of the said objections and exceptions thereto as amended came on regularly to be heard, the parties thereto being present or represented in court, and no objection to the hearing upon said final account and the objections and exceptions thereto or to the settlement thereof being made. Thereupon the court proceeded to hear and determine said matters. The record in respect to the proceedings of the court at said time appears to show that whatever disposition the court made thereof on said day and at the time of the hearing thereon was oral and was done in open court, no minute entry or written order being at the time made or filed; but thereafter, and on September 18, 1920, the court did sign and file its written order settling said account, which written order purported on its face to be the order which was made in open court on September 13, 1920, and to have been signed upon said last-named date. The bill of exceptions shows that the said written order of the court had, between the 13th and the 18th days of September, 1920, been prepared by the attorneys for the said executrix and presented to the judge of said court for signature upon said last-named day, and had then been signed and filed, the said Horace W. Philbrook not having participated in the drawing of said order nor being present at the time of the signing and filing thereof. It is from the order thus made and filed and thereafter entered that this appeal has been taken.

[1, 2] The first contention which the appellant urges upon this appeal is that the order appealed from, not having been actually drawn and signed by the judge of said court upon the date to which the matter of the hearing of the settlement of said account

had been continued, and no other order having been made on said day continuing said cause or the determination thereof to a later day, the said order as actually signed and filed on September 18, 1920, is void. There is no merit in this contention. The appellant makes no claim that said written order as thus signed and filed does not in fact conform to and embody the determination of said matter as arrived at by the court on the day of the hearing thereon. The order on its face purports to embody the action of the court as done and determined in open court at the time of the hearing of said matter on September 13, 1920. The fact that the drawing of the formal order was committed to the attorneys for the executrix and that said formal order was drawn and presented by them to the court for signing on the date of its actual signature is immaterial, but is in accord with the common and immemorial practice of courts in respect to the preparation of important orders and decrees which courts have directed to be made. The order, when so prepared and signed, is as much the order of the court as though the judge of the court had himself written it in its final form. The proceedings were not dropped or discontinued or abandoned in the interim, but were merely in suspension until such time as the preparation of such formal order as the court had determined upon or directed to be made could be accomplished. This having been done, and the said formal order when so prepared having been signed by the court as "done in open court" on the date of the hearing, it became, when so signed and filed, the formal and final order of said court as of said date. The presence or absence of the parties or their counsel when such order was actually signed and filed would be entirely immaterial, since it embodied the action which the court had taken and determined upon the hearing of said matter and in the presence of the parties thereto. Brownell v. Superior Court, 157 Cal. 703, 109 Pac. 91.

[3] The next contention of the appellant is that the probate court had no jurisdiction to require the appellant, as administrator of the estate of Florence E. Philbrook, deceased, to account to the estate of Randall or to the executrix thereof by reason of the fact that the letters of administration originally granted to said Florence E. Philbrook had been revoked during her lifetime, and she was not therefore the administratrix of said estate at the time of her death. It is the appellant's contention that the remedy of the executrix of the estate of Randall in such a state of facts was in a court of equity. He cites some early cases in this court as supporting this contention. Prior to the year of 1905 such may have been the rule, but in that year it was changed by the enactment of section 1639, Code of Civil Procedure, which expressly provides for the proceedings followed in the instant case.

[4] This same question was presented to the District Court of Appeal in the case of In re Philbrook, 191 Pac. 77, wherein the identical order assailed upon this appeal was considered and its validity as against the appellant's present contention sustained. The same question was presented to this court also by the appellant upon his application for a writ of habeas corpus following the decision of the District Court of Appeal above cited, and was decided against his contention by denial of his application for such a writ. It is therefore no longer open to review upon this appeal.

[5] This conclusion also applies to the appellant's next contention, which is that the executrix of the estate of Randall, having failed or neglected to present a claim against the estate of Florence E. Philbrook for the amount claimed to be due from her as the former administratrix of said estate, cannot now recover upon said claim or require her administrator to account for or pay to said estate of Randall the amount claimed to be due thereon. This question was also presented to the District Court of Appeal and to this court in the applications of the appellant herein for writs of habeas corpus (In re Philbrook, supra), and was decided adversely to his contention. We see no reason to modify the views expressed by the District Court of Appeal nor the conclusion reached by this court upon said applications, and hence hold the present contention of the appellant upon this point to be without merit.

[6] The appellant next contends that the court erred in its disallowance and reduction of certain items in said account relating to attorney's fees. The first point which he urges in support of this contention is that the original objections and exceptions of the executrix to said account were not verified. The appellant is probably correct in his insistence that these written objections and exceptions of the executrix made and filed to the appellant's verified account were pleadings which, under the provisions of section 446, Code of Civil Procedure, should have been verified. Code Civ. Proc. §§ 1635, 1713. Conceding this to be true, it still remains a sufficient answer to appellant's point in this regard that no objection was made on the hearing of said account and upon said exceptions thereto that the latter were not verified. We think that the appellant's objection thereto must be held to have been thereby waived. In the Estate of Marre, 127 Cal. 128, 59 Pac. 385, oral objections were presented by a contestant upon the hearing on an administrator's account to which the objection was not made that they were not in writing, as required by section 1635, Code of Civil Procedure, and the trial court proceed-

ed without objection to hear and determine the matter of said account and the objections thereto. It was held that the objection that said exceptions to said account were oral was thereby waived for the reason that, if the appellant had objected at the hearing to this method of procedure and had demanded that the contestants reduce their objections to writing, the court would doubtless have required the contestants to comply with the rule of practice prescribed in such cases. The like reasoning applies to the appellant's contention that the objections and exceptions of the executrix were not verified, since, if the point that contestants' objections and exceptions were not in writing would be thus waived, it follows necessarily that their lack of verification would be also waived by the failure to object to their consideration at the hearing upon that ground.

[7] But there exists an even better reason why the appellant's contention that the trial court was in error in disallowing and reducing the items embracing his claims for attorney's fees upon the ground that the objections thereto were not verified is unsound. It is that the court may upon its own motion, and without any objections being filed thereto, disallow or reduce any of the items in an administrator's account which it may, upon its own examination thereof, find to have been improperly charged. In Estate of More, 121 Cal. 635, 639, 54 Pac. 148, 150, it was held that "whether exceptions are filed or not, the court should carefully examine every account presented for settlement and be satisfied that it is in every respect practically correct before entering an order settling it." The probate court, says this court in Hirschfeld v. Cross, 67 Cal. 661, 8 Pac. 507, "is the guardian of the estates of deceased persons and has control of the person appointed by it to administer the estate, subject to review as provided by law." And in Estate of Sanderson, 74 Cal. 199, 15 Pac. 753, it was held that "it is the duty of the court carefully to scrutinize the account, and reject all claims of the executor illegal in themselves or unjust in fact."

[8, 9] It is, however, the further contention of the appellant that the trial court erred in its disallowance and reduction of certain items in his account relating to attorney's fees; that the record herein shows that no evidence was presented by the contestant or heard by the court touching the incorrectness of the account in these respects. The difficulty with this contention is that the appellant presents his case upon a bill of exceptions which does not pretend to contain all of the evidence presented to the trial court upon the hearing of said account, nor does it contain any specification of the insufficiency of the evidence to justify the decision of the court as to the disallowance and rejection of the items in said account referring to attorney's fees, as required by section 648, Code of Civil Procedure. There is no presumption, as appellant insists, that a bill of exceptions embraces all of the evidence in the case, but only so much thereof as is material to the exceptions assigned. Hayne on New Trial and Appeal (Rev. Ed. 1912) vol. 2, § 258, p. 1444. In the absence of such specification and of the evidence in the case, the appellant's contention in this regard is not available to him upon this appeal.

This conclusion also applies to the appellant's final contention as to the alleged error of the court in the disallowance of certain commissions and costs of said administratrix as set forth in her said account; neither specification nor evidence being presented as a basis for such contention.

Order affirmed.

SHAW, C. J., and RICHARDS, Justice pro tem., and LAWLOR, WILBUR, SHURTLEFF, SLOANE, and WASTE, JJ., concur.

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188 Cal. 281

PEOPLE v. MARTIN. (Cr. 2375.)

(Supreme Court of California. Feb. 24, 1922.)

1. Criminal law ⚷1023(8)—Order denying a motion for arrest of judgment is not appealable.

An order denying a motion for arrest of judgment is not appealable, in view of Pen. Code, § 1237.

2. Extradition ⚷41—Defendant extradited for embezzlement may be prosecuted for bigamy.

One charged with embezzlement, who is extradited from one state to the one from which he was a fugitive, may be tried in the latter state for bigamy.

3. Criminal law ⚷107—Statute fixing venue of bigamy in county where committed or county where apprehended held not repealed.

Pen. Code, § 777, fixing the jurisdiction of "every public offense in the county where it is committed" as amended by St. 1919, p. 81, does not repeal section 785, which declares that "when the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another the jurisdiction is in either county."

4. Statutes ⚷158—To justify presumption of intention to repeal by implication, two statutes must be irreconcilable or the intent must be clearly expressed.

Courts do not favor repeal by implication, and the presumption is always against the intent to repeal, where express terms are not used, and to justify the presumption of an intention to repeal one statute by another, either the statutes must be irreconcilable, or the intent to repeal must be clearly expressed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Criminal law ⚷108(1)—Person charged with bigamy, while under arrest in a certain county, held "apprehended" in such county within the meaning of venue statute.

Where defendant was held in one county, to which he had been brought, waiting extradition for embezzlement and, while there, was charged with bigamy, he was apprehended in such county within the meaning of Pen. Code, § 785, fixing venue either in the county of apprehension or that in which the bigamy was committed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Apprehend—Apprehension.]

6. Jury ⚷33(3)—Statute permitting trial in county where apprehended held not in violation of constitutional provisions since not a common-law crime.

Pen. Code, § 785, fixing venue of prosecution for bigamy either in county of its commission, or in county where defendant was apprehended, *held* not to violate Const. art. 1, § 7, declaring that "the right of trial by jury shall be secured to all and remain inviolate," on the ground that jury must be summoned from the vicinage where the crime is supposed to have been committed, since bigamy is not a common-law felony in view of Pen. Code, § 1033, relating to transfer of cases.

In Bank.

Appeal from Superior Court, San Diego County; Edgar A. Luce, Judge.

Ed. R. Martin was convicted of bigamy, and his motions in arrest of judgment and for new trial were denied and judgment pronounced, and he appeals. Affirmed.

See, also (Cal. App.) 200 Pac. 808.

A. A. Howell and Allan Brant, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

SHURTLEFF, J. The defendant and appellant was extradited from the state of New Mexico to the county of San Diego, upon a charge of embezzlement. While held in said county as a prisoner under such charge, the district attorney of the county filed in said county an amended information accusing the defendant of the crime of bigamy, alleged to have been committed "on or about the 15th day of November, 1920, at the County of Orange, State of California"; the information further alleged that defendant was apprehended in said county of San Diego. Upon the trial of the bigamy charge, the prosecution, after producing evidence tending to prove the allegations of the information, rested, whereupon the defendant offered to prove, first, that he was arrested out of the state upon the embezzlement charge and brought into San Diego county and there held upon such charge, and while so held, was arrested for the alleged bigamy; and, second, that after the alleged marriage in Orange county he never returned to San Diego county until extradited. To each of these offers the prosecution objected, upon the ground that it was incompetent, irrelevant, and immaterial how he came into San Diego county, that the fact that he was there was sufficient, which objection was sustained. The jury found the defendant guilty as charged. In due time defendant filed a motion in arrest of judgment and a motion for a new trial, both of which were denied, and judgment pronounced. It is from these orders and said judgment that this appeal is prosecuted.

[1] The order denying the motion for an arrest of judgment not being appealable (Pen. Code, § 1237), may be dismissed without discussion.

[2] The contention of defendant that, having been extradited from New Mexico on a charge of embezzlement, he could not legally be tried on the charge of bigamy without first having been given an opportunity to leave the state, cannot be sustained. It is now settled by the great weight of authority that a person charged with crime, who is extradited from one of the several states to the one from which he was a fugitive, may be tried for any criminal charge which the latter state may have against him, even though it is distinct from the offense named in the extradition papers. "Although there has long been a conflict in the decisions of courts of the several states, it is now generally accepted that a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was surrendered, but may be tried for any crimes committed in the demanding state either before or after extradition without having been given an opportunity to leave the state." Corpus Juris, vol. 25, p. 272, § 47, and cases cited.

[3, 4] We pass to the consideration of the rulings of the court upon defendant's offers to prove. It is asserted that the evidence embodied in the offers was material and admissible to show that the superior court of San Diego county was without jurisdiction to try the defendant, for the reason that the bigamy, of which he was accused, was committed in Orange county. Defendant advances a number of arguments in support of this claim, some of which, it must be conceded, are not lacking in persuasive force. It is claimed that section 777 of the Penal Code, as amended in 1919 (St. 1919, p. 81), repeals section 785 of the same Code, but to this we cannot assent. The material portion of section 777 as amended is:

> "Every person is liable to punishment by the laws of this state, for a public offense committed by him therein, * * * and, except as herein otherwise provided, the jurisdiction of

every public offense is in the county wherein it is committed"

—which language is followed with a single proviso, which alone constituted the amendment to the section, and referred to the jurisdiction of wards of juvenile courts, and is not germane to the present discussion. The above-quoted extract appeared verbatim in the section; indeed, it alone composed the section, prior to its amendment in 1919, and it is obvious that to have given the phrase "as herein otherwise provided," as the section originally read, any meaning or application whatever, it must be held that it had reference at least to the title and chapter of which it formed a part, and our construction is that the insertion of the proviso touching wards of juvenile courts in no manner narrowed or modified its former scope. The amendment merely added another exception to the general application of the section and did not repeal section 785 which declares that "when the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county." Courts do not favor repeal by implication. People v. S. F. & S. J. R. Co., 28 Cal. 254. "The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed." (Cyc. vol. 36, 1071), neither of which conditions is present here.

[5, 6] In our opinion, when the defendant was served with the warrant of arrest, issued in this case in San Diego county, where he was held as a prisoner, under the circumstances already narrated, he was "apprehended" in that county within the meaning of section 785 of the Penal Code just quoted, and was legally triable there, unless the section, as defendant affirms, is unconstitutional in that it infringes the provisions of section 7 of article I of the state Constitution, which declares, so far as pertinent to this inquiry, that "the right of trial by jury shall be secured to all, and remain inviolate." The settled construction of this clause of the Constitution is that it gives a right to a trial by jury only in cases where the right existed at common law. In Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234, this court said of this guarantee:

> "Under the provisions of other constitutions and statutes quite as broad as the clause above cited [Const., art. 1, § 7], it has uniformly been held that the right to trial by jury was not intended to be extended to cases in which the right did not exist at common law."

Likewise, in Ex parte Wong You Ting, 106 Cal. 296, 299, 39 Pac. 627, referring to the same provision the court declares:

> "It has been held to refer generally to the right of trial by jury as it existed at common law and at the time the Constitution was adopted."

Again, in the more recent case of In re Mana, 178 Cal. 213, 214, 172 Pac. 986, L. R. A. 1918E, 771, which involved the constitutionality of the act of the Legislature authorizing women to sit as jurors, we find this language:

> It seems "to be thoroughly settled by the unbroken line of decisions in all the states * * * that constitutional provisions guaranteeing the right to a trial by jury establish the right to a trial by a jury as known at common law."

People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75, a case relied upon by appellant, is to the same effect. The latter case also holds, which is important, that many of the incidents of a common-law trial by jury are essential elements of this right, and that one of such incidents is that "the jury must also be summoned from the vicinage where the crime is supposed to have been committed." From what precedes, the law applicable to this branch of the case may be summarized thus: That the constitutional guarantee gives a right to a trial by jury in all criminal cases where the right existed at common law and at the date of the adoption of the Constitution, one of the incidents of which right is the place of trial.

In Barber v. State, 50 Md. 161, 166, it is said:

> "Bigamy was not a felony at the common law; indeed, according to that law, it was not a crime of which the ordinary common-law tribunals took cognizance at all. It was originally considered as of ecclesiastical cognizance exclusively." 7 Corpus Juris, p. 1185.

This statement doubtless refers to the common law in the sense that it includes certain principles, usages, and rules of action which do not rest on written law, as contradistinguished from certain written or statutory laws, which also form part of the common law of England. 12 Corpus Juris, p. 176.

In 1604, during the reign of James I, bigamy was made a crime cognizable in common-law courts of England by a statute, which in part provided:

> "If any person or persons within his majesty's dominions of England and Wales, being married, or which hereafter shall marry, do at any time after the end of the session of this present parliament, marry any person or persons, the former husband or wife being alive; that then every such offense shall be felony, and the person or persons so offending shall suffer death as in cases of felony; and the party and parties so offending shall receive such and the like proceeding, trial and execution in such county where such person or persons shall be apprehended, as if the offense had been

committed in such county where such person or persons shall be taken or apprehended." 1 Jac. I, c. XI, 7 Stat. at Large, 39 Eliz. 12 Car. II, p. 88.

It was this statute that first made bigamy a felony and hence triable by a jury in a common-law court in England. The portion thereof permitting a trial in the county in which the defendant was apprehended was re-enacted in England in 1828 in these words:

> "Any such offence may be dealt with, enquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county." 9 Geo. IV, c. 31, § 22, 68 Stat. at Large, 106.

Substantially the same provision was, in 1861, incorporated in "An Act to consolidate and amend the Statute Law of England and Ireland relating to Offenses against the Person," as follows:

> "Any such Offense [bigamy] may be dealt with, inquired of, tried, determined, and punished in any County or Place in England or Ireland where the Offender shall be apprehended or be in Custody, in the same Manner in all respects as if the Offence had been actually committed in that County or Place." 24 & 25 Vict. c. 100, § 57, 101 Stat. at Large 425, 438.

We have thus traced in detail the evolution of the law relating to the trial by a jury at common law of the charge of bigamy, for the purpose of showing that, when first made a felony, cognizable by such tribunals, and continuously thereafter down to the time of the adoption of our Constitution of 1849, from which section 7 of article 1 of our present Constitution was taken (Const. 1849, art. 1 § 3), the statutes of England conferring such jurisdiction provided that one of its incidents should be, and was, that one accused of bigamy could be tried in the county wherein he was apprehended, though the act of bigamy was committed in another county. These statutes, in effect, declared that the accused could be tried by a jury from the vicinage either of the place where it is charged the crime was committed or of the place where he was apprehended. So far as our research has disclosed, the common law has never declared that a person accused of bigamy could only be tried by a jury selected from the vicinage of the place where the crime was alleged to have been committed. It is obvious that the provisions of section 785 of the Penal Code, providing for the trial of a person charged with bigamy in the county where he is apprehended, are the counterpart of the English statutes herein referred to. As indicating that our law may have been modeled upon that of England, it may be stated that, at the session of the state Legislature of this state, held in 1851, a statute was enacted providing that, when the offense of bigamy "is committed in one county and the defendant is apprehended in another, the jurisdiction shall be in either county," and such has been the law of California for more than 70 years past. Stats. 1851, p. 222, § 91; Compiled Laws of Cal. 1850-53, p. 435. From what precedes it follows that section 785 of the Penal Code, in so far as it provides that when the offense of bigamy is committed in one county and the defendant is apprehended in another the defendant may be tried in either county, is in accord with the common law, does not transgress said section 7 of the "Declaration of Rights," and is constitutional.

The foregoing views do not conflict with those expressed in People v. Powell, supra; upon the contrary, they are in entire harmony with them. In that case the defendant was, by information filed in the county of San Mateo, charged with murder alleged to have been committed in that county. He was twice tried in said county, each trial resulting in a disagreement. Without attempting to secure a third jury in said county, the district attorney applied for a removal of the case to the city and county of San Francisco, under section 1033 of the Penal Code as it existed prior to its amendment in 1905 (St. & Amends. 1905, p. 695), and which provided for a removal upon the application of the district attorney, which application was granted. The trial in the city and county of San Francisco resulted in a verdict of manslaughter, and judgment was pronounced accordingly. The defendant appealed from this judgment and from the order denying his motion for a new trial, which resulted in a reversal, upon the ground that murder was a common-law crime, one of the incidents of which was that the party charged therewith must be tried by a jury selected from the vicinage or county in which the alleged murder was committed, and, inasmuch as section 1033 of the Penal Code (as it then stood), if enforced, deprived him of such right, it was in that respect unconstitutional. In other words, the case turned upon the point that at common law a person accused of the crime of murder must be tried by a jury drawn from the county in which the deed was committed; that our Constitution guaranteed to him precisely the same right; and that it was beyond the power of the Legislature to abridge it. But, as we have said, and therein lies the difference between that case and this, at common law among the incidents of a trial for bigamy was that the accused could be tried either in the county in which bigamy was committed or in the county in which he was apprehended.

From what precedes, it follows that the rulings of the court upon the defendant's offers of proof, since they embodied evidence which were immaterial, were correct, and that the judgment and order denying appellant's motion for new trial must be and they are affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; WILBUR, J.; SLOANE, J.; WASTE, J.

(188 Cal. 307)

LOS ANGELES GAS & ELECTRIC CORPORATION v. CITY OF LOS ANGELES et al. (L. A. 5532.)

(Supreme Court of California. Feb. 25, 1922.)

1. Municipal corporations 🔑244(1)—Mere terminology of contract not controlling over real nature of transaction prohibited by charter.

If the terminology in a contract between a city and a power company was adopted as a mere subterfuge to conceal the real nature of the transaction, and if the actual transaction is one prohibited by the city charter, the mere terminology should not be controlling.

2. Municipal corporations 🔑244(1)—Contract between city and power companies held not "sale at wholesale of electric power" by city contrary to charter.

The city of Los Angeles did not violate Los Angeles City Charter, § 2, subd. 41, and section 191, prohibiting sale of electricity at wholesale, by entering into a contract with power companies looking to a purchase of their distributing systems, though the power companies distributed the electricity of the city and collected therefor and retained a certain percentage of the value of its system as compensation, pending a vote on a bond issue to be used in the purchase of the properties; the surplus going to the city.

3. Municipal corporations 🔑244(1)—Contract not invalid by reason of conduct of officials in executing it.

Valid agreements between a city and power companies will not be held invalid because conduct of city officials in executing them violates provisions of the city charter and the contract.

4. Municipal corporations 🔑870—Constitutional provision as to lending credit inapplicable to Los Angeles.

Const. art. 4, § 31, prohibiting the Legislature from giving or lending its credit, or authorizing the giving or lending of credit of the state, or of any county, city, township, or other political corporation or subdivision, has no application to the city of Los Angeles in respect to municipal affairs, the city having a freeholders' charter, directly provided for by article 11, § 6.

5. Municipal corporations 🔑66—Sale of electrical energy municipal affair.

The sale and distribution of electrical energy manufactured by a city is a municipal affair, and one over which the Legislature of the state has no control.

6. Municipal corporations 🔑873—Contract of city with power company held not a "lending of credit" within constitutional prohibition.

A contract of the city of Los Angeles, whereby it had power companies distribute electric energy manufactured by it pending an election to vote on the issuance of bonds to purchase the distributing systems of the power companies, the power companies to deduct from sums collected expenses of distribution and a certain percentage of the value of its properties, the city taking the surplus, did not violate Const. art. 4, § 31, prohibiting the lending of credit, assuming that such constitutional provision applies; the arrangement not constituting a partnership between the power companies and the city, and the mingling of capital being merely incidental to the purchase and sale of the distributing systems.

7. Electricity 🔑11—"Surplus power" which city could sell at wholesale.

Electrical energy, manufactured by the city of Los Angeles and sold within the city by power companies, was not "surplus power" which could be sold at wholesale by the city under Los Angeles City Charter, § 2, subd. 41, and section 191; the purpose of the proviso being to permit sale to outside consumers when the power was not wanted within the city.

8. Municipal corporations 🔑236 — Contract concerning furnishing of electric power held not within charter provision requiring letting to lowest bidder.

A contract between Los Angeles and power companies looking to the purchase of the plants, whereby the city for a certain time was to purchase certain amount of power from the companies, who were in turn required to account for the income to the city pending the taking over of their plants, *held* not one required to be let only after advertisement, and to the lowest bidder, as the power to be supplied by the companies could not be obtained elsewhere, and was furnished by public service corporations for distribution to customers already entitled to that service, under Los Angeles City Charter, § 207a.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Los Angeles Gas & Electric Corporation against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Paul Overton, S. W. Guthrie, Herbert J. Goudge, and H. C. Beach, and J. H. Powell, all of Los Angeles, for appellant.

Albert Lee Stephens, Wm. B. Himrod, Lewis E. Whitehead, W. B. Mathews, Roy V. Reppy, Gibson, Dunn & Crutcher, and H. H. Trowbridge, A. E. Morphy, and Harry J. Bauer, all of Los Angeles, for respondents.

WILBUR, J. This action is brought by the plaintiff as a taxpayer of the city of Los Angeles to enjoin the carrying out of a certain contract entered into by the city of

Los Angeles with the Southern California Edison Company and with the Pacific Light & Power Corporation for the distribution of the electric energy developed by the power plants owned by the city. The city of Los Angeles has developed hydroelectric power in bringing water from the Owens river to the city of Los Angeles; 37,500 horse power is developed in San Francisquito canyon. The city is empowered by its charter to develop and sell electrical power. The question involved in this case is whether the city has violated a provision of the charter hereinafter quoted which prohibits the sale by the city of its electric energy at wholesale unless authorized so to do by a two-thirds vote of the electors of the city. The question, then, is whether or not the contract in question makes a sale of electric power by the city within the prohibition of the charter. It appears that the city has a distributing system which uses less than 10 per cent. of the power developed at the San Francisquito plant. Until a distributing system can be constructed or purchased for the distribution of the balance of such electric energy to consumers 90 per cent. of the hydroelectric power which would otherwise be developed at this plant must go to waste and become a total loss to the city unless it can be sold to or distributed by those having adequate distributing systems. In view of this situation the city of Los Angeles was confronted with the problem of either acquiring existing distributing systems in the city of Los Angeles or of constructing a sufficient distributing system of its own. The city officials of the city adopted the plan of purchasing the existing distributing plants of the Pacific Light & Power Corporation and the Southern California Edison Company. In order to consummate this purchase it was essential for the city to issue bonds and to secure the necessary consent of two-thirds of its electors expressed at an election to such bond issue. An election was agreed to be called June 7, 1917. Pending the holding of such an election the contract under attack in this action was executed between the city and the companies having such distributing plants. By this contract the city proposed to enter into an agreement to purchase the distributing plants of these two corporations at a price fixed in the proposed agreement and under conditions therein specifically set forth, subject, however, to the approval of the voters voting at the bond election thereafter to be held.

The contract covered the period from May 1, 1917, to July 1, 1917, subject to extension at the option of the city to July 2, 1919, and subject to termination during that period at the option of the city upon three months' notice, and provided that the contract should terminate upon the purchase and transfer of the distribution system to the city under the agreement therefor, a copy of which proposed agreement of purchase was attached to and made a part of the contract. In this proposed contract of purchase the price to be paid for the distributing system within the city of Los Angeles was fixed at $8,270,000, plus such sum as the railroad commission should fix as the value of the distributing system in the Westgate annexation district, as such system existed on January 1, 1917, plus moneys expended for extensions and betterments of such systems after January 1, 1917, until the transfer to the city, plus $1,145,000 severance damage, less $21,600 to be deducted annually therefrom under the operating contract, all payable on or before July 1, 1919. Said amounts to be paid only from the proceeds of bonds authorized by the voters for such purpose, the city to agree in the proposed agreement to purchase from the companies all electricity required in excess of the supply produced by the city from its generating plants, and not less than 25,000 horse power.

Pending the consummation of the contemplated purchase of the distributing system it was agreed that the system should be used to distribute power generated by the city and by the companies to the customers of the companies in the city. By this arrangement the corporations agreed to distribute the electrical energy of the city to the consumers then served by those corporations within the city limits. The companies also agreed to collect from the consumers for such service. The funds derived from the sale of such electrical energy to the consumers were to be applied by the companies in the manner specifically agreed on in the contracts. Sufficient of the returns from the sale of electrical energy were to be retained by the corporations to pay 8 per cent. upon the purchase price of the plants as fixed in the agreement of purchase and sale and upon the severance damage allowed in connection with the sale; a damage fixed, no doubt, in the light of the principle of eminent domain by which severance damage, if any, is allowed in the event of condemnation; $3\,{}^{36}/_{100}$ per cent. upon these values was to be paid into a trust fund to be applied to repairs and improvements necessary to maintain the plants and make necessary extensions, and the balance thereof to be disposed of in connection with the sale in accordance with the agreement of the parties by which in case of a sale it was planned to make the city whole on its purchase, either by the replacements and extensions made from time to time, or by the payment to it from this fund of the estimated depreciation. Other provisions in the contract with reference to the operation of the power lines during the period in which the title remained in the vendor need not be specifically stated except to state that the general management of these distributing systems was to be in the companies subject to the control of a board of four persons, two to be chosen by the city and two by the companies, and, in the event of a disagreement, a fifth to be selected as referee. One of the most important features of the plan was the agreement that the city should purchase from the corporations, both before and after the sale, about 25,000 horse power of electrical energy, the amount and price of which is minutely specified in the agreement.

[1] The entire scheme covered by the contract is one for the distribution of 62,500 horse power of electrical energy to customers mostly within the city of Los Angeles, 25,000 of it to be supplied by the companies and 37,500 by the city. The contract specifically provides that the city is to purchase the 25,000 horse power from the electrical and power companies, and that the power lines of the companies are to be used for the distribution of the electrical energy of the city. Of course it must be conceded that, if this terminology was adopted as a mere subterfuge, to conceal the real nature of the transaction, and if the actual transaction is one prohibited by the charter, the mere terminology used by the parties should not be controlling. It is, however, significant that the agreement, as expressed by the parties thereto, is one by which the city is to purchase the distributing system of the corporations, and in addition thereto to purchase 25,000 horse power of electrical energy from the corporations, and not one for the sale of power by the city to the companies.

There is no agreement whatever on the part of the city to sell electrical energy to the companies, unless it be determined that, notwithstanding the ostensible nature and character of the transaction, the actual agreement was to sell electrical energy at wholesale. The charter provision relied upon by the plaintiff in this action, subdivision 41 of section 2, is as follows:

> "* * * And no electric power now or hereafter owned or controlled by the city shall ever be sold, transferred, leased or disposed of to any person or corporation for resale, rental, disposal or distribution to consumers, or other persons, without the assent of two-thirds of the qualified voters of said city given as aforesaid; provided, that nothing in this subdivision contained shall be construed to prevent the ordinary sale and distribution by the city of electric power, belonging to the city, to the inhabitants thereof, or persons doing business therein, for their own use, or to prevent the distribution or supplying, by the city, of surplus electric power not required by the city for distribution to consumers within its limits, to consumers outside of the limits of the city, for their own use, or to other municipal corporations for municipal use, or for resale and disposal by such municipal corporations to consumers within such municipalities, respectively."

Substantially the same provision is also found in section 191.

[2] It is evident that the purpose of this charter amendment is to require the city to acquire by purchase or construction of a distributing system adequate to serve the citizens of the city of Los Angeles with the electrical energy which it owns, rather than for the city to sell its power to others to retail to consumers. It would be disastrous if this provision should be construed so that, during the period necessary for the construction or acquisition of a distributing system, the enormously valuable power rights of the city should be almost wholly wasted. It is stated in the briefs that the amount of revenue to be derived by the city during the pendency of this contract, that is, up to the first of July, 1919, would be in excess of $1,000,000, and the actual returns received by the city are in excess of $2,000 per day.

Upon the argument upon rehearing it was stated that the returns from this contract already paid over to the city to August 31, 1921, amounted to $3,824,899, of which amount $1,140,755 had been paid for the first 8 months of 1921. It is evident that these general restrictions of the charter were not adopted with a view to providing for the hiatus between the acquisition of power generating and power distributing systems by the city, but rather to the management of both when acquired, and to compel the acquisition of both.

Was the arrangement between the city and the companies a "sale" of electrical energy by the city to the companies prohibited by the charter? The scheme adopted by the city authorities for the distribution of this power, by which it is served directly to the consumers within the city limits, and by which the amount paid by the consumers goes directly to the city or inures to its benefit in the extension and maintenance of an electrical distributing system to be purchased by the city, is certainly not a violation of the spirit of the charter, which commits the city to the scheme of retail distribution as distinguished from a wholesale distribution of its power, but is in accord with such purpose. If the system adopted is not a violation of the spirit of the charter, the question remains whether or not it is a violation of the letter thereof. It is not a violation of the letter of the charter, for the reason that, instead of being a sale by the city at wholesale of its electrical energy, it is, on the contrary, an arrangement by which the city not only serves its own electrical energy directly to the consumers, constituting the distributing corporations its agents for that purpose, and for the collection and disbursement of those returns in accordance with an agreement for the purchase and sale of the plant, but also one by which the city agrees to purchase from the vendors, not only during the period in which the distributing systems remain in their possession before purchase, but subsequent to the final consummation of such purchase, electrical energy amounting to 25,-

000 horse power. Instead of an agreement on the part of the city to sell electricity, it is an agreement to buy electricity. It is true that the scheme proposed results in the defendant companies actually collecting from the consumers the price of electrical energy furnished to them; that it also provides for the retention by the companies of sufficient of the amounts so collected as would give to them 8 per cent. income upon the value of their property used in the distribution of the electric energy. Speaking in terms of substance rather than in detail, the agreements referred to are more in the nature of an agreement regulating the use and possession of property for the buyer and seller pending the consummation of the sale thereof.

The trial court denied the injunction sought, and plaintiff appeals.

[3] The appellant argues that the actual transaction between the city and the companies was a sale, whatever the contract on its face may be; that it was considered and treated by the parties as a sale of power *by* the city to these companies for which they paid the city at the rates fixed in the contract for the sale of the power *by* the companies; and that the actual returns made to the city are so nearly in accord with such supposition as to justify the conclusion that the parties intended the language of the contract as a mere subterfuge to conceal the real intent of the city officials entering into the agreement. In other words, that the schedule of prices for electricity stated in the contract is really intended to be for exactly the opposite purpose than what the contract states it to be, namely, as sale *by* the city instead of a sale *to* the city. Neither the city nor the companies are bound by such an understanding or intention, if inconsistent with the terms of the written contract. If the agreements between the city and the companies are valid agreements, and in accordance with the charter, they will not be held to be invalid because the conduct of the city officials in executing them violates both the charter and the contract. While the actual payments made during the month of May by the companies to the city average about $2,000 per day, a total of $62,913, such payments are not a contract price for 5,844,520 kilowatt hours furnished *by* the city. The circumstances that the ratio between the total amount already paid to the city and the amount of the power so far furnished by the city gives a price per kilowatt hour to the city approximating the rate fixed in the contract for power furnished *by* the companies is not material. The litigation was begun the day the contract went into effect. Under the terms of the contract payments were to be made daily by the companies to the city and such payments would necessarily be an approximation of the amounts due under the contract. The contract provides for the adjustment of payments in accordance with the terms of the contract monthly. The contract provision with reference to the payments is as follows:

> "The companies shall collect from consumers all money for electric energy supplied to consumers, and shall pay or cause to be paid to the city daily as collected all sums collected on account of electric energy furnished after the execution of this agreement under and by means of said distributing systems. less such percentage of such sums as is to be retained and received by the companies under provisions of paragraph H of this agreement. The amount of such deductions from daily collections shall be determined by the parties hereto as accurately as may be practicable subject to more complete and final adjustment, settlement and payment to the party to whom such payments may be due, on or before the tenth day of each calendar month, covering all collections during the preceding month."

Until such settlement it will not be known exactly what amount of the returns from the sale of power to the consumers will be paid to the city.

In this connection it should be observed that the appellant claims that the city, under this agreement, might get nothing for its power, a contention hardly consistent with the claim that the contract provides for a sale of 37,000 horse power at a fixed price. This argument is made in connection with the contention that section 31 of article 4 of the Constitution is violated, in that the city has made a gift of its property or has extended its credit in violation of the provisions of the Constitution. Appellant's statement is as follows:

> "But more than this. Nowhere in this agreement are the companies obligated to pay the city one cent for the city's power 'merged into' the distributing systems of the companies. 'Oh, yes,' say these self-same public officials, 'we get what is left after the companies receive the various specified items.' But what if the answer should be like the reply of the little boy when asked for the core of his apple—'there ain't going to be any core.' There is no obligation on the companies to have anything left. They conduct the business as they see fit; they take their share of the partnership first, and the devil take the hindmost. A more flagrant violation of the constitutional provision can hardly be imagined. That such things could be demonstrates the necessity and reason for the rule."

It would seem that the determination as to whether or not the so-called operating agreement is in effect a sale of electrical energy at wholesale to the contracting companies, or is a method of distributing the power of the city to its consumers, would turn in part upon the question as to whether or not the return to the city would be regulated solely with reference to the quantity of power furnished by the city. If the contract was so arranged that the city would at all times receive a definite amount for the power furnished, regardless of the hazards of the business or the expenses of distribution, then it might be argued with some force that it was a sale within the meaning of the charter prohibiting such a transaction. On the other hand, as the arrangement is such that the city merely pays for the use of a distributing system an amount fixed by the contract, and receives all the money paid by the retail consumers except amounts so paid to the contracting companies for the use of their system, it would seem clear that the transaction is not a sale of power by the city to the companies. Furthermore, as the contract is so adjusted that an increase of rates paid by the consumers would not inure to the benefit of the distributing companies, but to the benefit of the city, it would seem clear that there had not been a sale or transfer of electrical energy to the companies as contemplated by the charter. Under the contract in question, if the rates to the retail consumer are doubled the city would reap the entire benefit of the increase. Whereas, if the city distributes at a fixed wholesale rate, and the retail price is increased, the benefit of such increase would go to the retailer, and not to the wholesaler. The contract seems to be a reasonable arrangement, honestly made, to bridge over a necessary period during which the city is seeking to acquire these distributing systems, so as to comply with the charter in its sale of power, and it is not so framed as to violate either the letter or the spirit of the charter.

It is contended by the appellant that, if the contract in question be construed as a lease, it is invalid, and in violation of section 51a of the Public Utilities Act (St. 1915, p. 149), without the consent of the railroad commission. As we understand the record, such consent has been obtained, and the appellant does not press the point.

[4, 5] As already stated, appellant contends that the contract violates section 31 of article 4 of the Constitution, prohibiting the Legislature from giving or lending its credit, or authorizing—

"the giving or lending, of the credit of the state, or of any county, city and county, city, township, or other political corporation or subdivision of the state now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual, municipal or other corporation whatever. * * *"

This provision of the Constitution is in the article regulating the powers of the legislative department of the state government, and is a limitation upon the power of the state Legislature. The powers of the city of Los Angeles are not derived from the Legislature, but from a freeholders' charter directly provided for by the Constitution. That is to say, the people of the state, through the Constitution, authorize the people of the city to regulate its affairs by a charter to be framed by a board of freeholders and voted upon by the people of the city, and approved by a resolution of the Legislature. Section 31 of article 4 has no application to a city charter. It is expressly provided by the Constitution, art. 11, § 6, that the city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. The sale and distribution of electrical energy manufactured by a city is a municipal affair, and one over which the Legislature of the state has no control.

[6] It may be said also that the contract complained of by the appellant does not purport to give away the power of the city, and does not in fact do so, and that, if there is no adequate return to the city from its power so distributed, it will be because of insufficiency of the retail price to cover the expenses of generating and distributing the power, and not because anything has been given to the contracting corporations. The argument of the appellant, however, is based upon the contention that the contract establishes a business partnership, and that such a partnership is per se a violation of article 4, § 31, of the Constitution. In this behalf they cite the case of Walker v. Cincinnati, 21 Ohio St. 15, 8 Am. Rep. 24, quoting the following therefrom:

"The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."

To the same effect they cite the case of Hunter v. City of Roseburg, 80 Or. 588, 156 Pac. 267, 157 Pac. 1065. See, also, Alter v. Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737. A situation more nearly parallel to that involved in this case is that of Admiral Realty Co. v. City of New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054, involving a contract between the city of New York and the Interborough Rapid Transit Company and the other with the Brooklyn Union Elevated Railroad Company. It was held that the contracts in that case did not violate a constitutional provision similar to our article 4, § 31, the arrangement there being for the use of certain subways belonging to the city, the construction of additional subways and elevated railroads, and the operation thereof jointly with the old lines as a single system, and providing for payment to the respective parties in accordance with their respective interests. The contract was sustained. Because of our view as to inapplicability of the constitutional provision relied upon (article 4, § 31), we do not pursue this matter further, although it is clear that such an arrangement as is here made could hardly be classed as a partnership, and the mingling of capital is merely incidental to the purchase and sale of a distributing system which the city is clearly authorized to purchase.

[7] It is urged by the city that the city power distributed by these systems is "surplus power," and therefore the consent of the voters is not required by the charter. A fair construction of the charter would seem to require that, where the power is to be sold at wholesale, to be distributed to the citizens of Los Angeles, the consent of two-thirds of the voters must be secured whether or not the power is surplus. The evident purpose of the proviso was to permit the sale of power to outside municipalities and consumers of energy when such power was not needed within the city itself and was therefore "surplus power."

[8] It is contended that, if the contract in question is in substance and effect an agreement to purchase 25,000 horse power of electricity from the companies, it is violative of section 207a of the charter, requiring a letting to the lowest responsible bidder after advertisement, where contracts involve an expenditure of more than $500 by the city. We think it clear that the arrangement entered into with the companies, however it may be characterized, is not a contract required to be let only after advertisement and to the lowest bidder. The power to be supplied by the companies could not be obtained elsewhere, and is furnished by public service corporations for distribution to customers already entitled to that service. The case of Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189, seems to support this view under somewhat similar charter provisions of the Oakland charter. See, also, on this general subject, section 802 of Dillon on Municipal Corporations (5th Ed.). The time fixed for the termination of the contract (July 1, 1919) has already passed, but, by reason of the fact, admitted by counsel that it has been extended from time to time, and is still in force, we have not considered the issuance of an injunction a moot question.

A rehearing was ordered to correct an erroneous statement as to the execution of the contract of purchase, as distinguished from the operating contract to which the proposed form of the contract of purchase was attached, and to consider the effect of such error. We are satisfied with our former conclusion, and, with some minor changes, have adopted the former opinion.

Judgment affirmed.

We concur: LAWLOR, J.; SHURTLEFF, J.; SLOANE, J.

SHAW, C. J. (concurring). The agreement which is the subject of this controversy, when stripped of matters of detail and description, is nothing more than an arrangement between the city of Los Angeles and the two public service corporations named therein whereby, pending the final consummation of a proposed sale to the city of their electric distributing plants, the two corporations undertook to distribute to consumers in the city of Los Angeles, by means of their existing systems of distribution, the electricity generated by the city in its own power plant and a sufficient amount of additional electricity from their own plants to supply the wants of such consumers, which additional electricity was thereby to be considered as sold by said corporations to the city for that purpose, and to collect for the city the money due from such consumers for the electricity so distributed to them. The city on its part agreed that the two corporations, as compensation for such services to the city should retain a certain fixed percentage of the money collected from consumers, and should pay over to the city the balance thereof.

I cannot see that by such agreement the city has "sold, transferred, leased, or disposed of" any electric power "to any person or corporation for resale, rental, disposal or distribution to consumers," within the meaning of subdivision 41, § 2, of the city charter. Stats. 1911, p. 2066. To the contrary, it seems clearly to provide for a purchase of electric power by the city from said corporations of enough additional electric power to supply its consumers, and for the distribution and sale of the city's electric power, including the power so purchased, by and through the two corporations as its agents for that purpose. This does not contravene the provisions of the charter aforesaid.

I concur in the conclusion that the judgment of the court below be affirmed.

188 Cal. 352

HILL v. SUPERIOR COURT OF SAN LUIS OBISPO COUNTY. (S. F. 10028.)

(Supreme Court of California. March 7, 1922.)

1. Courts 🔑475(2, 3)—County in which petition for letters of administration is first filed has jurisdiction to determine residence.

A county in which the first petition for general letters of administration is filed, has jurisdiction to determine the residence, and persons who claim the jurisdiction to be in another county must appear in such court and have the fact as to residence therein determined.

2. Wills 🔑248—Person in possession of will may resist granting of letters, and, on failure to show want of jurisdiction, may present will to that court for probate.

A party who claims the jurisdiction to be in a county other than that in which the petition for letters of administration has been filed, and who has a will in his possession, may resist the granting of letters for want of jurisdiction, without asking probate of the will, and, on failure to show want of jurisdiction, may then present his petition to the court to have the will probated in such county.

In Bank.

Application by John A. Hill, etc., for a writ of prohibition against the Superior Court of San Luis Obispo County to prevent the court from proceeding in a certain case. Writ granted.

Dunn, White & Aiken and Jesse J. Dunn, all of Oakland, for petitioner.

L. A. Enos, of San Luis Obispo, and Sullivan & Sullivan and Theo J. Roche, and W. A. Breen, all of San Francisco, for respondent.

SHAW, C. J. [1, 2] The court is unanimous in the opinion that, in cases of this character, the county in which the first petition is filed for general letters of administration has jurisdiction to determine whether or not the residence is in that county. Miller v. Superior Court (Cal. Sup.) 199 Pac. 806; Dungan v. Superior Court, 149 Cal. 103, 84 Pac. 767, 117 Am. St. Rep. 119; Estate of Damke, 133 Cal. 435, 65 Pac. 888; Estate of Damke, 133 Cal. 430, 65 Pac. 889. Persons who claim that the jurisdiction is in some other county must appear in the court in which the petition is first filed and present their evidence, and have the fact as to the residence determined there. If the decision is against them, they can appeal and have the matter settled by the court of last resort. If the party, who claims that the jurisdiction is not in the county where the petition was first filed, has a will in his possession, he may do either one of two things: (1) He may resist the granting of letters in the first county upon the ground there is no jurisdiction there, without asking probate of the will. If he finally succeeds in showing that there is no jurisdiction in that county, that would end that proceeding, and a new proceeding to probate the will and obtain letters testamentary could then be instituted in the proper county; or (2) if he fails to show want of jurisdiction, he may then present his petition to that court to have the will probated in that county, whereupon that court would proceed accordingly to probate thereof. There is no objection to this practice. It is indeed the better practice because it prevents there being two proceedings to administer the same estate in different counties, involving double expense and a conflict of authority.

The writ of prohibition against the superior court in San Luis Obispo county is granted.

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188 Cal. 271

RYCKMAN v. FOX FILM CORPORATION.
(L. A. 6913.)

(Supreme Court of California. Feb. 23, 1922. Rehearing Denied March 23, 1922.)

1. Bills and notes 🔑525—Evidence held to sustain finding that transferee took check in due course as a holder for value.

Testimony that payee gave $750 check to his attorney in payment of $250 fee, with directions to use balance in payment of other creditors of payee, that the attorney received the check in good faith without notice of infirmities, and that he deposited the check in his bank and immediately issued checks to payee's other creditors for difference between amount of his fee and the amount of the check so received from payee, *held* to sustain a finding that the attorney was a holder for value, and that he did not take or hold the check as an agent of the payee.

2. Evidence 🔑471(29)—Testimony as to consideration for check held a statement of fact and not a legal conclusion.

Testimony in answer to question as to the consideration for check, "It was for professional services rendered and to be rendered to G. [payee]" in specified litigation, *held* a statement of a fact, and not a mere legal conclusion.

3. Bills and notes 🔑348—Delay in presentment of check held not to relieve drawer of liability to payee's transferee in absence of a showing that delay injured drawer.

Drawer who stopped payment on check could not avoid liability to transferee to whom payee indorsed check three months after the execution thereof on the theory that the check was a stale check of which the transferee could not be held a holder in due course under Civ. Code, §§ 3134, 3266b, as re-enacted in St. 1917, pp. 1540, 1560, in the absence of a showing that the drawer had been injured by the delay.

On Petition for Rehearing.

4. Appeal and error 🔑907(4)—Sufficiency of evidence to sustain judgment presumed in absence thereof.

Where record on appeal shows that by stipulation all evidence offered and admitted upon the trial of the cause was omitted from the record on appeal except in so far as the evidence related to a particular matter, the court will presume that there was sufficient evidence before the trial court as to other matters to sustain the judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by J. H. Ryckman against the Fox Film Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Alfred Wright and Alexander Macdonald, both of Los Angeles, for appellant.

J. H. Ryckman and Cornelius M. Enns, both of Los Angeles, for respondent.

PER CURIAM. This is an appeal from a judgment in the plaintiff's favor in an action to recover the amount of a certain check for the sum of $750 issued by the defendant to Goldstein Company, a corporation, and by the latter, through its president, Robert Goldstein, indorsed, assigned, and delivered to the plaintiff, and upon which check payment was stopped by the defendant. The answer admitted the making and issuance of said check, but alleged, in substance, that the same had been issued by the defendant under a misapprehension and mistake as to the amount due by it to the Goldstein Company, there being in fact, at the date thereof, only due to the said Goldstein Company the sum of $17.50, and that as to all above said sum the check was without consideration. The defendant further alleged that the said Goldstein Company knew of this fact and took and received said check with full knowledge that it was being issued under a mistake of fact and was without consideration; and the defendant also alleged that the plaintiff at the time of the assignment and delivery to him of said check by the Goldstein Company was informed by it that said check had been issued to it under said mistake of fact, and that same was without consideration, and took said check with full knowledge of said facts. For a further and separate answer and defense the defendant repeated by reference the foregoing averments of its answer, and further alleged that the said Goldstein Company delivered the said check to the plaintiff for the purpose of having him cash the same and pay certain debts and obligations of said corporation on its behalf, and that in so receiving said check and in all things done by him with reference thereto the plaintiff was acting as the agent of said corporation, and his acts were the acts of said corporation. Wherefore the defendant prayed that the plaintiff take nothing by his said action.

The cause came on for trial on the issues as thus framed, and upon the submission thereof the court filed its findings of fact and conclusions of law, and in so doing found that it was not true, as alleged in the defendant's answer, that said Goldstein Company delivered said check to the plaintiff for the purpose of cashing the same for or on behalf of said Goldstein Company and paying certain of its debts and obligations, or that the plaintiff received said check as the agent of said corporation for the purpose of paying said or any of its debts or obligations, or that in the presentation of said check for payment the said plaintiff was acting for or as the agent of said corporation; but, on the contrary, the court found that the plaintiff received said check in good faith for a valuable consideration and in due course and was the owner and holder thereof. The court, however, also found that at the time of the making and delivery of said check by the defendant to the Goldstein Company the defendant believed and was of the impression that it was indebted to said Goldstein Company in said sum, but that the fact was that the defendant was then indebted to said Goldstein Company in the sum of but $17.50, and that said check for the sum of said $750 was delivered by it to said Goldstein Company under said mistake of fact, and that there was no consideration for said check or for the amount of money named therein or the supposed debt evidenced thereby. The court further found that it was not true, as alleged in defendant's answer, that at the time said Goldstein Company delivered said check to the plaintiff he was informed by it that said check had been issued under a mistake of fact or without consideration, nor was it true that said plaintiff took said check with full or any knowledge of the facts and circumstances or any of them surrounding the execution and delivery of said check by the defendant to the Goldstein Company. As a conclusion of law from the foregoing findings of fact the court found that the plaintiff was the owner and holder of the check in due course for value and in good faith, and was entitled to recover from the defendant the full amount of $750, with legal interest from the date of its delivery to him, together with his costs. Judgment was entered accordingly, and it is from such judgment that this appeal has been taken.

The appellant's main contention upon this appeal is that the evidence is insufficient to sustain the finding of the trial court to the effect that the respondent took the check in question for value, and not as the agent of the indorser for the purpose of paying certain debts and obligations of the latter out of its proceeds. The contention of the appellant in that regard is that the undisputed evidence shows that the respondent did take the check in question for said purposes and as the agent of its indorser, and hence took the same subject to the defense of lack of consideration which could have been urged against its immediate payee. The evidence thus relied upon is that of the respondent himself, which is in substance as follows: Mr. Ryckman, who was and is an attorney, testified that the check was indorsed and delivered to him by Goldstein Company through its president, Robert Goldstein, who, it was admitted, had authority to indorse and deliver the same. When asked the question, "What was the consideration for this check?" he answered, "Professional services rendered and to be rendered in the matter of the United States v. Goldstein, then pending in the federal court." Upon cross-examination he was asked the question, "For what other purposes was that check delivered to you besides in payment for your services?" To which he answered, "No other purposes." No other questions were asked upon cross-examination of the plaintiff, who thereupon rested his case. The defendant, in support of its defense, introduced a deposition of the plaintiff taken at its instance during the pendency of the case, wherein the plaintiff in response to the question, "What did you pay for the check," answered, "It was given to me in consideration of legal services, and to pay certain bills of Goldstein's which he directed me to pay, he being in jail." He further testified:

> "He requested me to pay at the Hellman Bank $225 to meet checks that he had issued against that bank that he thought were about due to be presented to the bank, which I did. He directed me to pay $25 to get a brief on the historical points involved in 'The Spirit of Seventy-Six' from some competent person, and he directed me to pay $250 to Blakeley, who is an attorney of Goldstein's in this case of his, upon account of his fees. I deposited the check to my credit in the California Savings Bank and immediately issued checks against it, as directed by Mr. Goldstein."

He further replied in response to a question as to what the balance of $250 was to be applied to:

> "Two hundred and fifty dollars was to be applied to my fees for services rendered and to be rendered."

He further testified that the checks which he had issued in payment of the several amounts as requested by Goldstein had all been cashed, with the exception of one, which he had succeeded in stopping payment upon after being notified that payment had been stopped upon the Goldstein check. This constituted all of the evidence in the case upon this point.

[1, 2] The trial court found it sufficient to base its finding upon to the effect that the plaintiff took said check in due course and as a holder for value, and that he did not take or hold the same as an agent of the Goldstein Company. We are of the opinion that the foregoing evidence is sufficient to sustain this finding of the trial court. The chief assault which the appellant makes upon this evidence consists in its claim that the reply of the plaintiff to the question as to what was the consideration of said check that "It was professional services rendered and to be rendered to Mr. Goldstein in the matter of the United States v. Goldstein, then pending in the federal court," is a mere conclusion of the witness, which is of no weight as evidence, and which is entirely overcome and destroyed by his later answer upon the taking of his deposition that in addition he was requested by Mr. Goldstein to pay certain of his outstanding bills and obligations amounting in the aggregate to something like $500. We cannot agree with the appellant's contention in this regard. The original statement of the witness that the consideration of this check was professional services rendered and to be rendered by him was a statement of a fact, and not a mere legal conclusion. It was in effect a statement that the witness had rendered and was to render certain valuable professional services to the party delivering said check to him. It was as much a statement of fact as would have been his statement that the consideration of said check was money paid or goods delivered or property transferred. The plaintiff's answer might have been objected to by the defendant as a mere conclusion of the witness, and it might have moved to strike it out upon that ground, but no such objection or motion was made. The defendant had also the recourse of subjecting the plaintiff to cross-examination with a view of ascertaining whether the relation of attorney and client actually existed between the parties, or whether any professional services had in fact been or were to be performed, or what, if anything, was their value; but no such inquiry was made by the defendant upon cross-examination, and, this being so, we think the response which the plaintiff made in answer to the inquiry as to what was the consideration for the delivery of the check to him is not now open to the objection that it was a mere legal conclusion and of no weight or value as evidence. The case of Winslow v. Glendale L. & P. Co., 164 Cal. 688, 130 Pac. 427, cited by the appellant in support of its contention in this regard, in no wise supports it. There a certain witness was asked for whom he was working, and over the objection of the defendant was permitted to testify that he was "working for the Glendale Light & Power Company." It was held that this was a conclusion of the witness, and as such inadmissible over objection in accordance with long and well-settled rules of evidence. But no such objection was urged in the instant case, nor was any attempt made by cross-examination or otherwise to show that the plaintiff was not the attorney of the person delivering him the check, or that he had not performed or was not to perform professional services as such for the full or even greater value than the amount of the check. On the contrary, it stands as an admitted fact in the action that the plaintiff was at the time the attorney of Goldstein, and that as to a considerable portion of the amount named in said check it was given to him on account of his services as such attorney. To that extent at least the check was given him for value. Nor do we think that the effect of this evidence was materially weakened by the subsequent showing made by the defendant upon the reading of the plaintiff's deposition that at the time the check was given to the plaintiff he was requested to pay certain obligations of his client, Goldstein. This portion of the transaction must be regarded from the viewpoint and attitude of the parties as disclosed by the meager record before us. Goldstein was in jail. The check in question was drawn upon the Hollywood Bank. He had overdrawn his account at the Hellman Bank, which was neither the bank upon which this check was drawn nor the bank where the plaintiff had his own checking account. It is not an unreasonable inference that the intention of these two parties to this transaction was that the plaintiff should do that which the undisputed evidence shows he actually did do, viz. that he should deposit this check to his credit in his own bank and issue his own checks in payment of his client's obligations. If this was the actual understanding of the parties, then the plaintiff was as a result thereof substantially in the position of exchanging his own checks for the check given to him by his client. In this attitude he would not be merely acting as his client's disbursing agent, but rather in the position of one who has given value for value as much so in fact as he would be if he had either delivered directly to his client his own checks in return for that indorsed and delivered to him or if he had paid to the indorser of the latter its value in money. Matlock v. Scheuerman, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747; Russell v. Hadduck, 3 Gilman (Ill.) 233, 44 Am. Dec.

693; Adams v. Soule, 33 Vt. 538. The trial court was entitled to draw these inferences from the evidence in this case, and apparently did so, in view of its finding that the plaintiff was not the agent of Goldstein in receiving said check for the purposes for which he did receive it and in the presentation of the same for payment. The trial court also found upon sufficient evidence that the plaintiff had received the check in question in good faith and without notice of its infirmities. We are not disposed to disturb these findings upon this appeal.

[3] The appellant makes the further contention that, the check in question having been made and delivered to Goldstein Company by the defendant on December 19, 1917, and not having been indorsed or delivered by its said payee to the plaintiff until March 7, 1918, the check was a stale check of which the respondent could not be held to be a holder in due course. In support of this contention the appellant cites us to sections 3134 and 3266b of the Civil Code, as re-enacted in St. 1917, pp. 1540, 1560, which require that instruments payable on demand should be negotiated within a reasonable time. No evidence was presented in this case by either party showing the cause of the delay in presentment of this check nor by the defendant offering any proof as to any loss occasioned to it by the delay. On the contrary, the evidence clearly showed that, had said check been presented for payment immediately after its issuance, it would have been paid by the bank upon which it was drawn, since the defendant did not discover that it had been issued through its misapprehension and mistake as to the amount due the Goldstein Company until just before the date of its actual presentation, and did not, prior to such discovery, stop its payment. Section 3265b of the Civil Code, as enacted in 1917 (St. 1917 p. 1559), reads as follows:

> "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

This present section of the Civil Code is substantially identical with section 3255 thereof as it stood prior to the passage of the Uniform Negotiable Instruments Act of 1917 (Stats. 1917, p. 1531), which embraces the foregoing provision in its present form. Both the former and present provisions of the Civil Code upon this subject were taken in almost their identical language from the Field draft of New York Civil Code, § 1826, which was itself based upon the law merchant as it had long existed, relating to delays in the presentment of checks for payment. The Supreme Court of the United States in the case of Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008, and Bull v. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97, declares the rule of the law merchant to be that the drawer of a check is only entitled to be discharged from liability thereon to the extent that he can show that he has sustained damage or been prejudiced in his rights by the delay. See, also, Story on Promissory Notes, § 491. In the case of German American Bank v. Wright, 85 Wash. 460, Ann. Cas. 1917D, 381, 148 Pac. 769, the Supreme Court of Washington, construing sections of the Uniform Negotiable Instruments Act of that state, which are identical with the sections of the like act in this state, declares the rule to be that the burden is upon the drawer of a check which has been delayed in presentment to show that he has been injured by the delay. No such proof having been presented by the appellant in the instant case, its contention in this regard is without merit.

Judgment affirmed.

SHAW, C. J., RICHARDS, Justice pro tem., and WILBUR, LAWLOR, WASTE, SLOANE, and SHURTLEFF, JJ., concur.

On Petition for Rehearing.

PER CURIAM. [4] The petition for rehearing is denied.

The question as to whether the check upon which recovery was sought by the plaintiff herein was a stale check so as to destroy its negotiability was not put in issue by the pleadings herein, nor does it appear to have been presented upon the trial, nor was it urged by the appellant until its reply brief was filed. The record herein shows that by stipulation all evidence offered and admitted upon the trial of the cause was omitted from the record upon appeal, excepting only the evidence touching the question as to whether the plaintiff took said check as the agent of the drawee or as a transferee thereof for value. This being so, we are unable to say that there was not sufficient evidence before the trial court to fully explain and excuse the delay in the presentation of said check for payment and to show that such delay was not unreasonable under the particular circumstances of the case.

SHAW, C. J., RICHARDS, Justice pro tem., and SLOANE, SHURTLEFF, LAWLOR, and WILBUR, JJ., concur.

(188 Cal. 237)

PEOPLE v. MAYEN. (Cr. 2388.)

(Supreme Court of California. Feb. 21, 1922.)

1. Searches and seizures 🔑7—Fourth amendment to United States Constitution applies only to seizures by federal agencies.

Const. U. S. Amend. 4, relating to searches and seizures, only applies to the federal government and its agencies.

2. Courts 🔑97(6)—Decisions of federal courts as to federal Constitution not controlling in construction of state Constitution.

Decisions of federal courts construing Const. U. S. Amend. 4, are not controlling nor necessarily applicable in the construction of Const. Cal. art. 1, § 19, relating to searches and seizures.

3. Searches and seizures 🔑3—Affidavit held not to sufficiently describe goods.

Any affidavit merely referring to the property to be taken as "personal goods and property, to wit, certain paraphernalia," did not sufficiently describe the property to justify the issuance of a search warrant, under Const. art. 1, § 19; Pen. Code, §§ 1525, 1528, 1529.

4. Criminal law 🔑395 — Papers and articles unlawfully seized properly admitted in evidence.

The fact that papers and articles introduced in evidence were seized without a proper search warrant in violation of Const. art. 1, § 19, did not render their introduction error, though the court overruled a motion for an order requiring their return to the accused.

5. Criminal law 🔑1134(9) — Searches and seizures 🔑5—Proceeding to recover articles illegally seized is independent of criminal proceeding and not reviewable on appeal from conviction.

Proceeding by accused to recover property obtained without lawful search warrant in violation of Const. art. 1, § 19, is independent of a criminal prosecution, and denial of a motion in the criminal prosecution for an order for the return of the articles unlawfully taken is not a matter that can be considered on appeal from the conviction.

6. Criminal law 🔑393(2)—Unlawful seizure of articles introduced in evidence not violation of Constitution concerning compulsion to be witness against self.

Const. art. 1, § 13, providing that no person shall be compelled in any criminal case to be witness against himself, is not violated by the introduction in evidence of papers and articles surreptitiously and forcibly taken without proper search warrant in violation of article 1, § 19.

7. Larceny 🔑24—Facts held to constitute attempt to commit crime.

Where accused ingratiated himself into the confidence of his victim, and through a confederate, who appeared as a casual acquaintance, framed up a stock gambling investment reported to be a sure thing for a large profit, and accused and the confederate supplied a certain part of the fund and the victim was induced to agree to contribute his share and procured the money, which was to be delivered to one of the confederates, and was asked by accused to turn over the amount agreed upon, but before the agreement was actually made accused was arrested, there was an "attempt" to get possession of the money, and hence an attempt to commit larceny.

8. Criminal law 🔑44 — Attempt to commit crime.

If the actual transaction was commenced which would have ended in the crime, if not interrupted, there was clearly an attempt to commit the crime.

9. Indictment and information 🔑130, 132(7) —Charge of larceny and attempt, in two counts, proper, and petition for severance properly denied.

An indictment may charge grand larceny and attempt to commit larceny in two counts, and a petition for severance was properly denied under Pen. Code, § 954, as amended by St. 1915, p. 744, though the indictment referred to entirely separate offenses.

10. Criminal law 🔑406(2)—Information given officer in pursuance of attempt to corrupt held admissible.

Information given by accused to a police officer in pursuance of an attempt to corrupt the officer into confederating with him, and in the belief he had succeeded and with the expectation that the officer would corruptly use the information in his behalf, was admissible.

11. Criminal law 🔑1169(12)—Error in introducing statements by accused cured by instruction.

Any error in permitting officer to testify to statements made by accused was cured, where the court withdrew the testimony from the jury with instructions to disregard it.

12. Criminal law 🔑721(2)—Prosecuting attorney could comment on defendant's failure to testify to certain matters.

Where accused took the stand as a witness in his own behalf, prosecuting attorney was entitled to comment upon not only what he said, but as to what was left unsaid which would have been pertinent to and within the scope of the matter to which he testified.

13. Criminal law 🔑721(2)—Comment on accused's failure to testify held error.

Where accused was being tried for two offenses and only testified as to one of them, it was error for the prosecuting attorney to comment on his failure to testify as to the other offense, since the evidence should be separate as to each offense and considered separately, under Pen. Code, § 1323.

14. Criminal law 🔑1186(4) — Comment on accused's failure to testify held harmless.

Where evidence against accused was conclusive and practically uncontradicted, improper comment by prosecuting attorney on accused's failure to testify was not reversible error, under Const. art. 6, § 4½.

15. Criminal law 🔑855(8)—Conversation between juror and grand juror held not error.

A passing conversation between a juror and a member of the grand jury, who was in the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

courtroom at one of the adjournments, in which the grand juror remarked that he was a member of the grand jury and was interested in the case, did not carry any implication which would affect the juror's mind in arriving at a verdict.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Fred H. Mayen was convicted of grand larceny, and appeals. Affirmed.

See, also, 193 Pac. 173, 813.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

SLOANE, J. The defendant appeals from a judgment of conviction of grand larceny and of attempted grand larceny.

The case is before us upon an order for hearing in the Supreme Court after judgment of reversal in Division 2 of the Second District Court of Appeal.

The important point in issue and upon which the District Court of Appeal set aside the verdict and reversed the judgment of the trial court arose upon the admission in evidence, on the trial, of certain incriminating articles of personal property which had been taken from the apartments of defendant without his consent under the authority of an alleged search warrant.

The facts attending the taking, detention, and use of this evidence as concisely stated by the District Court of Appeal are as follows:

> "After appellant was arrested his home was entered by a detective in the service of the district attorney and articles described as follows were taken from the place: Three photographs of appellant, four or more letters in the handwriting of appellant, addressed to his wife, three or more letters written by Mrs. Mayen to appellant, a memorandum book, seven or eight plans and specifications of mining property, and a valise containing papers, letter heads and newspaper clippings. These were all delivered, by the officer, to the custody of the district attorney. On the occasion of the entry the detective was armed with a search warrant, issued pursuant to an affidavit which contained only the following reference to the property sought to be seized after search therefor: 'That personal goods and property, to wit, certain paraphernalia, is now concealed in the house of' appellant. The warrant itself described the property to be seized merely as 'certain personal property used as a means of committing a public offense, to wit, attempted grand larceny.' On the day of his trial, several hours before the work of impaneling a jury was commenced, and, as it was alleged, within four days after he had been advised by counsel of his rights in the premises, appellant presented to the trial court his motion for an order requiring the district attorney to return to him the papers and other articles which had been seized under the warrant. This motion was made pursuant to a written petition substantially in the form approved in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and upon the ground that the search warrant was invalid and ineffective, and that therefore the seizure was in violation of appellant's rights under the Fourth and Fifth Amendments to the Constitution of the United States and sections 13 and 19 of article 1 of the Constitution of California. The court denied the motion. Later, when certain of the seized papers were offered in evidence, appellant objected to their reception on the grounds upon which he had made the motion, but the objection was overruled and various of the documents were admitted."

It is the contention of appellant that the search and seizure were in violation of the Fourth Amendment to the Constitution of the United States and section 19 of article 1 of the Constitution of California, which provide that—

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is also contended that the admission in evidence of articles so seized over the timely objection of the defendant is in violation of the provision of the Fifth Amendment to the Constitution of the United States and section 13 of article 1 of the Constitution of California, that no person shall be compelled in any criminal case to be a witness against himself.

[1, 2] All consideration of the application of the federal Constitution to this case may be at once eliminated, as it is well settled that the Fourth Amendment to the Constitution of the United States relating to searches and seizures only applies to the federal government and its agencies. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; State v. Peterson (Wyo.) 194 Pac. 342, 13 A. L. R. 1284; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085. In the Weeks matter it was held that, even where the matter was pending in the federal court, the unlawful search and seizure having been made before the finding of the indictment, and not by an officer of that court, the provisions of the Constitution could not be invoked against the evidence so procured. Consequently, the rule adopted by the United States courts is not controlling authority here and is not necessarily applicable in principle to the interpretation of the state Constitution on this point.

We are confronted, then, with the open question, unless it is foreclosed by the decisions of our own courts, whether the admission of the evidence complained of constitutes a violation of the constitutional rights of the appellant under sections 19 and 13 of article 1 of the Constitution of this state.

[3] It must be granted, to begin with, that the search warrant under which the effects of appellant were taken was invalid. It is declared in section 19 of article 1 of the Constitution, after providing against unreasonable searches and seizures, that no search warrant shall issue except upon oath or affirmation, particularly describing the things to be seized, and it is provided by section 1525 of the Penal Code that such a warrant may not issue except upon affidavit particularly describing the property sought to be made the object of the search, and by sections 1528 and 1529 that the warrant itself must describe the property with "reasonable particularity." As shown in the statement of facts heretofore quoted, the affidavit in this case merely referred to the property to be taken as "personal goods and property, to wit, certain paraphernalia," and the warrant contained no other description than "certain personal property used as a means of committing a public offense, to wit, attempted grand larceny."

If it were conceded that the description in the warrant met the requirement of the Code for "reasonable particularity," in view of the fact that all the information the affiant had in the matter was the admission of the defendant that he had enough evidence in his apartment to hang him, yet not even the meager description of the warrant was contained in the affidavit which was the source of the magistrate's authority to issue a search warrant.

It must be admitted, then, that the search and seizure was unreasonable and unlawful and violated the rights of appellant as guaranteed by section 19 of article 1 of the Constitution of California.

Without at all minimizing the gravity of such offense, or the sacredness of the right of every citizen to be secure in his person, home, and property from any unlawful invasion by the state, it does not follow that the subsequent detention and introduction in evidence of the property thus wrongfully taken constituted error on the trial of the appellant.

The trespass committed in the wrongful seizure of these personal effects by unauthorized officers, and the subsequent use of the same in evidence on the part of the prosecution, were in legal effect entirely distinct transactions with no necessary or inherent relation to each other.

There was nothing in the character of the articles taken, or in the fact that they belonged to the defendant, which affected their competency as evidence.

It is conceded that they were relevant and material to the case for the prosecution, and appellant's counsel themselves claim that these personal effects were of such significance in the case as to determine the verdict against their client.

[4] There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained.

There is no need to elaborate this proposition. The general rule is thus stated by Greenleaf (1 Greenl. on Ev. § 254):

> "Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice of how they were obtained, whether lawfully, or unlawfully, nor will it form an issue to determine that question."

Or, as stated in Commonwealth v. Dana, 2 Metc. 329, where the Supreme Court of Massachusetts was considering such evidence offered in a lottery case:

> "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence. * * * When papers are offered in evidence, the court can take no notice how they were obtained * * * nor would they form a collateral issue to determine that question."

The decisions upholding this doctrine and covering most of the states of the Union without a dissenting voice so far as we have discovered, are too numerous to mention, but may be found collated in note to State v. Turner, 136 Am. Rep. 135-153; State v. Edwards, 59 L. R. A. 465; L. R. A. 1915B, 834; L. R. A. 1916E, 74; Am. Digest, Searches and Seizures, 1920–21. Even the United States Supreme Court decisions, upon which appellant relies for a modification of the general rule stated, accept the doctrine in its general application. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

In Adams v. New York, supra, Mr. Justice Day, who also delivered the opinion in Weeks v. United States, in applying the rule to the unlawful seizure of private papers of a defendant without authority of a search warrant, which papers were afterwards used in evidence over the objection of the defendant, says:

> "In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained"

—citing with approval the quotations heretofore made from Greenleaf and from the opinion in Commonwealth v. Dana; also, quoting from Commonweath v. Tibbetts, 157 Mass. 519, 32 N. E. 910, where it is said:

> "Evidence which is pertinent to the issue is admissible although it may have been procured in an irregular or even an illegal manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally, but his testimony is not thereby rendered incompetent."

The same principle is established in California under the decisions in People v. Alden, 113 Cal. 264, 45 Pac. 327, and People v. Le Doux, 155 Cal. 535, 102 Pac. 517. In the latter case certain incriminating letters of the defendant, who was charged with murder, were obtained by a deputy sheriff from the house of defendant without authority of law. It was held in the opinion that—

> "Such search and seizure were absolutely unwarranted in law, though had * * * by an officer of the law. It was in clear violation of the constitutional guaranty, state and federal, of the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

Under this state of the case the opinion, after reviewing pertinent state and federal decisions as to the admissibility in evidence of the letters thus wrongfully procured, declares:

> "It thus appears that whatever wrong may be perpetrated by the invasion of one's constitutional rights against unreasonable search and seizure, the redress for that wrong is not in the exclusion of pertinent evidence which may be obtained by the seizure. The courts, upon the mere question of admitting or rejecting evidence, will not take cognizance of the mode of its production, unless it be shown that the defendant has been compelled himself to give or produce it. So it is said * * * in People v. Alden [supra], 'nor does the competency of evidence in any way depend upon the means by which it is brought to the court where it is offered in evidence.' The letters were, therefore, properly admitted in evidence."

Appellant relies and the District Court of Appeal based its opinion in the judgment from which this hearing is granted, upon certain decisions of the Supreme Court of the United States which it is claimed take the case from the application of the general rule heretofore discussed.

We approach a consideration of these decisions of the Supreme Court, and likewise the able and carefully considered opinion of the District Court of Appeal, with the utmost deference and respect. The federal decisions chiefly relied upon are Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177 (heretofore cited), and Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647, and Amos v. United States, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654.

The general conclusion reached through these decisions is that where the federal government or its agencies has obtained possession of the property of a defendant through an unlawful search and seizure, and such defendant has made a timely demand for the return thereof, which demand has been denied, such property cannot be used in evidence against him without violation of the Fourth and Fifth amendments to the federal Constitution.

The Boyd Case is readily distinguishable from the matter before us. In that case a provision of the custom laws required that on demand of the government attorney the defendant must produce in court his private books, invoices, and papers, or else the allegations of the attorney in the premises shall be taken as confessed. This was held to be equivalent to authorizing an illegal search and seizure, and by requiring that defendant himself produce the evidence was, in effect, compelling him to become a witness against himself. It was naturally held that such a law was violative of both the Fourth and Fifth Amendments.

The Weeks Case and the Gouled Case are much more closely in point in the facts presented. In the former an indictment was returned against the defendant Weeks charging him with use of the mails for the purpose of transporting certain lottery coupons or tickets, in violation of the federal statutes. The defendant was arrested by a police officer, so far as the record shows, without a warrant. Other police officers, without a search warrant and without authority, entered his room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later the police officers, in company with the marshal, made another unauthorized entry of the premises, and, after further search, seized and carried away certain letters and envelopes belonging to defendant.

Before the time for the trial the defendant filed in the cause a petition alleging the unlawful search and seizure of his effects in violation of his constitutional rights, and the purpose of the district attorney to use the articles so seized as evidence against him on the trial, and demanded their surrender.

The court in which the matter was pending granted the petition except as to such articles as were relevant and pertinent to the case as evidence, and on the trial the articles retained were received in evidence over defendant's objections. After reciting the facts, the opinion of the Supreme Court proceeds (232 U. S. p. 393, 34 Sup. Ct. 344, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177):

> "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the Fourth and Fifth Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

After recognizing the rule theretofore stated in Adams v. New York and other authorities, but distinguishing the facts relied on by the government, the opinion continues (232 U. S. p. 398, 34 Sup. Ct. 346, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177):

> "We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed."

As hereinbefore pointed out, the court limited its ruling to the papers taken by the United States marshal, on the ground that the first seizure was not by an officer amenable to the directions of the federal courts, and therefore his acts were not governed by the constitutional provisions referred to.

In Gouled v. United States some of the papers used in evidence had been taken from the premises of the defendant surreptitiously by one acting under directions of officers of the intelligence department of the army of the United States, and others under search warrants issued under authority of law and upon affidavits averring that there were in defendant's apartments certain papers relating to and used in the commission of a felony. Before trial a motion was made by the defendant Gouled for a return of the papers seized, which relief was denied, and when the motion was renewed at the trial, but before any evidence was introduced, it was denied and objection was made at the trial to the introduction of the papers taken without search warrant, which objection was overruled. The papers so obtained and held were offered and received in evidence on the trial in behalf of the prosecution.

The Supreme Court in this case has taken an even more pronounced stand than in the Weeks Case. The opinion, delivered by Mr. Justice Clarke, holds that the evidence so seized should have been excluded. The following conclusions are reached in this opinion: (1) That no right of search and seizure exists even under a search warrant for papers having only evidentiary value, and for the purpose of using the same in a criminal proceeding against the person from whose premises they are taken; (2) that if before trial as timely a demand as the circumstances will allow is made upon the court having control of such prosecution for papers or effects seized by any officer of the federal government under color of his office, for their surrender, upon a showing that they were obtained by unlawful search and seizure, such demand must be granted, and the use of such papers and effects thereafter in evidence is reversible error, and in violation of the rights of the defendant under both the Fourth and Fifth Amendments.

Amos v. United States, supra, in an opinion also prepared by Mr. Justice Clarke, follows the same doctrine.

It will be noted that these decisions recognize the prevailing doctrine that on the trial of one charged with crime the court is not required upon a mere objection at the trial to the competency, relevancy, and materiality of the evidence, to investigate the manner in which the evidence offered has been produced; that it is only where a timely motion or proceeding has been instituted, setting up the wrongful search and seizure and demanding a surrender of the property, and upon hearing denied, that such evidence may be excluded; and that the federal courts will not hear such application or investigate such complaint unless the seizure was made by an officer or through the agency of the federal government.

In other words, the use of such evidence is sustained unless the property was seized under the agency of the government itself, and the aggrieved party has preserved his right to object to its use by a timely application before the trial for an order restoring to his possession the property unlawfully seized.

In the instant case no federal question under the Fourth and Fifth Amendments is involved. We are only concerned with the application of like provisions of our own state Constitution and criminal procedure to the facts before us. The limitations laid down by the federal decisions cited to the use in criminal cases of the class of evidence under discussion are therefore only controlling to the extent that their reasoning on parallel lines and the eminent source from which they proceed impels our judgment and assent.

It may be taken for granted that the provisions of our own Constitution and those of nearly all the states of the Union against unreasonable searches and seizures, and protecting the citizen from being compelled in any criminal case to be a witness against himself, have been adopted, in almost the precise words and for the same reason as in the federal Constitution. They are safeguards designed to protect the intimate sanctity of the person and the home from invasion by the state. They are not intended primarily to secure the possession, use, or control of property, for they are not directed against the private unofficial trespasser. Weeks v. United States, supra; Gindrat v. People, 138 Ill. 105, 27 N. E. 1085; United States v. O'Dowd (D. C.) 273 Fed. 600. Much less is their primary object to enable the criminal to sequester and conceal the evidence of his crime so that it cannot be used against him. Only to the extent that the rejection of the use of such evidence will protect the citizen against the unlawful encroachments of state authority can it be justified.

In Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, the federal Supreme Court says:

> "But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. * * * We think they [the constitutional provisions] were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."

As is said in Williams v. State, 100 Ga. 511, 520, 28 S. E. 624, 627 (39 L. R. A. 369):

> "We believe the framers of the Constitution of the United States and of this and other states merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify or declare lawful any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. * * * The office of the federal and state Constitutions is simply to create and declare these rights. * * * With faithfully enforcing such laws as are thus provided, the responsibility devolving upon the executive and judicial branches must necessarily end. We know of no law in Georgia which renders inadmissible in evidence the fruits of an illegal and wrongful search and seizure. Nor are we aware of any statute from which it could be logically gathered that the admission of such evidence violates any recognized principle of public policy. Whether or not prohibiting the courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom, is a matter for legislative determination."

It may in this connection be noted that the decisions of our own court and of every other jurisdiction are in entire accord with the Supreme Court of the United States in holding that the seizure by officers of the law of private papers and effects by unlawful and unauthorized entry and search, to be used as evidence in criminal prosecutions of the persons from whom taken, is a violation of the constitutional right to security against unreasonable searches and seizures; and that such constitutional guaranty is one which should be zealously enforced in behalf of every citizen. But no authority, so far as we have been able to discover, has suggested that the subsequent use of articles so taken as evidence is in itself any part of the unlawful invasion of such constitutional guaranty. The search and seizure are complete when the goods are taken and removed from the premises. Whether the trespasser converts them to his own use, destroys them, or uses them as evidence, or voluntarily returns them to the possession of the owner, he has already completed the offense against the Constitution when he makes the search and seizure, and it is this invasion of the rights of privacy and the sacredness of a man's domicile with which the Constitution is concerned.

The Constitution and the laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment.

Thus it is that almost from time immemorial courts engaged in the trial of a criminal prosecution have accepted competent and relevant evidence without question, and have refused to collaterally investigate the source or manner of its procurement, leaving the parties aggrieved to whatever direct remedies the law provides to punish the trespasser, or recover the possession of goods wrongfully taken. The federal authorities relied upon by appellant do not question the general acceptance of this doctrine by the courts, and only differentiate it, in the cases cited, on the ground that persons from whom personal effects are unlawfully taken are entitled to demand and recover possession of their property by application on motion, and that, when they have made such timely demand to the tribunal controlling the custody of such property, there should not be an arbitrary refusal to grant the demand in order to hold the ill-gotten articles as evidence, and the admission of such property thereafter as evidence is held error.

[5] The right of one whose goods have been unlawfully seized to recover their possession, and that irrespective of its effect in depriving the state of their use in evidence, is not disputed; but the contention, which we think is maintained by the great weight of authority, is that the proceeding for such recovery is independent of the criminal proceeding in which it is sought to use such articles as evidence. Even conceding the right to demand such recovery by motion before the court in which such criminal action is pending, as is apparently the rule in the federal courts and as recognized in some of the state decisions (People v. Kinney [Sup.] 185 N. Y. Supp. 645; State v. Peterson [Wyo.] 194 Pac. 342, 13 A. L. R. 1284), upon what theory can it be held that such proceeding is an incident of the trial, in such a sense that the ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case. The right of the defendant is not to exclude the incriminating documents from evidence, but to recover the possession of articles which were wrongfully taken from him. That right exists entirely apart from any proposed use of the property by the state or its agents.

Its determination involves the framing of separate issues of fact as to the rights of possession of the goods and the method of seizure, by whom taken, and whether or not the trespass was committed by an agent of the state. The court having tried such issue, and, as in the case before us, denied the relief demanded, we question if under any procedure recognized in the state of California such ruling can be collaterally attacked. As well might a collateral attack upon a judgment roll received in evidence on a trial be maintained on appeal therefrom on the ground that it was invalid because of some extrinsic fraud in its procurement. Only matters incident to the cause of action on trial are subject to review on appeal therefrom, and for this reason it is held that an objection on the trial to the admission of evidence on the ground that it has been wrongfully seized does not lie, and cannot be reviewed on appeal, but that any rights so involved must be raised in an independent proceeding (10 R. C. L. p. 993; State v. Dist. Court, 59 Mont. 600, 198 Pac. 362), and such is the effect of the rule in Weeks v. United States and Gouled v. United States, supra, as to the independent nature of the proceeding.

It is our conclusion that any rights determined under such independent proceeding cannot be reviewed under our procedure on the record of appeal from the action in which such evidence was used.

The fallacy of the doctrine contended for by appellant is in assuming that the constitutional rights of the defendant are violated by using his private papers as evidence against him, whereas it was the invasion of his premises and the taking of his goods that constituted the offense irrespective of what was taken or what use was made of it; and the law having declared that the articles taken are competent and admissible evidence, notwithstanding the unlawful search and seizure, how can the circumstance that the court erred in an independent proceeding for the return of the property on defendant's demand add anything to or detract from the violation of defendant's constitutional rights in the unlawful search and seizure?

There might be some reason, on grounds of public policy, for the state to refuse the use of evidence thus wrongfully seized, on the ground that its admission encourages and in a sense condones the lawless acts of overzealous officers of the law, in their methods of obtaining evidence in criminal cases, but in the absence of any legislative or judicial declaration to that effect after the litigation of the question in numerous cases in nearly every existing state jurisdiction, dating back over a hundred years, as suggested in Williams v. State, supra, the courts may properly wait on legislative action to change the rule.

In the Gouled Case the federal Supreme Court extends the protection of the Fifth Amendment to the Constitution against this class of evidence, applying the rule announced in Boyd v. United States, supra.

With the utmost deference to the high authority from which this doctrine comes, we do not feel justified in accepting it as a rule of evidence under the law of California and in the application of our state Constitution thereto.

[6] Section 13 of article 1 of our Constitu-

tion says, as does the Fifth Amendment to the federal Constitution, that no person "shall * * * be compelled, in any criminal case, to be a witness against himself." This means, as we understand it, that one charged with the commission of a crime has the right at all stages of the investigation to stand silent and inert before his accusers. If he is required to contribute by word or act to the evidence against himself, his constitutional right is invaded. Such was the situation in Boyd v. United States, supra, which is cited as authority on this point in the decision last referred to. But to apply such an interpretation to the surreptitious or forcible seizure of incriminating evidence, even from the possession of the defendant, would bar the use of all information emanating from the acts or possessions of such defendant not voluntarily furnished. In the face of such an interpretation of the Constitution, how could the law authorize the search of the person of one arrested for crime, and the use of evidence of his guilt thus secured? How could a witness who had by trespass or dissimulation witnessed, or overheard incriminating acts or statements of the accused be permitted to testify? How could articles used in commission of a crime be taken from the premises of the defendant by authority of a search warrant to be used in evidence, as is permitted by section 1524 of our Penal Code? In each instance suggested the incriminating facts would be involuntarily forced from the possession of the accused.

In Weeks v. United States, as heretofore pointed out, the Supreme Court refused to take cognizance of the use in evidence of property unlawfully seized by one not an agent of the government; yet what possible distinction could exist so far as the use of such evidence was concerned as affecting the defendant's rights under amendment five of the Constitution, whether this evidence was secured against him by the wrongful act of an officer of the court or of a private citizen?

In this case a considerable part at least of the property seized and used in evidence, and the return of which and its exclusion on the trial was demanded, seems to have consisted of paraphernalia designed for use in similar swindles to that of which the defendant was accused. It was subject to seizure under a proper search warrant by virtue of subdivisions 3 and 4 of section 1524 of the Penal Code, and if it had been more fully described in the affidavit and search warrant would have been properly taken.

The invasion of appellant's rights in respect to these articles was technical rather than substantial.

We concur with the authorities cited that even the technical rights of citizens to be protected from unlawful searches and seizures should be zealously safeguarded and the infringements thereof adequately punished; but we are not prepared to impose upon the courts of this state the duty and burden of injecting into a criminal prosecution the collateral investigation of every objection that may be raised as to the source from which and the manner in which evidence in the hands of public prosecutors has been obtained. The parties aggrieved should be left to independent action to protect their constitutional rights, and obtain redress for their infringement, and if in such a proceeding error is committed, it should be determined in some appropriate method of review upon its own record, and not collaterally on appeal from a judgment of conviction in a criminal case in which the seized property was used as evidence.

On the other points presented by defendant's appeal we are unable to find any error that would justify a reversal of the judgment of conviction.

[7] The evidence was clearly sufficient to sustain the verdict on both counts. The defendant was charged with grand larceny and attempted grand larceny. The means used for obtaining possession of the stolen money in the one count and in attempting to obtain possession of it in the other was by trick and device. The case for the prosecution was testified to by the same accomplice under both charges, and in each separate count by the party who was the victim of the offense. The testimony of the accomplice was corroborated in practically every detail by the respective victims, and was further substantially supported by the documentary evidence secured by the search and seizure. The details of the transactions in the two cases were so nearly identical in the scheme resorted to in gaining the confidence of the victims in order to secure possession of their money that the evidence in each was undoubtedly competent as to the other.

It is contended, however, as to the charge of attempt to commit grand larceny, that however conclusive the evidence may be to establish the probative facts relied on, such facts are not sufficient to constitute an "attempt" to commit a crime within the meaning of the law. Briefly stated, the evidence shows that the defendant ingratiated himself into the confidence of one Weiss, and through a confederate, who appeared in the plot as a casual acquaintance, framed up a stock gambling investment which from inside information was represented to be a sure thing for a large profit. Defendant and the confederate supplied a certain part of the funds, and Weiss was induced to agree to contribute his share. He procured the money, which was to have been delivered to one of the confederates, to be invested.

He was asked by defendant to turn over the amount agreed upon, but before the payment was actually made, the defendant was arrested. The plan had gone far beyond the point of mere preparation. The actual attempt was made to get possession of the money. The arrest was made while the parties were on their way from Los Angeles to Oakland, where the deal was to be consummated.

[8] "If the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime." People v. Stites, 75 Cal. 570, 17 Pac. 693; People v. Compton, 123 Cal. 403, 56 Pac. 44; People v. Paluma, 18 Cal. App. 131, 122 Pac. 431; People v. Moran, 123 N. Y. 257, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732.

[9] Defendant's petition for severance was properly denied. Section 954 of the Penal Code as amended in 1915 (St. 1915, p. 744) provides that the indictment or information may charge two or more "different offenses of the same class of crimes or offenses under separate counts," and the prosecution is not required to "elect between the different offenses or counts set forth in the indictment or information."

In this case the counts of the indictment refer to entirely separate offenses, but they are of the same class, and so closely related in the plan and scheme of their commission, as to be very appropriately joined, under the code provision cited.

[10, 11] Appellant assigns as error the admission in evidence of the alleged confession of the defendant. The defendant made certain incriminatory statements and admissions to one of the arresting officers. Part of these statements were purely voluntary and unsolicited. Other statements were made after defendant had been informed that his interrogator was a police officer, but the information was given in pursuance of an attempt on the part of the defendant to corrupt the officer into confederating with him, and in the belief that he had succeeded, and with the expectation that the officer would corruptly use the information in defendant's behalf. This is not such a situation as shown in People v. Quan Gim Gow, 23 Cal. App. 507, 138 Pac. 918, relied on in support of appellant's contention. There was no inducement or threat in the sense that renders a confession inadmissible in evidence. However, the trial court withdrew this part of the testimony from the jury with instructions to disregard it, so that if there was error in its admission it was cured by such instruction.

[12] The specification of misconduct of the counsel for the prosecution representing the district attorney's office has some foundation. There were repeated comments of the prosecuting officer which were open to censure. For the most part the court corrected them so far as possible by instructions to the jury. There were some matters passed over, however, to which objections should have been sustained, and the comments specifically withdrawn from the jury; but, in view of all the circumstances attending the trial, the exchange of caustic repartee by counsel on both sides, we cannot believe that the jury regarded the objectionable remarks of the district attorney's office other than part of the bickerings of counsel. The most serious ground of misconduct was the repeated reference of the prosecuting attorney to the failure of the defendant to testify to certain matters. This would have been utterly without excuse had the defendant not gone upon the witness stand at all. He did, however, take the stand as a witness in his own behalf, and as to the points he was examined upon opposing counsel were entitled to comment not only concerning what he said but as to what was left unsaid which would have been pertinent to and within the scope of the matter to which he testified.

The defendant only testified in the Evans Case. All he testified to was that he did not know Evans and that he never saw him until long after the time of the alleged offense. This was equivalent to denying that he had any of the transactions with Evans testified to by witnesses for the prosecution. To test his denial of acquaintance with Evans it would be proper cross-examination to question him as to every alleged transaction claimed to have occurred between him and Evans. "A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony in chief as well as with respect to facts which he expressly states." People v. Teshara, 141 Cal. 633, 75 Pac. 338. We see no reason why on such testimony, within the scope that may be covered by cross-examination, comment should not be made as to the unsatisfactory nature of the defendant's testimony and the degree to which it fails to satisfactorily meet the testimony for the prosecution for which it was offered as a denial.

> "If the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses." State of Nevada v. Harrington, 12 Nev. 125; Diggs v. United States, 220 Fed. 545, 136 C. C. A. 147.

Under such interpretation of the law any reference to and criticism of the defendant's testimony in the Evans Case and of his failure to go more fully into the incriminatory matters covered by his general denial, may be justified.

[13] There was no such excuse, however, for the repeated comment upon the failure of the defendant to testify in the Weiss Case

concerning which he did not become a witness. The district attorney in the course of his argument repeatedly called the attention of the jury, as a significant fact pointing to his guilt, to the failure of the defendant to take the stand and deny the charges in the Weiss Case. Among the comments made were the following:

> "They don't even deny the Weiss proposition. Now, remember that this fellow who sits here has not denied that all of this was his property. * * * Now, you know he wouldn't even ask if these villainous things were taken from his apartment. He wouldn't ask him even that. He wouldn't even ask him if he ever saw old man Weiss. * * * I can't see what in the world they put the fellow on the stand for to deny that he ever saw Evans. That is the extent of it. He does not deny that he attempted to put this thing over on the old man Weiss. * * * Do you realize that this defendant—his counsel—they have confessed the Weiss count. In other words, they haven't seen fit to even have him deny the truth of that thing."

It must be remembered that the Evans Case and the Weiss Case, though joined in one indictment, were separate and distinct offenses and, as the jury was instructed, the evidence in each case must be separate, and that, because such defenses are joined in one indictment, it should in no way prejudice the jury in the separate consideration of either.

Timely objection was made by defendant's counsel to these comments of the district attorney, but the court failed to sustain the objection or to cause their withdrawal from the consideration of the jury. Neither was there anything in the instructions to indicate to the jurors that they should not consider to his prejudice the failure of the defendant to testify.

It has been the disposition of this court where timely objection was not made or where the court has by appropriate instructions to the jury withdrawn such improper comment from their consideration, to deny a reversal, if the evidence in the case was such as to clearly support a conviction. Where there was reasonable ground to presume prejudice from such comment it has been held to require a reversal. People v. Tyler, 36 Cal. 522; People v. Brown, 53 Cal. 66; People v. McGungill, 41 Cal. 429; People v. Kromphold, 172 Cal. 512, 157 Pac. 599; People v. Morris, 3 Cal. App. 1, 84 Pac. 463; People v. Mirandi, 38 Cal. App. 179, 175 Pac. 653.

It is likely that the license exercised and permitted on the part of the district attorney in this respect was based on the theory that, in taking the witness stand and denying any connection with the Evans affair, defendant had completely let down the bars. Both causes of action were tried together, and the witness was qualified by the oath administered to testify to both counts in the indictment. But as already pointed out he only testified in the one case and was entitled to the full benefit of section 1323 of the Penal Code as to the other. The conduct of the district attorney was clearly error, and would demand a reversal of the verdict in the Weiss matter, if it appeared that any miscarriage of justice had resulted.

Under the testimony presented to the jury, we fail to see how it could have avoided a verdict of conviction.

[14] The evidence against the defendant was conclusive and practically uncontradicted. It is true it depended in part upon the testimony of an accomplice, but Weiss himself gave detailed evidence along substantially the same line, and the seized articles given in evidence were strongly corroborative. Only the rejection of the testimony of both of the principal witnesses for want of credibility could have defeated a conviction, and the reference to defendant's failure to testify could hardly have served to discredit the evidence of the prosecution. While in no manner justifying the improper comments of the district attorney, we think it is a case for the application of section 4½ of article 6 of the Constitution.

[15] Neither do we think the rights of the defendant were prejudicially affected by the alleged misconduct of one of the jurors by reason of a passing conversation with a member of the grand jury who was in the courtroom at one of the adjournments, in which the grand juror remarked that he was a member of the grand jury and was interested in the case. Whether the remark was made in explanation of his presence there, or to preclude further conversation with the juror, we cannot see that it carried any implication which would affect the mind of a juror in arriving at a verdict.

A number of exceptions are taken to the rulings of the court in giving and refusing instructions. There were very many instructions offered and it would be strange if the rulings were all beyond criticism, but taken as a whole the law of the case is fairly presented by the instructions given.

The judgment is affirmed as to both charges of the indictment.

We concur: SHAW, C. J.; LAWLOR, J.; SHURTLEFF, J.; WASTE, J.

WILBUR, J. I concur.

In regard to the question of whether or not the conduct of the district attorney resulted in a miscarriage of justice, I think it should be stated that in imposing sentence the trial judge provided that the terms should run concurrently, so that the conviction upon the Weiss count does not increase the term of imprisonment, and I am somewhat influenced in my conclusion that there has been no prejudicial error by this fact in addition to those stated by Justice SLOANE.

188 Cal. 344

YOLO WATER & POWER CO. v. EDMANDS et al. (S. F. 9710.)

(Supreme Court of California. March 6, 1922.)

1. Eminent domain 🔑265(2)—Landowner entitled to compensation undiminished by costs reasonably incurred in his defense.

The principle upon which a defendant in a condemnation suit is exempted from payment of costs is that he is entitled under the Constitution to the value of his land without diminution by costs reasonably incurred in good faith in the defense of the action.

2. Eminent domain 🔑265(4)—Landowner can be charged on appeal with costs occasioned by erroneous objection to dismissal as to part of the land.

Where the plaintiff in condemnation proceedings sought to amend its complaint by eliminating therefrom land below the high-water mark of a lake, and the trial court, upon objection by defendants, erroneously refused to permit such amendment, the appeal from the erroneous judgment thereby resulting was needlessly caused by defendant, and was not reasonably necessary to his defense, so that he can be charged with the costs of such appeal.

In Bank.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Condemnation proceedings by the Yolo Water & Power Company against William O. Edmands and others. A judgment of condemnation was reversed on appeal by the plaintiff, and defendants move to recall and correct the remittitur. Motion denied.

See, also, 187 Pac. 755; 195 Pac. 463.

Theodore A. Bell, of San Francisco, Arthur C. Huston, of Woodland, and W. P. Thomas, of Ukiah, for appellant.

John S. Partridge, of San Francisco, H. E. Witherspoon, of Upper Lake, Preston & Preston, of Ukiah, and Ben C. Jones, of Lakeport, for respondents.

SHAW, C. J. This is a motion to recall the remittitur heretofore issued in the action after the decision by the District Court of Appeal of the Third Appellate District, and to correct the same by striking therefrom the words "appellant to receive costs." The motion was originally made in said District Court of Appeal, and after decision in that court was brought to this court for rehearing.

The action was begun in the superior court for the purpose of condemning a large body of land situated on the shores of Clear Lake in Lake county, for the purpose of having the water level of Clear Lake raised so as to cover said land and cause the water impounded thereby to be used for public distribution and sale. A large part of the land sought to be condemned was situated below the high-water mark of the lake. Before the trial began the plaintiff asked leave to amend its complaint by striking out of the description of the land to be condemned all that portion thereof lying below said high-water mark, containing some 472.65 acres. Upon the objection of the defendant the superior court refused to allow plaintiff so to amend its complaint and withdraw said land from the proceedings in condemnation. Thereupon the cause proceeded to trial, and a jury allowed the defendants a large sum of money as the value of the land so sought to be withdrawn, and judgment was given accordingly. From this judgment the plaintiff appealed to the District Court of Appeal of the Third Appellate District. The main ground of the appeal was that the court erred in refusing leave to amend the complaint by striking the above-mentioned land from the description therein. That court sustained the point, and reversed the judgment solely for that reason. This judgment was in the following words:

> "The judgment is reversed and the trial court is directed to permit the plaintiff to amend its complaint." Yolo W. & P. Co. v. Edmands (Cal. App.) 195 Pac. 463.

Thereupon, following rule 23 of this court (176 Pac. xi) the clerk entered upon the record, and inserted in the remittitur a judgment that the appellant recover the cost of appeal. The motion to strike this clause from the judgment is based on the rule laid down in San Joaquin, etc., Irr. Co. v. Stevinson, 165 Cal. 540, 132 Pac. 1021, and other similar cases, holding that the landowner in a condemnation suit is entitled, under the Constitution, to the full value of his land as allowed by the jury, and that he cannot be made liable for the costs of a successful appeal taken by the plaintiff in the action for errors in the procedure in the course of the trial. In the case just cited a simple judgment of reversal had been entered, and the clerk, following the same rule, had entered judgment in favor of the appellants for costs, and included such judgment in the remittitur. This court in that case held that the rule did not apply in condemnation cases under the circumstances there appearing. In that case the plaintiff sought to condemn water supposed to belong to defendant. The court below granted a nonsuit chiefly on the ground that the water proposed to be taken by the plaintiff was not to be devoted to any public use. On appeal the Supreme Court decided that this point was not well taken, and that the plaintiff was entitled to condemn such water. On the motion to correct the remittitur and judgment the court held that the defendants had a right to make the objection, and that they should not be subjected to costs for having made it erroneously. It is claimed that this rule is decisive of the present case.

We think the present case is easily distinguishable from that case. Here the appellant had originally sought to condemn a large body of land which it afterwards sought to withdraw from the suit. In effect it asked leave of the court to dismiss its action with respect to that land. The defendants, for purposes of their own, objected to this request, and succeeded in inducing the court below to refuse it. The objection was essentially different from the one in the Stevinson Case. There the plaintiff was seeking to condemn the property, and the defendant claimed he was not entitled to do so. Here the plaintiff seeks to abandon his suit to condemn, and the defendants insisted that he should persist therein. On the appeal it was declared that the plaintiff had a right to abandon its action, and therefore that the defendant had no right to object to such dismissal.

[1, 2] The principle upon which a defendant in a condemnation suit is exempted from the payment of costs is that he is entitled, under the Constitution, to the full value of his land without diminution by any costs reasonably incurred by him in good faith in the defense of the action. The principle does not at all apply to a case where the plaintiff desires to abandon his suit and asks leave of the court to do so, whereupon objection is made by the defendant, and plaintiff is compelled to proceed to judgment and to obtain his leave to withdraw his suit by means of an appeal. The fault for that appeal lies wholly with the defendant, who causelessly insisted upon the plaintiff continuing the prosecution of the action which he desired to dismiss. No principle of justice and no constitutional provision require that the defendant be exempted from the costs caused by him in a proceeding because of an objection of that character.

The motion to correct remittitur is denied.

We concur: WASTE, J.; SLOANE, J.; LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

(188 Cal. 393)

RANSOME-CRUMMEY CO. v. SUPERIOR COURT IN AND FOR SANTA CLARA COUNTY et al. (S. F. 9992.)

(Supreme Court of California. March 11, 1922. Rehearing Denied April 7, 1922.)

1. Corporations 🔑592—Do not cease to exist during suspension of powers for nonpayment of franchise tax.

Under St. 1917, pp. 371, 377, Pol. Code, § 3669c, subds. 2 and 3, as added by St. 1917, p. 358, and section 3668c, as added by St. 1917, p. 355, failure of a corporation to pay its license and franchise taxes, merely suspends its rights, powers, and privileges with a provision for revival, and does not, as did the former law, cause a forfeiture of its charter, and a corporation does not cease to exist during the suspension of its privileges.

2. Corporations 🔑617(5)—Notice of entry of judgment to corporation whose powers were suspended is inoperative.

A purported notice of entry of judgment, given to counsel for the corporate plaintiff at a time when the powers of the plaintiff were suspended for failure to pay its franchise tax, is inoperative, since the corporation had no power to receive such notice, nor could any person lawfully receive it in the name of the corporation.

3. Corporations 🔑617(5)—Motion by corporation whose powers are suspended does not waive notice of judgment entry.

An attempted notice of intention to move for a new trial, given by a corporation whose powers were then suspended for nonpayment of its franchise tax, does not have the effect, which a valid notice of such intention would have, of waiving notice of the entry of judgment.

4. New trial 🔑139—Notice of intention to make motion is jurisdictional.

A notice of intention to move for a new trial is essential to the jurisdiction of the court to entertain the subsequent proceedings, and such notice cannot be waived, and is not waived by the voluntary appearance of the adverse party.

5. Corporations 🔑615½, New, vol. 14 Key-No. Series—Revival of corporate powers does not validate acts during suspension.

The revival of the powers of a corporation, after their suspension for nonpayment of the franchise tax, does not validate acts attempted during the period of suspension.

6. New trial 🔑155—Failure to pass on motion over which court acquired no jurisdiction is not denial thereof.

The rule that, under Code Civ. Proc. § 660, as amended by St. 1917, p. 240, the failure to pass upon a motion for new trial within three months of the notice of entry of judgment is, in effect, a denial of the motion, does not apply where the court never acquired jurisdiction of the motion because notice of the entry of judgment was given while the corporation's powers were suspended for failure to pay its franchise taxes.

In Bank.

Petition for writ of mandate by the Ransome-Crummey Company against the Superior Court in and for Santa Clara County and J. R. Welch, Judge thereof, to require the court to take jurisdiction of a motion for a new trial. Writ denied.

R. M. F. Soto, of San Francisco, for petitioner.

Ralph C. McComish, of San Jose, for respondents.

LAWLOR, J. This is a petition for a writ of mandate to be issued directing respondents, the superior court of the state of California, in and for the county of Santa Clara, and Hon. J. R. Welch, a judge thereof, to take jurisdiction of a motion for a new trial interposed by petitioner in the case of Ransome-Crummey Company v. John H. Graves et al., numbered 20902 in the records of the said court, and directing respondents to grant the motion as of the 6th day of September, 1921.

Petitioner commenced the said suit on June 14, 1913, to foreclose a lien on certain property in the city of San Jose, alleged to belong to said J. H. Graves, to satisfy an assessment levied for street work done by petitioner. The cause was heard before the said superior court of Santa Clara county. Findings of fact and conclusions of law were made and filed by the court, and, pursuant thereto, judgment was rendered for the defendant May 26, 1916. On June 7, 1921, a purported notice of the entry of judgment was given to the attorney who had represented petitioner, and on June 15, 1921, petitioner's attorney assumed to serve on the attorney for Graves a notice of intention to move for a new trial. Petitioner, on September 2, 1921, moved the court to grant a new trial on the grounds that the evidence was insufficient to justify the decision of the court; that the decision was against law; and that there were errors in law occurring at the trial, excepted to at the time by the plaintiff. At the hearing on that date, counsel for the defendant called the court's attention to the fact that, on February 28, 1920, petitioner's rights, powers, and privileges had been suspended because of the nonpayment of its license and franchise taxes. Further hearing of the matter was continued until September 6, 1921, at which time it was shown by petitioner that all delinquent taxes had been paid on September 3, 1921, and that, upon such payment, a certificate had been issued by the state controller whereby all the rights, powers, and privileges of petitioner as a corporation were restored. By reason of the objections made by the defendant, respondent, the superior court, declined to pass upon the merits of the purported motion for a new trial and dismissed it. Thereupon petitioner commenced this proceeding to compel respondents to consider the motion upon its merits.

Graves, the defendant in the original action, joined with respondents in the answer to the petition, alleging he is the real party in interest. In addition to denying petitioner's right to the writ of mandate on the ground that its rights, powers, and privileges had lapsed at the time the said motion for a new trial was made, certain facts are alleged in the answer concerning the assignment of petitioner's claim against Graves which, if true, might constitute a valid defense to petitioner's motion for a new trial, as showing it is not the real party in interest. For these reasons respondents pray that the petition for a writ of mandate be denied.

[1] It is provided in Statutes of 1917, pp. 371, 377:

> That "after six o'clock p. m. of the Saturday preceding the first Monday in March in any year, the corporate rights, privileges and powers of every domestic corporation which had failed to pay the [license] tax and money penalty for nonpayment thereof imposed by this act shall, from and after said hour of said day, be suspended, and incapable of being exercised for any purpose or in any manner, except to execute and deliver deeds to real property in pursuance of contracts therefor made prior to such time, and to defend in court any action brought against such corporation until said tax with all accrued penalties * * * are paid;" that (page 378) "no court shall have jurisdiction to make or enter any decree of dissolution of any domestic corporation until all taxes and penalties due under this act shall have been paid;" and further, that (page 377) "all corporate powers, rights and privileges, suspended or forfeited under the provisions of this act may be revived and restored to full force and effect upon application therefor by any stockholder or creditor thereof and upon payment of all accrued taxes and penalties due to the state under this act and subdivision (d) of section fourteen, article thirteen of the constitution."

Section 3669c, subdivision 2, of the Political Code, reads:

> "After six o'clock p. m. of the Saturday preceding the first Monday in March in any year, the corporate rights, privileges and powers of every domestic corporation which has failed to pay said [franchise or other] tax and money penalty shall, from and after said hour of said day, be suspended, and incapable of being exercised for any purpose or in any manner, except to defend any action brought in any court against such corporation, until said tax with all accrued penalties * * * are paid as hereinafter provided."

Subdivision 3 of the same section provides:

> That "All corporate powers, rights and privileges suspended, or forfeited, may be revived and restored to full force and effect by the payment of all accrued taxes and penalties. * * *" St. 1917, p. 359.

Section 3668c of the Political Code is in part as follows:

> "No final discharge in bankruptcy or decree of dissolution shall be made and entered by any court, nor shall the county clerk of any county or the secretary of state file any such discharge or decree, or file any other document by which the term of existence of any corporation shall be reduced or terminated until all taxes, penalties, and costs * * * shall have been paid and discharged." St. 1917, p. 355.

Before the enactment of these statutes, the penalty imposed upon a corporation for a failure to pay its license and franchise taxes was a forfeiture of its charter (Stats. 1905,

p. 493, and amendments thereto; Stats. 1911, p. 530; Stats. 1915, p. 422), which resulted in a dissolution of the corporation. Lewis v. Miller & Lux, 156 Cal. 101, 103 Pac. 496. After such a forfeiture the corporation was governed by the rules relating to dissolved corporations, and all actions prosecuted by or against such a corporation abated, except in those cases where an action against the corporation survived by the terms of section 10a of the act of 1905 as added by St. 1906 (Ex. Sess.) p. 25, as amended in 1907 (St. 1907, p. 746). Brandon v. Umpqua Lumber & Timber Co., 166 Cal. 322, 136 Pac. 62. Under the terms of the present statutes, the penalty for nonpayment of license and franchise taxes has been changed, and the result of such nonpayment is no longer a forfeiture of its charter and consequent dissolution of the corporation, but only a suspension of its rights, powers, and privileges, with a provision for revival. Furthermore, the statutes, above quoted, expressly provide that there shall be no dissolution of a corporation until all license and other taxes have been paid. The distinction between the position of a corporation, after failure to pay its license and franchise taxes, under the former and under the present law was pointed out in Rossi v. Caire (Cal.) 199 Pac. 1042, where the status of such a corporation was considered. The court in that case said:

> "The corporation [under the former laws] simply ceased to exist, just exactly as in the case of a forfeiture for cause by judicial decree, without any existing provision of law for rehabilitation as a corporation. It was not a case simply of suspended animation, as under the present license tax law, but one of absolute death."

It follows that petitioner did not cease to exist during the period of suspended animation. Its right, therefore, to maintain the action against Graves is not governed by the rules relating to dissolved corporations, and the question of the power of its directors to maintain the action in the corporate name is not involved. During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes. The right to institute or maintain actions is not included in this reservation, but is denied to corporations as a part of the penalty.

[2] At the time the purported notice of entry of judgment was given to counsel for petitioner, and at the time it attempted to give notice of its intention to move for a new trial, its corporate powers were suspended. As the receipt of notice of entry of judgment would be the exercise of a corporate power, it follows that, at the time such notice was given in this case, petitioner, as a corporation, could not receive it, nor could any person lawfully receive it in the name of the corporation. The notice was therefore inoperative.

[3] It has been held that a party litigant may waive notice of entry of judgment and commence proceedings for a new trial without it (Estate of Richards, 154 Cal. 478, 98 Pac. 528), and that such a waiver is effected by giving notice of intention to move for a new trial (Thorne v. Finn, 69 Cal. 251, 10 Pac. 414). In the case at bar, petitioner attempted to give notice of such intention, but such purported notice was void as the exercise of a suspended power, and it could not operate as a waiver of the notice of entry of judgment. For the same reason it could not serve as a preliminary step in securing a new trial.

[4] A notice of intention to move for a new trial is necessary to confer jurisdiction on the court to entertain the subsequent proceedings. Such a notice may not be waived, and is not waived, by the voluntary appearance of the adverse party. Title Insurance & Trust Co. v. California Development Co. et al., 171 Cal. 173, 152 Pac. 542. As the court cannot acquire jurisdiction in the absence of such notice, the subsequent appearance of petitioner in the action, after its rights, powers, and privileges were revived, could not cure the defect or constitute a waiver.

[5] Furthermore, we are of the opinion that the subsequent revival of the corporate rights, powers, and privileges did not have the effect of validating the acts attempted during the period of suspension. The revival is not made retroactive by the statute. The suspension of the rights, powers, and privileges is a disability imposed on a corporation as a penalty, and it would tend to deprive the statute of its force and encourage a corporation in default to postpone payment of its taxes indefinitely, if it were held that, by subsequent payment of the delinquent taxes, all the benefits of the attempted acts denied to the corporation could be secured. That it was not intended that the acts, during the time of the suspension, should have any effect whatever is shown by the fact that both the sections of the Political Code and the Statutes of 1917, above referred to, make the performance of such acts by any person on behalf of the corporation a misdemeanor.

[6] It was suggested upon the oral argument that the court, in any event, is now without jurisdiction to hear the motion, because of the lapse of more than three months from the date of the purported notice of entry of judgment. It is true that a failure to pass upon such a motion within three months of the notice of entry of judgment is in effect a denial thereof. Code Civ. Proc., § 660, as amended in 1917 (St. 1917, p. 240); Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486; San Francisco, etc., T. Rys. v. Superior Court, 172 Cal. 541, 157 Pac. 604. But it follows from what we have said that the court never acquired jurisdiction of the motion, and that, because of the invalidity of the notice of entry of judgment, the three-

month period during which it might have passed on the motion was never commenced. The position of the parties is therefore the same as if none of the attempted steps looking to a new trial had been taken, and the denial of the writ is without prejudice to further proceedings based on the entry of the judgment.

Writ denied.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; SHURTLEFF, J.; SLOANE, J.

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188 Cal. 350

BRADFORD v. GLENN, Judge.
(S. F. 10176.)

(Supreme Court of California. March 7, 1922.)

Escape 🔑4—Prisoner escaping while outside walls "escapes from prison."

A prisoner serving a sentence of imprisonment in a state prison is, in contemplation of law, a prisoner therein, as well when at work outside under the surveillance of prison guards as when confined within its walls, so that if he escapes when outside he escapes from a prison within Pen. Code, §§ 106, 787.

In Bank.

Application by Hugh B. Bradford, etc., for a writ of mandate prayed to be directed to Malcolm C. Glenn, as Judge of the Superior Court of Sacramento County, requiring him to proceed with the trial of petitioner on a charge of having escaped from a state prison. Writ granted.

Clifford A. Russell, Dist. Atty., of Sacramento, for petitioner.

SHAW, C. J. The defendant, Cecil Murray, was in a state prison, and was taken out to work, under guard and under authority of the law, on a highway in Trinity county, and there he escaped. He was charged with that escape under the section which makes it an offense. The information was filed in the superior court of Sacramento county, and that court refused to proceed with the case. Section 787 of the Penal Code provides that a charge of escaping from a prison may be tried in any county in the state.

Section 106 of the Penal Code provides that—

> "Every prisoner committed to a state prison for a term less than for life, who escapes or attempts to escape while being conveyed to or from or while confined within such prison or while at work outside such prison under the surveillance of prison guards is guilty of a felony."

We are of the opinion that a person serving a sentence of imprisonment in a state prison is, in contemplation of law, a prisoner therein, as well when at work outside under the surveillance of prison guards as when confined within its walls, so that if he escapes when outside he escapes from a prison, within the meaning of section 787.

Let the writ of mandate issue as prayed for.

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56 Cal. App. 386

SACRE v. CHALUPNIK et al. (L. A. 6405.)

(Supreme Court of California. March 10, 1922. Rehearing Denied April 7, 1922.)

1. Trial 🔑388(4)—Court need not expressly find fact admitted in pleadings.

The court need not expressly find a fact averred in the pleading of one party, and not denied by the other.

2. Judgment 🔑256(2)—Finding of a stipulated fact that must have been result of mistake held properly disregarded in entry of judgment.

In ejectment, where pleadings showed that defendants had entered the land on a certain date, and defendants rested their right of such possession upon a judgment, a finding, in conformity with a stipulation, that defendants made entry at a certain later date subsequent to the bringing of the action, was properly disregarded as irrelevant and aside from the concluded issue on that point, as the date in the stipulation must have been the result of a mistake in dictation or transcribing.

3. Ejectment 🔑11—Final United States receiver's certificate prima facie evidence of ownership; "certificate of purchase."

United States receiver's certificate, showing payment for land, was prima facie evidence of ownership, and was a "certificate of purchase" within the meaning of Code Civ. Proc. § 1925, and the one receiving it was in a position to initiate and maintain an action in ejectment.

[Ed. Note.—For other definitions, see Words and Phrases, Certificate of Purchase.]

4. Stipulations 🔑19—Agreement as to rental value on one trial not binding in subsequent trial.

A stipulation in ejectment proceeding as to rental value of land was not binding on the plaintiff on a subsequent trial several years later under changed conditions.

5. Action 🔑68—Court properly permitted plaintiff to reopen and file supplemental complaint.

Where ejectment case was abated pending the termination of proceedings in the United States land office, and meanwhile the proceedings in the land office terminated successfully for the plaintiff and ripened under the final receipt from the receiver of the land office into full title, freed from all claim of the defendants, court did not err in permitting plaintiff to reopen the case and to file a supplemental complaint, under Code Civ. Proc. § 464.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Lou M. Sacre against J. C. Chalupnik and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Riddle & Cheroske and Sebald L. Cheroske, all of Los Angeles (W. J. Tremeear, of Los Angeles, of counsel), for appellants.

Conkling & Brown and C. L. Brown, all of El Centro, for respondent.

WASTE, J. In this action in ejectment the plaintiff had judgment for restitution of the property, with damages for the withholding of the same, and the defendants have appealed. One of the points strongly relied on for a reversal is that by reason of a finding of the trial court as to the date of the entry, and ouster, by the defendants, which is in accord with a purported stipulation of fact, the plaintiff failed to establish the right to maintain the action, and as a consequence the judgment is unsupported by the findings and is against the law. Another contention relates to the construction and effect to be given to a stipulation in the agreed statement of fact relating to the rental value of the land. The action of the trial court in permitting plaintiff to file an amended and supplemental complaint is also challenged. Unless we may disregard the finding as to the date of the entry on the land by the defendants, the judgment lacks the necessary support, and must be reversed, for the reason that the time of the ouster is therein found to have occurred long after the suit was instituted. Consequently, if the finding shall control, no cause of action is found to have existed in plaintiff, as against these appellants, at the inception of the action.

The original complaint was filed on November 4, 1915. It was therein alleged that while plaintiff was the owner and entitled to the possession of the land, defendants within the three years preceding entered thereupon and ousted plaintiff, and ever since had continued to, and then were withholding possession without right. Defendant J. C. Chalupnik by his answer denied the allegation of the complaint, and asserted title and right of possession in the defendant Emma C. Chalupnik. In the separate answer of Emma C. Chalupnik she admitted that she entered upon the premises within the three years preceding, denied any unlawful withholding, and alleged—

> "That on or about the 2d day of December, 1914, the plaintiff did temporarily oust and eject this defendant from said premises and withheld possession thereof from this defendant until possession thereof was restored by a judgment of this court; that since the possession of said premises were restored to this defendant by the judgment of this court, this defendant has withheld, and does now withhold, said premises from the possession of said plaintiff; that such withholding by this defendant has been by virtue of the said judgment."

By way of a further and separate answer and cross-complaint, defendant Emma C. Chalupnik alleged that under an application to file a desert land entry upon the land in question, made in January, 1913, she had entered upon, and into possession thereof, and for more than two years preceding the commencement of this action had been in peaceable, quiet, and undisturbed possession of the same—

> "except for the period from about the 2d day of December, 1914, to the —— June, 1915, during which period the plaintiff was in the unlawful possession of said premises, as decided by judgment of the above-entitled court, in case No. 2105, which judgment was made and entered on or about the *3d day of June, 1915*." (The italics are ours.)

Certain additional averments, attributing fraud to plaintiff and Fred E. Meyers in connection with the claim of plaintiff to the land, and setting forth the pendency of a contest in the United States land office between the parties concerning the title to the land, are contained in this pleading, which was filed November 23, 1915. These allegations were repeated in an amended and supplemental answer and cross-complaint filed by said Emma C. Chalupnik on June 27, 1916. The date (June 3, 1915) and the substance of the judgment under which the defendant asserted her right to possession were particularly pleaded. It was therein further alleged that the contest in the United States land office had been decided adversely to said defendant, and that an appeal had been taken by her to the Commissioner of the General Land Office. The prayer was for judgment in defendant's favor, or that the action be abated until the final determination of the contest in the land office.

The plaintiff amended her complaint, and did not deny the date of the judgment and re-entry as alleged by the defendant. The case was submitted upon the pleadings and a stipulation of fact dictated in open court to the court reporter. On August 25, 1916, the court, by a minute order, directed that judgment in abatement and for costs be awarded defendant, but no such or any judgment was entered at that time.

The contest in the land office resulted in a decision in favor of the plaintiff, and a patent to the land was issued to her July 10, 1918. She thereupon moved the court to reopen the case and to be allowed to file a supplemental complaint, setting up said fact in confirmation of her title, and further showing the accrued rental value of the land during the whole period of defendant's unlawful withholding. This motion was granted. The supplemental complaint was filed, and the demurrer of the defendants thereto was overruled. The defendants declined to answer, but moved to strike the pleading from the files upon the ground that a judgment in abatement had theretofore been entered, which, not having been appealed from, had become final. The motion was denied, and the default of the defendants for not answering the supplemental complaint was duly entered. Thereupon the action proceeded to trial upon evidence as to the rental value of the property and the stipulation of facts, as to other matters, entered into upon the occasion of the former submission. The trial court found title and right of possession in plaintiff, but that on June 3, *1916* (the italics are ours), the defendant Emma C. Chalupnik unlawfully entered upon the premises and ousted plaintiff therefrom, and had ever since unlawfully withheld possession. The rental value of the land was fixed, and judgment for possession and the amount of damages suffered by reason of the withholding was entered for plaintiff. It is from said judgment that this appeal is prosecuted by the defendants.

The action was commenced November 4, 1915, and the appellants contend that the plaintiff failed utterly to establish her right to maintain ejectment, and is concluded by the finding of the trial court that the defendants entered on the premises and ousted plaintiff on June 3, *1916*, which was after suit brought. That finding rests upon a statement in the stipulation of facts. Respondent asserts that the date "June 3, 1916," in the stipulation, was an error, either of transcribing or dictation. Appellants do not controvert this assertion, and make no attempt to show that the stipulation was in fact correct as to the date of the re-entry—the sufficient reason being that they cannot do so, as abundantly appears from the record.

[1, 2] The correct date of the ouster, June 3, 1915, affirmatively appears from the allegations and admissions in the answer and cross-complaint of the defendants. In every one of these several pleadings—and all, with one exception, were filed before June 3, *1916*—the defendants admitted they were in possession of the land, and rested their right of such possession upon the judgment of June 3, *1915*. There was no denial of this admission and averment. The issue as to actual possession of the land at the time of the commencement of the action was thus closed. When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as "found." It has been repeatedly held that the court need not expressly find a fact averred in the pleading of one party, and not denied by the other. In re Estate of Doyle, 73 Cal. 564, 570, 15 Pac. 125. Here we have an even stronger reason for invoking the rule, for the fact of the entry and ouster of plaintiff, by the defendants, before the commencement of the action, and the unbroken continuance to that time, as pleaded by plaintiff, is expressly admitted by the various pleadings of the defendants, who seek to justify under a judgment already rendered, the precise date of which is fixed, and which of necessity must have been rendered before the defendants could set it up as a justification of the admitted re-entry upon the land. The finding, which implies an ouster at a date one year later than that admitted by the defendants, was irrelevant and aside from the concluded issue on that point, and may be disregarded as nugatory. Gould v. Stafford, 77 Cal. 66, 68, 18 Pac. 879; Reinhart v. Lugo, 75 Cal. 639, 640, 18 Pac. 112; Ortega v. Cordero, 88 Cal. 221, 226, 26 Pac. 80. It is so apparent that the stipulation of fact, embodied in the finding, that the date of re-entry by the defendants occurred in 1916, instead of 1915, when it did actually take place, was the result of a mistake in dictation or transcribing, that we are not impressed with the effort of the appellants to profit by it.

[3] The finding that ever since March 10, 1915, plaintiff has been the owner, and entitled to the possession of the land, is amply supported. On that date she obtained the United States receiver's certificate showing payment for the land. Her final receipt was prima facie evidence of ownership, and was a "certificate of purchase" within the meaning of section 1925 of the Code of Civil Procedure. She was therefore in position to initiate and maintain the action in ejectment. Graves v. Hebbron, 125 Cal. 400, 405, 58 Pac. 12; Witcher v. Conklin, 84 Cal. 499, 502, 24 Pac. 302; McDonald v. Edmonds, 44 Cal. 328; Thompson v. Basler, 148 Cal. 646–648, 84 Pac. 161, 113 Am. St. Rep. 321. When the action finally came on for trial, she had obtained the United States patent to the land, and, not having parted with her title, was the owner in fee.

[4] When the case was first submitted, prior to the intimation by the trial court that the action should abate pending the termination of proceedings in the United States Land Office, the parties entered into a stipulation reading "The rental value of said land is the sum of $4 per acre per annum." When the action came on finally for trial, over the objection of the appellants, the court took testimony as to the rental value of the land during the several years constituting the period of the ouster, and fixed and determined the damages according to such evidence.

Appellants insist that the plaintiff and the court were bound by the original stipulation of fact, and that it was error to determine the amount of damages on any other basis than the amount of the rental value fixed by the agreed statement. We are not impressed with appellants' contention. The stipulation was entered into at the time of the first submission, which was several years before the date of the final trial. The position of respondent that it was made only in anticipation of any judgment that might be rendered at that time, and also for the purpose of determining the amount of the bond in event of an appeal from any such judgment, seems a most reasonable one. The trial court took that view, and admitted the offered testimony. Rental value of land does not always remain at the same figure. It is hardly to be supposed that the parties contemplated that no judgment would be entered upon the first submission, or that the case would be reopened under changed conditions several years later, and then be submitted on the same stipulation of facts without further agreement thereto. The record discloses no such understanding. There was an offer on the part of respondent to resubmit the question of damages on the agreed statement, in so far as it related to the particular date when the stipulation was entered into. Appellants refused to so stipulate, and insisted that the figure of $4 per acre per year should be held to cover the rental value of the land for the whole period. The parties not being able to agree, the court proceeded to take the testimony on that subject, from which it arrived at the amount of damages suffered by the respondent. We find no error in this proceeding.

[5] Appellants complain of the action of the court in permitting plaintiff to reopen the case and to file the supplemental complaint. The equitable claim of the plaintiff to the land in litigation, under the final receipt from the receiver of the land office, ripened into full title, freed from all claim of the defendants, by reason of the successful termination of the proceedings in the United States land office and her acquisition of the patent, after the commencement of the action. It was proper, therefore, that she should submit such matters in confirmation of her title to the consideration of the court by means of a supplemental pleading. Code Civ. Proc. § 464; Metropolis, etc., Bank v. Barnet, 165 Cal. 449, 453, 132 Pac. 833.

Other points urged on the appeal are more or less germane to the questions already decided, and require no further consideration. The judgment is affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; RICHARDS, Justice pro tem.

(188 Cal. 366)

PEOPLE v. VALCALDA. (Cr. 2386.)

(Supreme Court of California. March 7, 1922.)

1. Homicide ⟹187—Where defendant offers proof to show good nature, state may show him to be quarrelsome.

Where defendant, prosecuted for homicide, claimed self-defense, and introduced evidence showing himself to be a gentle, generous natured and inoffensive man, it was proper for the prosecution to show other specific acts and conduct of defendant showing him to be a litigious, quarrelsome man, holding enmities resulting in real or imaginary wrongs, and threatening violence to those who had incurred his enmity.

2. Criminal law ⟹1037(1)—It is too late to urge on appeal misconduct of the district attorney where prompt objection was not made.

On appeal it is too late to urge misconduct of the district attorney as to matters of argument where prompt objection was not made, so that their prejudicial effect, if any, might have been obviated by their withdrawal, or by a suitable instruction to the jury to disregard them.

3. Criminal law ⟹730(8)—Where court admonished jury to disregard objectionable statements of district attorney there was no reversible error.

Where objectionable matter in address of the district attorney occurred during his comments upon evidence concerning the defendant's particular conduct which he said indicated defendant to be a sane, but evil-minded, man, where the defense was insanity, and the court admonished the jury to disregard the obnoxious statements of the district attorney, *held* that such matter did not constitute reversible error.

Wilbur, J., dissenting in part.

In Bank.

Appeal from Superior Court, Amador County; C. P. Vicini, Judge.

John Valcalda was convicted of murder in the first degree, with sentence of death, and he appeals. Affirmed.

McNoble & Berry, of Stockton, for appellant.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and T. G. Negrich, Dist. Atty, of Jackson, for the People.

RICHARDS, Judge pro tem. This appeal is from a judgment of conviction of the defendant of the crime of murder of the first degree. The homicide with which the defendant was charged was that of having shot and killed one John Cox in the city of Sutter Creek, Amador county, on the 2d day of March, 1921. The shooting occurred at about the hour of 3:30 o'clock in the afternoon of said day, upon the main street, and in the business part of said city, and as to these facts, and also as to the fact that the de-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes fendant shot and killed the deceased without warning or immediate provocation, there was no dispute.

The sole defense which was offered on behalf of the defendant upon his trial was the defense of insanity, and upon that issue a large amount of evidence was presented both for and against said plea. The jury found against the defendant upon this issue, and upon his plea of not guilty, and found him to be guilty of murder in the first degree. The court sustained this verdict upon motion for a new trial and sentenced the defendant to suffer the death penalty for his crime.

Upon this appeal the appellant urges that the evidence in the case was insufficient to justify this verdict and judgment, but the burden of his contention in that regard is placed solely upon the plea of his insanity for a long time prior to and at the time of the commission of the homicide. It would serve no useful purpose to state this evidence in detail to a greater extent than it may be found necessary so to do in determining the other points made upon this appeal, since we are satisfied from a careful review of this evidence that it was amply sufficient to justify the verdict of the jury.

[1] The next, and main, contention of the appellant is that certain testimony of a highly prejudicial character, offered on behalf of the prosecution in rebuttal of the defendant's said plea and proofs of insanity, was permitted to be introduced by the court over the defendant's objection. This testimony is summarized in the appellant's brief as follows:

> "On rebuttal, the people were permitted to introduce evidence that: (1) In the month of December, 1917, defendant was arrested upon a charge of misdemeanor, found guilty, paid a fine of $510 and served eight days in jail. (2) That in the month of December, 1920, or January, 1921, he interfered with an officer in the discharge of his duty. (3) That in the month of January, 1921, defendant 'threatened to cut the heart out of one John Brignoli and make him eat it,' and in the same month he 'threatened to cut the guts out of an Austrian' who owed him some money."

This objectionable testimony was but a small portion of a much larger mass of evidence presented by the prosecution in rebuttal of the defendant's said plea, and both the reason and justification of its admission is to be found in the following state of the record before us. In the early stages of the trial, and at the outset of the defendant's proffer of evidence in support of his plea of insanity, the defendant's counsel in his opening statement to the jury said:

> "We will show you, gentlemen of the jury, that the disposition of this defendant is that of a kind and generous one, a man who was always ready to help and assist any one who was in trouble, a man who loved children and was constantly making children of his acquaintance presents."

A little later, and in support of the defendant's offer of evidence as to a specific act of kindliness and charity on the defendant's part, his counsel said:

> "Now all of this matter, all of his acts and conduct, and what he said, will go to make up this proposition."

The proposition to which defendant's counsel was addressing himself, and with reference to which a considerable amount of evidence of like character to that above offered was given, was that of showing the defendant before the jury in the favorable light of being a kindly hearted, generous natured man, such a one as would not have committed the murderous and cowardly crime with which he was charged while in a sane and normal state of mind. A further reason for the defendant's proffer of this sort of evidence consisted in his claim, accentuated throughout the trial, and insisted upon here, that there had never been any quarrel or cause of hatred as between himself and the deceased during their years of acquaintanceship and residence in the same town. With regard to these claims, a brief review of certain facts, bearing directly upon the relation between the parties as well as upon the defendant's mental attitude and poise for some time prior to and at the moment of the homicide, will be necessary.

The defendant was a native of Italy, having been born there in about 1888, and having come to the United States in about the year 1903. A few years later, becoming ill, he was sent home to Italy, the expense of his return there being met by a collection taken up by his friends. Some two or more years thereafter he came back to California, restored in health, and by working in the mines repaid his friends their expenditure on his behalf, and somewhat later came to Sutter Creek, where he opened a saloon and gambling place, in the conduct of which he was apparently fairly successful. The deceased, John Cox, was also a saloon keeper in Sutter Creek at this time, and the relations between the two were friendly. In the latter part of the year 1914, John Cox informed the defendant that a woman named Elizabeth Peirano, who was a friend of his, was in destitute circumstances, her husband having just died leaving her with five dependent children. The defendant who was at the time a stranger to the woman, co-operated with Cox in soliciting funds for her relief, collecting about $139, a portion of which he contributed, and which was in part applied to the payment of the funeral expenses of the deceased husband, and the balance delivered by the defendant to the widow. The defendant was at this time and thereafter an unmarried man. Some months after this act of benevolence this woman began visiting him, coming to the rear part of his saloon, which being brought to the attention of a Mrs. Bogliolo, a cousin of the defendant, she undertook to warn the defendant against the woman, upon the ground that she was no good. The defendant seems to have been put upon inquiry by this warning, since a little later he informed his cousin that the woman was also in the habit of going to the back door of Cox's saloon, and that Cox, who was a married man, was urging the defendant to marry the woman, which he had promptly refused to do, although his illicit relations with her continued. This was in the year 1915.

In April, 1916, Mrs. Peirano gave birth to a child in San Francisco, and in the birth certificate named the defendant as the father of the child. Upon learning this fact the defendant was much exercised, and consulted an attorney with a view to demanding that his name be taken from said birth certificate. This being found impossible, the defendant sought the Peirano woman and resumed relations with her, and told her that he would marry her if she would produce the child and enable him to convince himself by its inspection that he was its father. This she failed or refused to do, and the defendant began asserting that not himself, but John Cox, was the father of the child. The idea that his name appeared in this birth certificate as the father of this child when, as he claimed, John Cox was its real father, became apparently an obsession with the defendant, for he consulted various attorneys and made various attempts in the vain effort to have this record changed, and also talked frequently upon the subject with his friends and acquaintances, often in a much excited and disturbed frame of mind, during the several years which followed. In the meantime John Cox removed from Sutter Creek to Vallejo, where he took employment as a blacksmith. The defendant also, in the year 1918, left Sutter Creek, going to San Francisco to live. John Cox and the defendant did not come in contact during these latter years while the former was living in Vallejo and the latter in San Francisco. It does not appear what became of the Peirano woman in the meantime, but the defendant frequently in talking with his friends dwelt upon his standing grievance that his name appeared in the said birth certificate as the father of said Peirano woman's child, while in fact said John Cox was its father.

Upon the trial of this cause, the appellant urged that these numerous instances of the defendant's mental distress over this matter developed from an obsession into a derangement of mind, until he became a paranoiac, and that such was the form of his insanity when he saw John Cox for the first time in several years on the afternoon of the 2d of March, 1921, upon the streets of Sutter Creek, and there slew him without present provocation or any warning. Intermingled with this proof and contention, counsel for the defendant presented at the trial the specific evidence above referred to as to the defendant's kindliness of nature, generosity, and affection for children, and the jury was asked to believe, upon the strength of this evidence, that the defendant had no quarrel with John Cox, and held throughout no evil disposition toward him, and hence that the act of killing him without provocation or apparent cause was in itself the strongest proof that the defendant's act in so doing was the act of an insane person. It would seem to require no very deep or searching analysis of sex psychology to show that ordinarily as between the two male members of such a triangle of illicit love and passion, feelings of jealousy and hatred would be borne in the breast of one or the other of them, and most probably in the bosom of that one who came to feel that the other had secured from the object of their common desire a higher pledge of affection than he himself had been able to secure.

As an offset to this reasonable deduction, the defendant offered the specific evidence as to the defendant's mild and generous and gentle character. The importance of this evidence to the defendant's case cannot be overestimated, and it was to meet such proof in the specific form in which the defense had chosen to present it, and to overcome its effect, that the prosecution offered and secured the introduction of the evidence at which the main objection of the appellant has been aimed. That evidence consisted in the showing that at some time during the year 1917 the defendant had become involved in a litigation, in the course of which he had been subjected to a fine of $500, or thereabouts, with the alternative of a jail sentence, and that, after serving eight days in jail, he had paid to the sheriff the amount of this fine, and that later on he had gone to the sheriff's office in an attempt to have the Peirano woman arrested upon some charge involving the insertion of his name in the aforesaid birth certificate, and that, upon the refusal of the sheriff to make such arrest without a warrant, the defendant, in an excited frame of mind, had charged the sheriff with having robbed him out of the $500 which he had paid as such fine. The prosecution also, over the defendant's objection, offered evidence to show that there had been trouble between the defendant and one John Brignoli over a debt which the defendant had owed the latter, and for which he had given as security some stock in a mining corporation which Brignoli had sold for the debt, and that, litigation arising from the affair, Brignoli paid the defendant $500 to settle the case. Not long thereafter a mutual friend, one Malatesta, saw the defendant in an effort to restore friendship between the latter and Brignoli, with the result of the defendant saying:

> "I don't want you to talk John Brignoli to me. Furthermore, if he comes around me I will cut his heart out and make him eat it."

The witness Malatesta also testified that upon another occasion the defendant, speaking of a certain Austrian who owed him $40, and whom he said he was going to see, said:

> "I'll either get that $40 or I'll cut his guts out."

The prosecution also, over the defendant's objection, introduced evidence to the effect that upon an occasion but a few months prior to this homicide the defendant had interfered with one Joe Bernardis, a local constable, in the discharge of his duty, by objecting in an angry manner to the latter's arrest of another person.

As to all of this evidence the court stated to the jury at the time it was offered that it was not admitted for the purpose of showing other offenses, or any intention of committing other crimes—

> "but for the sole purpose of showing whether or not he was sane or insane, the condition of his mind, and for that purpose alone the testimony is admissible; and the jury will be instructed that all such testimony goes in only on the fact—to establish one fact and that is the sanity or condition of mind of the defendant."

With regard to the admissibility of the foregoing evidence, especially for the purpose for which it was offered, and to which it was thus limited, we entertain no doubt. The defendant himself opened the door for the admission of such evidence by himself offering proof of specific acts and conduct showing the defendant in the favorable light of being a gentle, generous-natured, inoffensive man. The prosecution met this evidence with a showing of other specific acts and conduct on the part of the defendant showing him to be a litigious, quarrelsome man, holding enmities, resulting in real or imaginary wrongs, and threatening violence to those who had incurred his enmity. This evidence as to the acts and conduct of the defendant during the same period covered by the evidence presented on the defendant's behalf upon the issue of insanity bore directly upon the question as to the mental attitude of the defendant toward the deceased for a considerable period preceding the homicide, and upon the vital question in the case, viz. as to whether the defendant in slaying the deceased was acting as a sane but evil-minded man, destroying his enemy, or whether he was a mentally unbalanced paranoiac, doing his deadly deed without motive or criminal intent, and without realizing the wrongfulness of his action.

The authorities fully sustain the action of the trial court in the admission of this evidence. The leading case upon this subject throughout the whole country is that of United States v. Guiteau, 1 Mackey (12 D. C.) 498, in which the murderer of President Garfield was upon trial, and in which the defense was insanity. The Supreme Court of the District of Columbia, in commenting upon the evidence pro and con which had been presented upon that plea, said:

> "Several witnesses were allowed to testify to acts of the defendant in 1872, and in two or three years following, which were fraudulent. Evidence had been introduced on his part, for the purpose of proving insanity, which searched the history of his whole life, down to the time of the act charged in the indictment. The defendant himself had, as a witness in his own behalf, gone over the same ground. In this body of defensive evidence his moral nature and traits had been presented, as a means of showing that acts done by him must be accounted for by a conclusion of insanity. It was competent to show, in rebuttal, that the grounds on which this inference of insanity was based, did not exist, and to do this by exhibiting particular acts and conduct of the defendant, contemporaneous with the history produced on his part, which tended to disprove the existence of those grounds. If a conclusion might be drawn from his moral nature that his acts must be insane, it was relevant and proper to show that his real moral nature was one which did not call for such an explanation.
>
> "After comparing the evidence, as to particular acts, offered on both sides, we are of the opinion that the evidence in rebuttal was responsive to the evidence in defense, and was admissible."

The Circuit Court of the United States has announced the same doctrine in the case of United States v. Holmes, 1 Cliff. 98, Fed. Cas. No. 15,382, wherein the court, in the course of a long and illuminating opinion says:

> "When a person accused of crime relies upon his prior and subsequent acts, conduct, and declarations to show that he was insane at the time he committed the act charged against him, and actually offers them in evidence to establish that defense, we entertain no doubt that it is competent for the government to introduce other acts, conduct, and declarations of the accused, within the same period, to rebut that presumption, and to show that he was sane. Were it otherwise, it is not perceived how this class of legal investigations can be satisfactorily conducted, as jurors, if the proposition assumed by the counsel for the prisoner be correct, must always be compelled in cases like the present to decide the question of sanity or insanity upon a partial view of the facts, and may often be deprived of the means of ascertaining the truth. Courts of justice have established the principle that such evidence is admissible for the accused, whenever he sees fit to offer it, and so long as that rule continues in force it must of necessity be competent for the government to introduce countervailing proof."

The authorities from other jurisdictions hold generally to the same view. Hopps v. Illinois, 31 Ill. 385, 83 Am. Dec. 231; State v. Jones, 50 N. H. 382, 9 Am. Rep. 242; Smith v. State, 95 Miss. 789, 49 South. 945, 27 L. R. A. (N. S.) 461, Ann. Cas. 1912A, 23; 1 Wigmore on Evidence, § 228.

In the case of People v. Donlan, 135 Cal. 489, 67 Pac. 761, this court adhered to the same rule, the court saying:

> "It is claimed on the part of appellant that this testimony was irrelevant and had a tendency to prejudice the minds of the jury. If the evidence tended to establish the facts constituting the offense charged in the information—that is, that the acts of the defendant were the acts of a debased and murderously inclined person, instead of those of a madman or one insane—it was right and the duty of the people's attorney to offer such evidence, and the court did not err in admitting it. The purpose was not to prejudice the minds of the jury, but rather to convince them of the truth of the acts charged. The evidence tended to show a motive for the homicide, and that the acts of defendant were inspired by hatred and revenge, and were not those of an insane person. The evidence, therefore, was relevant, and tended to show that defendant was sane at the time of the commission of the offense charged."

See, also, People v. Willard, 150 Cal. 543, 89 Pac. 124.

The appellant cites the two cases of People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74, and People v. Harris, 169 Cal. 53, 145 Pac. 520, as supporting his contention as to the inadmissibility of this character of evidence. In the first of these cases the question arose over the attempted cross-examination of the defendant himself as to certain particular acts for which the court held no proper foundation had been laid. In the other case the question arose out of an apparent attempt on the part of the defendant to prove his own good character in respect to truthfulness and honesty by a question asked of his mother as to whether she had always known him to be truthful and whether she had ever known him to steal anything. This court upheld the action of the trial court in refusing to admit this evidence and in doing so said:

> "It is the rule as claimed by appellant that when the insanity of an accused is interposed as a defense, his acts and conduct and declarations made a reasonable time before and after the alleged criminal act is committed may be given to the jury on the question of his insanity at the time the criminal act was committed if they appear to have any tendency to show his mental condition at that time. People v. Willard, 150 Cal. 544, 89 Pac. 124. But here the question proposed did not indicate in the slightest that the conversation sought to be elicited would have any such tendency."

In the case of United States v. Holmes, supra, the distinction is clearly pointed out between the admissibility of evidence of particular acts of a defendant for the purpose merely of proving good character and its admissibility when offered upon the issue of the defendant's insanity at the time of his commission of the crime.

[2, 3] The appellant finally urges certain acts of alleged misconduct on the part of the district attorney in the course of his argument of the case. Most of the objectionable matter in the address of the district attorney occurred during the course of his comments upon the evidence which had been presented concerning the particular acts and conduct of the defendant as indicating him to be a sane but evil-minded man. As to nearly all of these remarks no objection was urged at the trial, and no request made for an instruction thereon. It is too late now to urge misconduct as to these matters as to which, if prompt objection had been made, their prejudicial effect, if any, might have been obviated by their withdrawal or by a suitable instruction from the court to the jury to disregard them. As to any objections which were made at the time to the remarks of the district attorney, the record shows that the court did admonish the jury at the time to disregard the obnoxious statements of the district attorney. We perceive no reversible error as to these matters.

The foregoing covers all of the points urged by the appellant for a reversal of the case. We find no merit in any of them. The record in this case, taken as a whole, sufficiently shows that the defendant, as the consummation of an evil and immoral life, committed a willful, premeditated, and unprovoked murder, and that he has been fairly tried and lawfully convicted of his crime.

Judgment affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; WASTE, J.; SHURTLEFF, J; SLOANE, J.

WILBUR, J. I concur in the judgment of affirmance, and in the main with what is said in the opinion of Mr. Justice RICHARDS. An investigation as to the insanity of a defendant in a murder case may take as wide a range as the investigation of that subject in any other type of case, and the limitations to be placed upon this testimony is largely in the discretion of the trial court. Estate of Baker, 176 Cal. 430, 168 Pac. 881. The declarations of the defendant are admissible in evidence as verbal acts tending to show the mental condition of the defendant. The fact that such declarations might tend to degrade the character of the defendant or excite prejudice against him is no reason for excluding the evidence. A defendant who has placed his mental condition in issue, and who admits that he committed the criminal act charged against him, opens the door to the widest possible investigation of his mental status, and he cannot complain of the fact that the people present and rely upon evidence which is inconsistent with his theory as to his insanity.

The defendant claims that he is suffering from a type of insanity known as paranoia. This type of insanity always manifests itself by one or more delusions. The delusion apparently relied upon by the defendant in this case is that he was wronged by the man he killed. The evidence is insufficient to establish that such belief was an insane delusion, for the evidence clearly shows that the defendant believed, and had reason to believe, that the deceased and Mrs. Peirano entered into a conspiracy to compel the defendant to marry Mrs. Peirano, and that in the course of this conspiracy the deceased took advantage of the fact that the defendant was having meretricious relations with the woman by himself causing the woman to become pregnant, and then prompting the woman to claim that the child was begotten by the defendant, and to demand that the defendant marry her for that reason. As ground for this belief the defendant knew that Cox had asked him to marry Mrs. Pierano about the time the child was begotten; that when it was born Mrs. Peirano gave the defendant's name as the father of the child, and demanded that he marry her, and that the woman persistently refused to show the defendant the child, although he agreed to marry her if the child appeared to be his. After nearly five years' effort to have the birth certificate changed, the defendant on the day the murder was commited was completely baffled in his efforts to obtain redress by having Mrs. Peirano arrested. Immediately after the refusal of the district attorney and sheriff to act he procured the gun and killed Cox, the other member of the conspiracy. It is evident that the defendant's conclusion that he had been wronged by Cox was not an insane delusion, for it was based upon reason and facts.

I feel that I do not sufficiently understand the sex psychology of an illicit triangle of love and passion to join in the statement of the majority opinion in that regard. As I understand the main opinion, it advances the theory that the defendant killed Cox because he thought the woman showed Cox a higher degree of love than she did him; but it appears that both Cox and the woman wanted the defendant to marry her, and both claimed that he was the father of the child. The defendant seems to have believed that he was the victim of too great a demonstration of affection instead of too little.

I do not concur in the concluding paragraph of the main opinion because I do not feel that we are called upon to pass judgment upon the previous life of the defendant.

188 Cal. 353

In re GOULD'S ESTATE.

ROBINSON v. GOULD et al.

(S. F. 9884.)

(Supreme Court of California. March 7, 1922.)

1. Evidence 🔑553(1)—Hypothetical question held inconsistent.

A question asked of experts in a will contest case, which in one place stated that the hypothetical man inquired about could not remember anything, and in another place stated he was a lawyer engaged in active practice and trying cases up to the day before his death, was inconsistent.

2. Evidence 🔑568(2) — Experts' answer to hypothetical question as to testator's insanity, held insufficient to sustain verdict against will.

Where a hypothetical question relating to testator's sanity stressed the fact that the hypothetical man had cut off a daughter without any reason clearly did not relate to testator, *held* that the experts' opinions that the hypothetical man was insane were not sufficient to sustain a verdict against the will, especially where the experts testified their opinion would be changed if there was a reason for the provisions of the will, and did not clearly show that they regarded the man as legally insane.

3. Wills 🔑333—General verdict in will contest is unauthorized.

Under Code Civ. Proc. § 1314, requiring a special verdict in a will contest, the jury should find specifically the ultimate fact of incompetence, and a general verdict is unauthorized.

4. Wills 🔑329(5)—Requested instruction that ill will or unnatural disposition did not invalidate if testator was sane held proper.

Where the experts' opinions of testator's insanity were based upon the provisions of the will cutting off a daughter with $1, and the court had instructed that the jury could consider that circumstance in determining the issue of incompetency, requested instructions by proponents that the mere fact that testator bore ill will to one of his children, or made an unnatural disposition of the property, did not invalidate the will if the evidence clearly showed testator was sane, should have been given.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Frank H. Gould, deceased. Contest of a will by Doris Robinson against E. B. Gould and others, proponents. From an order denying probate to the will, proponents appeal. Reversed.

See, also, 181 Cal. 11, 183 Pac. 146.

Frank Freeman, of Willows, and Walter Drobisch, of San Francisco, for appellants.

Joseph A. Brown and Elmer E. Robinson, both of San Francisco, for respondent.

WILBUR, J. This is an appeal by the proponents of a will from an order denying probate to that will after a trial of a will contest before a jury and a verdict against the validity of the will. The only ground of contest was unsoundness of mind. The will was dated January 17, 1918. The testator died January 26, 1918. The situation presented by the record is unique in several respects; among others, the will was written by the testator himself on the last day of the trial of a divorce suit between the testator and his wife, and immediately after the court had announced its conclusion as to the terms of the interlocutory decree, wherein the wife was awarded alimony and certain portions of the property. The testator had participated in the trial, testified as a witness, and had been under the observation of court attachés, witnesses, and attorneys during the trial, and we consequently have a very accurate picture of his mentality at that time, and in view of his sudden death from a rupture of an aneurism of the aorta nine days after the will was executed and the autopsy performed immediately thereafter, we have the medical reports concerning the condition of the brain itself.

The testator was a practicing lawyer of high standing. He continued the practice of the law up to the time of his sudden death, and at that time and for many years he had been the United States Surveyor-General for California, regularly attending to the duties of that office. Some 31 witnesses, business associates of high standing, testified in favor of the proponents of the will that in their opinion the testator at all times was of perfectly sound mind. No business associate or intimate acquaintance testified that in his opinion the testator was of unsound mind.

The testator had four adult children, three by a former wife and one, Doris Robinson, the contestant, a daughter by the wife who had secured an interlocutory decree of divorce on the day the will was executed. The will in question is in the following words and figures, to wit:

> "San Francisco, January 17, 1918.
>
> "This is my last will and testament.
>
> "I hereby revoke all wills heretofore made by me.
>
> "To my wife I leave $1—.
>
> "To my daughter Doris I leave one dollar.
>
> "All the rest and residue of my estate I leave to my three children by my first wife E. B. Gould, A. N. Gould and Gladys V. Gould.
>
> "Written entirely by my own hand and thus dated and signed. F. H. Gould."

The contestant relies upon the testimony of two medical experts, Dr. J. D. Ball and Dr. H. C. McClenahan, whose testimony was elicited by answers to hypothetical questions predicated in part upon the uncontradicted evidence in the case and in part upon disputed evidence. It appears from the testimony without contradiction that in 1914 the testator had suffered from a stroke of apoplexy, from which he quickly recovered without any very notable physical evidences of such a stroke, except a slight change in his facial expression and a slight interference with his walking. There was some change in his mental characteristics. He was more irritable after the stroke than he had been before. He was not strong, and tired more easily. He had separated from his wife eight times before the stroke, and finally separated from her in 1911. His daughter Doris used to come to his office for checks to pay the monthly bills of the household, and on such occasions he was sometimes greatly irritated by the amount of the bills. It is said that this was unusual for him. The stroke of apoplexy was evidence of arterial sclerosis, which continued until the time of his death. The aneurism of the aorta was also evidence of the hardening of the arteries, and the post mortem examination confirmed the fact that the testator was suffering from hardening of the arteries. He was also suffering from high blood pressure at the time of the execution of the will, and this continued up to and caused his death, by the rupture of the aorta, which was already weakened by an aneurism. During the trial of the divorce action on January 17th, the testator became weak and enfeebled, and as an excuse for a temporary respite he stated his condition, and this statement was taken down by the court reporter. The evidence shows clearly that the testator was not suffering from any delusions or hallucinations of any sort. Neither was he suffering from general insanity or dementia, but it was claimed that he was in such a condition, owing to the hardening of the arteries and blood vessels within the brain itself, and by reason of the high blood pressure, that under circumstances of intense emotion his brain would not function normally. From the physical manifestations on the 17th of January it is deduced that the testator was acting under intense emotion, and therefore was in an abnormal mental state. Under these circumstances a will is drawn wherein his beloved daughter is shut off with a dollar. And this adnormal act it is thought is the result of the abnormal functioning of the brain at that time. So that we have, it is claimed, a case of temporary insanity, we might almost say flashes of insanity accompanying flashes of emotion, or, perhaps more accurately, periods of insanity coextensive with periods of intense emotion.

A consideration of the hypothetical question upon which this conclusion is based will show that it is utterly valueless as applied to the facts of the case, because the facts assumed in the question are in conflict with the undisputed facts, and indeed inconsistent with others therein stated, and hence the man described in the hypothetical case is not the testator. The question covers 18 pages of the transcript, and is too long to be quoted in full, and for that reason we point out its defects. The question assumes:

> "That he was very fond of Doris, the contestant in this trial, down to the time of his death. * * *"

It is reiterated:

> "That this affection between the father and daughter *continued and was very great up to the time of his death.*" (Italics ours.)

The testimony of the daughter is that he told her that if she testified falsely in the divorce action she would never be anything to him thereafter. She did testify falsely as he believed in favor of his wife, her mother, and contestant testified that he never spoke to her as he left the courtroom. and no communication was held thereafter between them. The evidence on this subject will be discussed more fully later in this opinion.

[1] The question further assumes "that his memory was very poor after his stroke; *that he could not remember anything;* that he made the promise or appointment; that his memory was very poor after his stroke; that he could not remember anything; that he could not remember names; that he forgot appointments; * * * that his memory was poor; that on occasions in 1916 and 1917 he failed to recognize old acquaintances on meeting them, although apparently looking directly at them; that he frequently forgot his money. * * *" (Italics ours.)

The question thus assumes that the testator *could not remember anything,* in which case he would, of course, be of unsound mind, and no expert would have been needed to so declare. If it be said that the question as a whole could not be so construed, it is true, for it is elsewhere assumed in the question:

> "That Mr. Gould was a lawyer by profession, and that during most of the time mentioned was actively engaged in practicing that profession, *and tried lawsuits in court almost to the day before his death;* that he had attained considerable success as a lawyer, and was politically prominent for many years, having twice been speaker of the assembly at or about 1893 and having been State Building and Loan Commissioner in 1895 and 1896 and since 1914 to the time of his death *having been United States Surveyor General for California, and actually performing his duties as such to the day of his death.*" (Italics ours.)

It would be difficult to conceive of a lawyer without any memory trying a lawsuit. We cannot therefore tell which of these two inconsistent views of the facts the expert adopted in making his answers, or what standard of intelligence and memory between the two extremes he adopted in his answer to the hypothetical question.

[2] The man presented to the experts by means of the hypothetical question is one who, loving and adoring one child and despising the others, impulsively, without other reason than sudden emotion, leaves all his property to his despised children and disinherits his adored one; while the evidence shows that the testator not only had adequate provocation by reason of his daughter's testimony for a cooling of his affection, but also that a definite change in property relations growing out of the settlement and interlocutory decree in the divorce case had occurred, whereby the mother was awarded a substantial part of his property, which the contestant would naturally inherit from her. The defects in this question by reason of the omission of the occasion and results of the daughter's testimony in the divorce case will be made more manifest by a further statement of the facts shown by the record. The contestant stated as follows:

> "Yes, sir; just before I started to testify, he said, 'I would suffer my right arm to be cut off before I would let my daughter go on the stand.' * * *"

During her examination as a witness in the divorce case the reporter's transcript shows the following occurrence:

> "Mr. Savage (the wife's attorney): I won't be dissuaded from performing my duty.
> "The Court: What is the difficulty?
> "Mr. Savage: I am examining this witness, and I don't like to have somebody sitting opposite me and telling me it is a damned shame to ask these questions.
> "The Court: I did not hear that.
> "Mr. Gould: I said it was too bad to put those words in this girl's mouth.
> "The Court: I did not hear that language. If I had, I should have acted severely.
> "Mr. Gould: I realize it.
> "*The Court: I think it is a shame that the young lady is called as a witness at all.*
> "Mr. Gould: I do too. I would cut my hand off before I would do such a thing.
> "The Court: I think there is no necessity for it, but, having done so, there is no use talking about it now.
> "Mr. Gould: Please stop it.
> "The Court: I cannot stop it now. I never called this witness. I have done my best to have you folks arrange your troubles so there would be *no necessity for that which I knew would come.* Proceed, counsel, your question is leading. * * *" (Italics ours.)

Just before this occurrence the daughter had testified that her father had knocked her mother down, and that on another occasion he had knocked her against the washstand. Her testimony was obviously colored to favor her mother and discredit her father. She testified in the divorce case that she had been compelled to stay out of school because she did not have proper clothing, and on cross-examination she was asked if she had as much clothing as she thought she ought to have, and replied, "Not as many as anybody thought I ought to have." She was then asked the following questions and answered as follows:

> "Q. Everybody thought you were poorly dressed? A. I was poorly dressed.
> "Q. You were poorly dressed? A. I was poorly dressed.
> "Q. Everybody thought so? A. I didn't ask their opinion."

The obvious effort of the witness was to convince the judge that she was so shabbily dressed, because of her father's niggardliness that she was compelled to stay out of school. On the trial of this will contest, less than a year and a half later, she testified that she had stayed out of school without her father's consent and had lied to him about it; that the reason she stayed out of school was because she was humiliated by the references of her schoolmates to the then pending divorce case between her father and mother, and that when she finally told her father of this he consented that she remain away from school and take private music lessons instead. She further stated that the reason she did not give this testimony in the divorce case was because her father already knew it. She was questioned and answered as follows:

> "Q. Why didn't you say it at that time? A. He knew when he gave me permission.
> "Q. Why didn't you say it? A. He was there, and he knew when he gave me permission. * * *
> "Q. Was it harder for you to testify from the stand that he had given you permission to stay out of school than to testify that he hadn't furnished you the money with which to go to school? A. No; that was why I quit. That was one reason, and then on account of the divorce; that is another reason; and he knew how I felt about it, and he cried and felt bad for me. * * *"

Is it to be wondered at that a sane man who had cried and felt bad when his daughter had left school because she was humiliated by an action for divorce between her father and mother should bitterly resent that daughter testifying in the trial of that divorce action that she had stayed out of school because he was so stingy that he would not furnish her clothing to wear there?

The significance of this evidence lies in the fact that the medical experts testifying for contestant based their conclusion almost entirely upon the assumption that there was no change in the affection of the father for the daughter, and no reason for such change or for a will disinheriting his favored child. We are not left to mere inference in seeking the cause for his will. The Sunday (January 20th) before he died he told Mrs. Beck, an intimate acquaintance, that he had left Doris out of his will. To this the witness replied that—the daughter "would come around some day and tell him how much she loved him, and did not want to testify in the divorce action, and that her mother compelled her to, and that he would forgive her, and he said: 'It will take a great deal of explaining to set her straight with me. But I didn't leave her out as a matter of punishment. I am not angry with her; I am just terribly grieved that she had so little sense of honor that she could go on the stand and perjure herself as she did; but that is not the idea. In the settlement with her mother I gave the mother the home and its contents, besides other consideration, and I, of course, expect the home eventually to go to Doris, and that will be her portion of the estate, in my opinion.'"

He added:

> "Doris was a disappointment to him; that she was not honorable."

O. L. Evarts, an attorney at law, testified that in September, 1916, the testator said he had made a liberal offer of settlement to his wife, and that he was taking into consideration in making the offer "that he believed his wife would look out for the property he was turning over to her, which he considered about half, and if she looked out for it his children by her would finally get the property." That the day the interlocutory decree of divorce was *entered* the witness talked with testator, and—

> "he said he had given to his wife more property than he thought necessary, and had done better by her; that he had children by his first wife, and his second wife, and believed the second wife would look out for the children of that marriage, and that they would finally get the property, and he was perfectly satisfied with the settlement with the idea that these children of the second wife would get the property finally.
> "He seemed to be well satisfied that the matter was finally adjusted, and discussed some of the conditions of the agreement, but these I do not remember, except one that was he paid his wife $5,000 partly in money and part in some obligation, and was to pay her $75 or $100 a month."

Dr. J. D. Ball was asked as to the effect upon his opinion if the testator subsequently calmly and understandingly discussed the terms of the will, and allowed it to stand and was questioned and replied as follows:

> "A. If he had discussed it rationally and intelligently and without emotion and had a remembrance of what he had done and took into consideration all of the facts of his association with the various members of the family, it would be different."

It is clear from the record that the medical experts in expressing an opinion relied very largely upon the implied assumption in the hypothetical question that there was no sane or logical reason for a change of attitude on the part of the father toward the daughter. This is manifest by the cross-examination of Dr. H. C. McClenahan:

> "Q. Could it be possible that Mr. Gould could have a reason sufficient to himself for changing his affection from his daughter? A. Very much so; but the question does not relate anything of that kind. * * *
>
> "Q. We won't exclude the former relations; we will say that the relations were just as the question expressed them to be—was he of sufficiently strong mind that he could have changed his mind as to that, and changed his affections from his daughter to another member of the family, if he had sufficient reason to himself? A. If there was sufficient reason for it, and he gave valid reasons for cutting his daughter out of the will; no matter what his state of mind was, if the instrument was a logical one for this man to make, the condition of the man's mind would not enter as a factor. A lunatic can make a valid will, if it is a logical will.
>
> "Q. Then you would think that Mr. Gould, suffering as he was from this trouble, could have sufficient reasons to himself for changing his mind as to his affections for his daughter? A. Yes, sir; if he did that—certainly.
>
> "Q. So that there would be conditions under which this will would be absolutely valid, even suffering as he was from this trouble? A. Yes, sir.
>
> "Q. There couldn't be any question about that in your mind? A. Generally speaking, I should say yes.
>
> "Q. He was of sufficiently strong mind to pass on a reason for changing his own mind? A. I don't think there is anything in the question that would justify me in passing an opinion upon his reasoning capacity.
>
> "Q. Nothing in what question? A. In the hypothetical question.
>
> "Q. You are not passing upon his reasoning qualifications? A. No, I was taking the man's condition, and his emotional stress under which he was on the 17th day of January, the date of this will, plus the provisions of the will, in rendering my opinion.
>
> "Q. Perhaps we don't understand one another—I am assuming that these emotions that you speak of could be brought about by some act or conduct on the part of the daughter that would be sufficient to Mr. Gould? A. Yes, sir; and generally are.
>
> "Q. And so far as he was concerned, the making of the will under those conditions, he would be of sufficient mind to dispose of his property in that way? A. I don't think you furnish me hardly enough there to pass an opinion, if I have to carry those facts stated in the hypothetical question.
>
> "Q. I am going away from that hypothetical question. A. Are you including—assuming the hypothetical question?
>
> "Q. What I am getting at now is the reasoning operation and quality of the mind we are dealing with—that is, would it be true that a man suffering as he was would have a strong mind enough to act, and act intelligently, and act rationally, under a given state of circumstances—that is to say, even suffering as he was and with the degree of love that he had for his daughter in prior years; something had come about *that was sufficient to him to change his mind in that regard and make this will*, whether he would have a sufficiently strong mind, suffering under the disease as he was, to make a will that would be valid? A. There is no question about it." (Italics ours.)

Without further quotation from the evidence it is clear from what has been stated that there was omitted from the hypothetical question an uncontroverted fact which would have required the contestant's experts to have pronounced the testator sane, namely, that there was a rational basis for the will and for the testator's attitude as therein expressed toward his daughter and wife.

This brings us to a further consideration of the hypothetical question and to appellant's objection thereto. The question, after a statement of the assumed facts as addressed to Dr. Ball, concludes as follows:

> "Will you state whether or not in your opinion the man was, on the 17th day of January, 1918, of sound or disposing mind, and whatever your answer is give your reasons for your answer?"

To this the following objection was interposed:

> "Mr. Freeman: We now object to the question propounded to the witness on the ground it is incompetent, irrelevant, and immaterial, and on the further ground it is without foundation and not a subject of hypothetical question, but if subject to hypothetical question, the question itself is incomplete and does not state the evidence in such a substantial way as to satisfy the law. * * * A. The individual described in the case presented to me was not of sound *and* disposing mind. * * *" (Italics ours.)

As the question was addressed to Dr. H. C. McClenahan, "or" was displaced by "and," so the question was whether the man was of "sound *and* disposing mind." This witness was also shown the will and over the same objection answered, "I don't think he was of sound mind, nor do I believe he was of disposing mind at the time he executed that will, and under the conditions as stated in the hypothetical question," and in giving the reasons for the opinion states among other reasons:

> "He made a will that is not consonant with his attitude towards his daughter—his previous attitude. * * *"

It is claimed by appellants that the hypothetical question invaded the province of the jury, within the rule stated in Estate of Taylor, 92 Cal. 564, 28 Pac. 603, and Nobles v. Hutton, 7 Cal. App. 25, 93 Pac. 289, but respondent contends that the objection did not sufficiently advise the court that counsel was invoking that rule. We need not determine that matter, for the reason that in any view of the case, even if the evidence was admissible, it is insufficient under the facts to support a verdict. It is true, however, that the evidence is weakened by the form of the question and answers, so that it is at least doubtful as to whether the witnesses were basing their answers upon a conclusion of law from an assumption of fact. This may be illustrated by this portion of the testimony of Dr. Ball on cross-examination:

> "Q. If it were shown to you on the day of the making of his will he testified fully in an action, describing his property fully, so far as he had gone into the matter, and during the day, while he may have had an attack, as stated, of indigestion, or some stomach trouble, he recovered from that, and was cheerful, and without emotion, transacted business of considerable consequence, would that have any effect upon your opinion? A. An individual might know the nature of his act; he might know that he was making a will, he might even know the extent of his property within reason, and still not be of sound mind, *for the reason that he would not understand or appreciate his obligations to those that were dear and near to him.* In this case particularly there is not sufficient correlation between his conduct prior and subsequent to the diseased condition." (Italics ours.)

While the witness had in mind the correct legal rule, stated in general terms, it is clear his answer is based upon that rule, and that his application of the rule may have been wrong in this particular case. For where the testator knew that the contestant was his daughter; that she was married; that she was her mother's sole heir; that the law required that she be recognized in his will; that he had other children entitled to his bounty; that the burden of supporting the daughter had shifted by the law to her husband; that the interlocutory decree of divorce and property settlement had wholly changed the disposition of his property in case he died intestate—it is clear that he had sufficient appreciation of his obligations to his daughter and his other children to make a will. Whether the witness believed so or not, we cannot tell from the record.

[3] It appears then that no witness has pronounced the testator of unsound mind, whatever may have been the status of the hypothetical man described in the question submitted to the experts. The jury also failed to pronounce the testator of unsound mind. The verdict is as follows:

> "We, the jury in the above-entitled cause, find a verdict in favor of the contestant (plaintiff)."

The law requires a special verdict in a will contest (section 1314, Code Civ. Proc.) and the jury should have found specifically upon the ultimate fact of incompetence (Estate of Benton, 131 Cal. 472, 474, 63 Pac. 775), and a general verdict is unauthorized (In re Langan, 74 Cal. 353, 16 Pac. 188).

[4] The court by its third instruction told the jury that they could take into consideration whether or not the will was natural or unnatural in determining the soundness or unsoundness of the testator's mind, and by instruction No. 4 told them that they could weigh the circumstance that he gave his daughter no more than a dollar in determining the soundness or unsoundness of the testator's mind and by instruction No. 6, that they could consider the "affection and state of mind" of the testator toward contestant for the same purpose. In view of these instructions, and the fact that the instructions on mental capacity were couched in very general terms, the court might well have given instructions 6 and 12, proposed by the appellants as follows:

> "If you find from the evidence in this case that the testator bore some ill will or dislike towards one or more of his children, you are instructed that, if the testator was influenced thereby to make his will as he did, and at the time was of sound mind, and did so of his own free choice, his will would be valid, and should be recognized by you. Even if he did it unjustly, or with mistaken opinion as to the matters involved, this would not invalidate the will, but would rather tend to explain why he made his will as he did."
>
> "A will may be considered unnatural when it is different from that which might have been expected by relatives of the testator, or by the jury. But the consideration of that question is of no importance in a case in which the evidence clearly shows that the testator at the time he made his will was of sound mind, and therefore competent under the law to make it. Such evidence is of no moment, therefore, in any case involving the validity of a will unless there is some evidence immediately tending to show mental incapacity."

The instruction that the jury could take into consideration the unnatural character of the will without any explanation of how that fact was to be correlated with other facts might well be misleading.

While the failure to give these instructions may have contributed to the verdict, and to the miscarriage of justice manifested by the verdict, we base our reversal of the judgment solely upon the fact that it is wholly without support in the evidence.

Judgment reversed.

We concur: SHAW, C. J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.; RICHARDS, Justice pro tem.

56 Cal. App. 386

PEOPLE v. MINAMINO. (Cr. 841.)

(District Court of Appeal, Second District, Division 2, California. Feb. 11, 1922.)

1. Homicide ⇨166(6)—Defendant's threats to induce wife of person assaulted to leave husband held admissible.

In a prosecution for assault with intent to murder which was committed when prosecuting witness found defendant at witness' home, defendant claimed he had gone there to remove a misunderstanding existing between himself and witness' wife, evidence on behalf of the prosecution that defendant had threatened the wife in an endeavor to induce her to leave her husband was clearly admissible.

2. Witnesses ⇨277(3) — Cross-examination concerning defendant's relations with wife of prosecuting witness held proper.

In a prosecution for assault to murder where defendant had testified he went to the home of prosecuting witness for an innocent purpose, it was not error to permit the district attorney to cross-examine him as to whether he had threatened the wife of prosecuting witness if she refused to yield to him, and whether he had been to see her a great many times in her husband's absence.

3. Criminal law ⇨829(5)—Requested charge on threats against accused as affecting self-defense held covered.

In a prosecution for assault to murder, a requested charge, that defendant had a right to consider threats made against him by the prosecuting witness in determining whether the appearances were such as to justify a reasonable man believing he was in danger from the prosecuting witness, was sufficiently covered by an instruction that the circumstances indicating danger should be viewed from the standpoint of defendant, and all facts relating thereto considered, including threats made by the person assaulted against the defendant.

4. Criminal law ⇨815(1) — Instruction on flight need not require finding defendant knew he was accused of crime.

An instruction that the flight of a person immediately after the commission of a crime, or after a crime has been committed with which he is charged, is a circumstance indicating guilt, was not erroneous for failing to require a finding that accused knew when he fled that he was accused of the crime.

5. Criminal law ⇨824(15)—Defendant cannot complain of omission of form of verdict which he did not request to have submitted.

In a prosecution for an assault to murder, defendant cannot on appeal complain that no form of verdict convicting of assault with a deadly weapon was submitted, where he made no request for an instruction on the form of such verdict.

6. Criminal law ⇨1173(5)—Failure to submit form for conviction of assault with deadly weapon held favorable to defendant.

In a prosecution for assault to murder, where the court had instructed defendant might be convicted of assault with a deadly weapon and had submitted to the jury only two forms of verdict, one of which was a general verdict for the people, and the other was a general verdict of not guilty, which under Pen. Code, § 1151, import a conviction or acquittal of the offense charged, the failure to submit a form of verdict for conviction of assault with a deadly weapon was error favorable to accused.

7. Homicide ⇨286(1) — Instruction on presumption of intent held not inconsistent with requirement specific intent must be proved.

In a prosecution for assault to murder, instructions that a person is presumed to intend the natural and probable consequences of his own acts, and that the intention is manifested by the circumstances connected with the offense and the sound mind and discretion of accused, were not inconsistent with an instruction that the intent to murder must be proved as a fact in order to sustain a conviction for that offense, since the instructions on presumption did not purport to refer to the specific intent and could have been applied to the intent with which various other acts were committed.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

R. Minamino was convicted of assault with intent to commit murder, and he appeals from the judgment and from the order denying his motion for a new trial. Affirmed.

J. Marion Wright, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was convicted of assault with intent to commit murder as charged in the information. From a judgment and order denying his motion for a new trial this appeal has been taken.

The facts, in so far as they affect the issues here involved, are as follows: On the 16th day of December, 1920, the defendant visited the residence of the complaining witness, who was absent but whose wife was at their home. Later the complaining witness, K. Ozawa, returned and found the defendant and Mrs. Ozawa. A conversation was held having to do with the relation of Mrs. Ozawa and the defendant. According to the people's witnesses, Ozawa ordered the defendant to leave the house and the defendant fired shots at the complaining witness. Two of these struck him. The defendant and Ozawa both went out of the house and the defendant fired further shots, but these did not strike Ozawa.

The defendant denied shooting Ozawa and claimed that he was the one who was attacked and that the shots were fired in a struggle, but denied that the revolver was at any time in his hands. The evidence of the Ozawas sustains the jury in returning a verdict of "guilty of assault with intent to commit murder."

The defendant testified as an explanation of his being at the Ozawa home that he went there to remove a misunderstanding existing between Mrs. Ozawa and himself. In deciding whether the Ozawas' version of the affair was the truth or that stated by the defendant, and especially as to his claim that he was attacked by the complaining witness and his wife, it was important that the jury determine for what purpose defendant came to the Ozawa home. It is quite possible that, where the participants and only persons having first hand knowledge of the encounter flatly contradict one another, the element of motive might, in the mind of the jury, be determinative in deciding where lay the truth in the whole matter. The defendant evidently regarded this as important, for he carefully explained to the jury his purpose in going to Ozawa's residence.

[1] The contentions of the defendant in this appeal have to do with alleged error in the introduction of evidence having a bearing on the question of motive and the refusing and giving of certain instructions. The district attorney attempted to show that the defendant had endeavored to induce Mrs. Ozawa to leave her husband and go with him, and in this attempt had, among other things, threatened to kill her if she did not accede to his demands, During the taking of testimony on the people's case in chief, the court sustained objections to questions calling for answers of this character. Regardless of whether or not they were then proper, when the defendant took the stand and told his story they became so as cross-examination. At this time the objections of the defendant were overruled. Later Mrs. Ozawa was produced as a witness and in rebuttal testified to the threats of the defendant which he had denied and which according to her testimony were made in an endeavor to induce her to leave her husband and enter into unlawful relations with the defendant. We think this evidence was clearly admissible.

[2] Appellant insists that there was no ground upon which the district attorney had the right to ask the following questions:

> "Q. 'Now, did this conversation occur—did you on that occasion, or did the defendant on that occasion, ask you to have unlawful relation with him, and threaten you, to kill you, if you did not have that relation with him, with this revolver that you have previously testified to?'"
>
> "Q. 'You had been to see Mrs. Ozawa on a great many occasions in Mr. Ozawa's absence before the last of November, hadn't you?"

Common observation teaches that a man who has sustained, or attempted to sustain, unlawful relations with another's wife, may be expected to entertain ill will and perhaps hatred toward the husband. If the motive which actuated the defendant was a proper question for the jury to consider, surely these questions and the answers elicited by them were entirely proper to show motive on the part of the defendant. The court instructed the jury, presumably at defendant's request and, at any rate, without his objection, that if the evidence fails to show motive on the part of the accused to commit the crime charged, this is a circumstance in favor of the defendant's innocence and is to be weighed carefully by the jury in connection with the other evidence in making up the verdict. This statement of law is elementary, and it is equally so that evidence tending to show motive upon the part of the accused to commit the crime charged is competent and relevant in a case of this character

[3] Appellant insists that the court erred in refusing to give an instruction requested by the defendant to the effect that the defendant had a right to take into consideration threats made against him by the complaining witness or others acting in conjunction with him; that he had a right to take these threats into consideration at the time of the shooting; and that the jury must consider them in determining whether or not the appearances were such as to justify the defendant as a reasonable man in believing that he was about to suffer death and great bodily harm at the hands of the complaining witness or those acting in concert with him. The principle of law stated in this instruction was given to the jury in another part of the charge where the jury was told that—

> "In arriving at a conclusion as to whether appearances to the defendant at the time of the assault were such as to lead a reasonable man to believe that he was about to suffer death or great bodily harm at the hands of the persons assaulted, you should view the circumstances and appearances from the standpoint of the defendant, and take into consideration all the facts that have been testified to, that may actually have influenced him in his belief, such as the attitude and manner and *threats made by the person assaulted against the defendant, if any have been proven;* the dangerous violent character of the said person assaulted, if such has been proven; the size and strength of said person assaulted, and all other facts and circumstances in evidence which would tend to raise a reasonable fear in the mind of the defendant as a reasonable man." (Italics ours.)

[4] The court also gave this instruction:

> "The flight of a person immediately after the commission of a crime, or after a crime has been committed with which he is charged, is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case."

It is claimed that this instruction should not have been given unless the court had further informed the jury that they might consider flight as indicative of consciousness of guilt where it is shown that the defendant knew when he fled that he was charged with having committed a crime. Consciousness of guilt must exist in the mind of one who has committed any crime involving specific intent, regardless of whether or not the person is aware that he has been charged with crime. We think the instruction given was a proper one. There is nothing in the case of People v. Murphy (Cal. App.) 200 Pac. 484, to the contrary. In that case the court held that the evidence showed that the defendant had knowledge that he was charged with the crime in question and therefore was not prejudiced.

Another instruction pointed out as erroneous is the following:

> "Upon retiring to the jury room you should select one of your number to act as a foreman or forewoman, and, when twelve of your number have agreed upon a verdict, you will return to the court and announce your verdict. If your general verdict shall be in favor of the people of the state of California, then it should read as follows: 'We, the jury in the above-entitled action, do find the defendant guilty of assault with intent to commit murder as charged in the information.' If your general verdict should be in favor of the defendant, it should read as follows: 'We, the jury in the above-entitled case, find the defendant not guilty.'"

It will be noted that the instruction complained of expressly referred to a "general" verdict only. This "imports a conviction or acquittal of the offense charged in the indictment." Section 1151, Pen. Code. But appellant complains that this instruction makes no mention of the form of the verdict which the jury may use should it find the defendant guilty of assault with a deadly weapon.

[5] It does not appear that the defendant requested the court to instruct the jury as to the form of the verdict which they would use in case they should find the defendant guilty of assault with a deadly weapon. Therefore he cannot complain that such instruction was not given. People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Clark, 145 Cal. 727, 79 Pac. 434.

[6] Further, the instruction under consideration was one concerning the form of the general verdict to be used. Where, as in the instant case, the court fully instructed the jury that it could not find defendant guilty as charged unless it found as a fact beyond a reasonable doubt that the defendant at the time of the assault intended to kill and murder the complaining witness, the failure of the court to mention the form that might be used in case the defendant should be found guilty of the lesser offense of assault with a deadly weapon cannot have prejudiced the defendant. The court's charge elsewhere explained the law on the doctrine of reasonable doubt and the presumption of innocence. In another instruction the jury had been informed that the crime of assault with a deadly weapon was included in the charge of assault with intent to commit murder and under what circumstances the jury might find the defendant guilty of the lesser offense. We cannot assume that the jury would disregard these instructions, but it is only fair to suppose that they would follow them, and, unless convinced beyond a reasonable doubt of the defendant's guilt of the higher offense, they would acquit him altogether. People v. Clark, supra. If error were committed, it was favorable to the defendant. People v. Clark, supra, and People v. Lopez, 135 Cal. 25, 66 Pac. 965. However, we hold that no error has been shown.

[7] Finally appellant urges that certain instructions on the presumptions and proof necessary to show intent were conflicting and that two of them were erroneous.

The following instruction is admitted to have been a correct statement of the law:

> "You are instructed that the defendant, R. Minamino, is charged with committing an assault with a deadly weapon upon one K. Ozawa. In order to convict the defendant of this crime, it must be proven beyond a reasonable doubt that at the time the assault was made upon K. Ozawa, if you find there was such an assault made, the defendant intended to kill and murder said K. Ozawa, and this intent to kill and murder must be proven from the evidence as a fact, and that this intent existed at the time of said assault, if you find that the defendant did assault said K. Ozawa."

The instructions said to be inconsistent with the one last quoted are:

> "A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own acts."

And—

> "The court further instructs the jury that the intent or intention with which an act is done is manifest by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots or lunatics or affected with insanity."

We find no error in the giving of these instructions. The principles announced by them are not subject to dispute. Counsel has mistaken their application. They do not purport to refer to the specific intent which is an element of the offense charged. By the first instruction quoted upon this phase of the case, the court excluded them from consideration in this regard. But the jury must weigh all of the evidence before them and in performing that duty were required to determine the intent with which many acts were done by the various parties who participated in the altercation under investigation. The charge in this regard is entirely consistent and correct.

The defendant was fairly tried and was found guilty as charged upon evidence fully sufficient to sustain the verdict.

The judgment and order appealed from are affirmed.

We concur; FINLAYSON, P. J.; WORKS, J.

56 Cal. App. 355

WESTERN INDUSTRIES CO. v. MASON MALT WHISKY DISTILLING CO. et al. (Civ. 3934.)

(District Court of Appeal, First District, Division 1, California. Jan. 31, 1922. Hearing Denied by Supreme Court March 30, 1922.)

1. Sales 🔑172—Fact that compliance incurs greater expense than anticipated did not excuse performance.

The fact that compliance with a contract of sale of slops of a distillery incurred greater expense in regard to freight rates than was anticipated did not excuse performance.

2. Sales 🔑87(3)—Finding that delivery of slops was not to be made in any particular manner sustained.

Under a contract of sale of slops of a distillery, evidence *held* to support the construction of the trial court that delivery was to be made in no particular way, and that seller was obliged to deliver by tank cars exclusively if transportation by barge was not feasible.

3. Contracts 🔑176(1)—Construction of contract and undisputed evidence for court.

Where evidence introduced to aid in the construction of a contract is undisputed, it is the duty of the court to construe the contract in the light of such evidence.

4. Appeal and error 🔑213—Question treated below as one of law so treated on appeal.

Where question was treated by the parties as one of law in the trial court, it cannot be urged on appeal that the court should have submitted it to the jury.

5. Sales 🔑418(12)—Rule as to damages from loss of profits of resale stated.

Generally, in the absence of notice of a resale contract of the commodity contracted for, a buyer cannot recover, as special damages, his loss or profit on such resale on seller's failure to deliver and is limited to the market value of the product; but this rule applies only where the commodity has a fixed market value and the buyer is in a position upon breach to supply himself with the article contracted for.

6. Sales 🔑416(2)—Contracts of sale of product extracted from slops sold held admissible to show damages for nondelivery.

Where seller of distillery's slops, which had no market value, had knowledge that buyer had purchased the same for the purpose of extracting potash salts therefrom, for which it had offers of purchase, buyer's contracts for sale of the potash salts were admissible in evidence to prove value and loss of profits resulting from seller's failure to deliver.

7. Trial 🔑255(4)—Instruction as to purpose of evidence unnecessary in absence of request.

In action for damages for nondelivery, where plaintiff was permited to introduce in evidence contracts with third parties to show value of product extracted from the commodity sold, his counsel disclaiming that measure of damages was fixed by price contained in contract, a matter made clear to the jury by the court in the reception of the evidence, defendant cannot complain that court did not instruct upon the question, at least in the absence of a request.

8. Appeal and error 🔑1050(1)—Admission of instrument showing facts otherwise in evidence harmless.

If it was error to admit contracts in evidence, there was no prejudicial error where everything shown by the contracts was shown by other evidence admitted without objection.

9. Sales 🔑86—Assignment of rights under contract to purchase held valid.

An assignment to successor by buyer of rights under contract to purchase the slops from a distillery was valid and good as against the seller.

10. Estoppel 🔑92(2)—Seller estopped to deny power to assign contract.

A distillery was estopped to question the right of buyer to assign its rights under a contract of purchase and sale of the slops of the distillery, where it recognized the assignee as a successor of the buyer and made deliveries to it and received payments from it.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Western Industries Company against the Mason Malt Whisky Distilling Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Morrison, Dunne & Brobeck and Norman A. Eisner, all of San Francisco, and Thomas P. Boyd, of San Rafael, for appellants.

J. C. Meyerstein, Oscar Sutro, and Pillsbury, Madison & Sutro, all of San Francisco, for respondent.

TYLER, P. J. This action was brought to recover damages against defendant company for breach of contract. By a separate count plaintiff has joined as codefendants the stockholders of defendant company. Trial was had by jury and a verdict in the sum of $300,000 was rendered in favor of plaintiff. From the judgment entered thereon this appeal is taken.

The contract sued upon was entered into by and between defendant Mason Malt

Whisky Distilling Company (hereafter referred to as the Mason Company) and the Western Grain & Sugar Products Company, the plaintiff's predecessor in interest. The contract was made on November 10, 1916, and was assigned to plaintiff on April 26, 1917; this company having succeeded to the business of the Western Grain Company. Both parties operated plants for the manufacture of alcohol; plaintiff's works being located at Agnew, Santa Clara county, and the defendant's near Sausalito, in Marin county. The process of manufacture at both plants involved the distillation of molasses from which alcohol was extracted. From this process there resulted a certain waste or residuum commonly called "slops." These slops contained a certain percentage of potash. Prior to the time the contract was entered into, defendant company had been discharging this residuum through a pipe line into Richardson's Bay. Plaintiff's assignor had developed a process for the incineration of such slops and the extraction of potash therefrom, and was desirous of obtaining those of defendant company to be used for this purpose. A contract was accordingly entered into by the parties for the sale of the same. The contract provided that the slops from defendant's plant up to 70,000 gallons per day and any amount in excess thereof that plaintiff could receive up to 100,000 gallons per day should be delivered by defendants to plaintiff at its plant at Agnew. The gravity was provided for and it was stipulated that the slops should contain not less than 1.25 units of soluble K_2O (potash) per ton of 2,000 pounds. The price was fixed at 50 cents per unit of potash contained in a ton plus freight at the rate of 85 cents per ton; this combination of prices being equivalent to $1.18 per unit of soluable potash contained in the slops per ton. net, f. o. b. cars at Agnew. Any reduction in freight rates was to be shared equally between the seller and buyer, and any profits arising in freight on account of concentration of the slops at plant of seller should belong to the seller. For the purpose of determining the potash content, it was provided that a sample of each carload shipment was to be drawn by both parties. by the seller at point of loading cars, and by the buyer at point of emptying cars. The contract contained a clause that in the event of strikes, or for any other cause interfering with transportation or production of the goods, seller might suspend deliveries during actual time of such delay or interference, and a similar provision protected buyers against receipt of deliveries. The contract was to remain in force until July 15, 1917, with renewal options to extend as long as the buyer might see fit, under the same terms and conditions, such renewals, however, not to extend for a period thereafter longer than two years.

Performance of the contract was entered upon, and, subsequently, on April 26, 1917, it was assigned to plaintiff, the successor of the original company, and after this date all slops were billed by defendant to the new company and paid for by it. Plaintiff renewed the contract pursuant to the option at various times and for stated periods, until finally renewal was requested for the full remaining period of one year. This final election of renewal was made on March 21, 1918, and after defendants had notified plaintiff that they would make no further deliveries, for the reason, as they stated, that they lacked suitable transportation facilities, and no further deliveries were made, notwithstanding that the contract provided that in the event of means of transportation failing that deliveries might be suspended, not terminated. Thereafter this action was brought. The complaint alleges the making of the contract on November 10, 1916, with plaintiff's assignor, the assignment and ownership by plaintiff of the contract, and the breach thereof, and concludes with a prayer for damages. The answer of defendants denied that the Mason Company failed or refused to make deliveries contrary to the terms of their contract, and alleged in substance that transportation was interfered with, and that the only possible means of delivery was by barges in conjunction with tank cars, and that for various reasons defendants were unable to obtain the same. About a year after the complaint was filed and after the trial had commenced, defendants asked for and obtained permission from the court to file an amendment to their answer, under which a special defense was interposed. The amendment alleged that it was impossible for defendants to make deliveries without a material quantity of slops flowing into waters of the state, and that criminal proceedings had been instituted against defendants for violation of the state laws, and that the board of supervisors of the county of Marin had notified the defendant company that if it continued to pollute the waters of the state proceedings would be instituted to abate its business as a nuisance. That by reason thereof it is alleged defendant was forced and compelled to cease making deliveries.

At the trial, and for the purpose of proving that lack of means of transportation did not prevent deliveries, and that the refusal of defendant company to make the same was willful and deliberate, and was occasioned by its desire to utilize plaintiff's process and to reap greater profits by manufacturing the potash for itself, plaintiff offered, and there was received in evidence, testimony to show that prior to the time that defendant company notified plaintiff that deliveries could no longer be had, that the former engineer of plaintiff was employed by defendant, who erected a plant similar to that of plaintiff's and that immediately thereafter shipment of slops declined, and that defendant itself produced during the life of the contract a large quantity of potash salts for which they received a sum greatly in excess of the amount of damages here recovered. Further testimony was introduced to show that an officer of defendant company admitted to the general manager of plaintiff that the reason for failure to make deliveries was that defendants desired to extract the potash themselves so as to make more money. It also appears, from evidence offered by plaintiff and received by the court, that defendant company made no effort to obtain towboats, tank cars, or barges after it ceased to make deliveries, and that both tank cars or barges were readily obtainable, and that shipment without the use of barges could have been made by tank cars at Waldo shipped to Agnew. Evidence on this subject is abundant, but we do not deem a recital thereof necessary. It is sufficient to say that it is ample to support the contention that transportation was possible even with the elimination of barges. It was appellant's contention below, and is here, that it was not obliged to transport the slops by any other method that would subject it to higher expense than that which it incurred by shipment in barges. The court construed the contract as meaning that transportation by barges in conjunction with tank cars was not the exclusive or qualified method provided for deliveries by the contract, and this conclusion is reflected in the rulings of the court in the giving and refusal to give instructions to the jury upon this subject. A recital of these instructions would lengthen this opinion to undue proportions and answer no useful purpose. The court was consistent in its rulings with reference thereto, which were to the effect that no exclusive method of transportation or deliveries was contemplated by the parties, and that neither could defendant excuse its failure to perform on the ground that the use of barges involved an illegal spillage in the state waters if other means of transportation existed. This conclusion finds support in the express language of the contract. Nothing is said therein with reference to "barges." The sampling clause provides that the seller shall draw samples at the point of loading cars, and the buyer at the point of emptying cars. It further provides that freight weights are to govern. These provisions would strongly indicate that the parties did not contemplate an exclusive delivery by barges in conjunction with tank cars. The means of transportation, however, was of no moment to plaintiff. Its object was to have deliveries made under the contract. Transportation by barges in conjunction with tank cars was agreeable to it, and, indeed, all deliveries were had during the performance of the contract by this method. The mere fact, however, that the parties had in contemplation this means as a possible method of delivery, does not prove that it was the sole method by which deliveries were to be made. The case was tried upon the theory whether or not transportation by all tank car route was feasible, assuming barge deliveries to have been impossible. Considerable testimony was had upon the subject by both sides. The construction contended for by appellants at the trial was that, if they could not ship by barges in conjunction with tank cars, a different method was not practical or feasible, and that they were not required to ship at all. Plaintiff's theory was that transportation was practicable and feasible by an all-rail method, and that defendant was bound to make deliveries in this manner if delivery by barges was impossible.

[1, 2] Defendant, by the terms of its contract, having obligated itself to make deliveries in tank cars at Agnew, mere inconvenience or added expense did not excuse it from failing to employ any feasible or reasonable method of transportation. If the language of the contract is clear and unambiguous, the fact that compliance with its terms incurs greater expense than was anticipated does not excuse performance. Parties sui juris cannot escape performance of their undertakings because of unforeseen hardship. Sample v. Fresno, etc., Co., 129 Cal. 222, 61 Pac. 1085; Metzler v. Thye, 163 Cal. 95, 124 Pac. 721; Klauber v. San Diego Street Car Co., 95 Cal. 353, 30 Pac. 555; Ryan v. Rogers, 96 Cal. 349, 31 Pac. 244. If defendants had intended to exclude all-rail deliveries, they should have so contracted. Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209; Withers v. Moore, 140 Cal. 591, 74 Pac. 159; Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 75 Pac. 787; Sheffield Furnace Co. v. Hull Coal Co., 101 Ala. 446, 14 South. 672. They not only did not do so by express terms in their contract, but adopted language, as above pointed out, indicating that such was not their intention. Assuming, therefore, that the use of barges became impossible, such fact did not excuse nondelivery if delivery could be had by the use of tank cars exclusively. The evidence shows that such delivery could be had, and in addition thereto that plaintiff offered to absorb any additional freight rate by either method of transportation if only deliveries were made. We therefore conclude on this question that the construction given by the trial court was correct and finds support in the evidence. The instructions to the jury upon this subject were therefore proper.

[3, 4] In this connection it is further urged that the court erred in not submitting to the jury the question as to whether or not it was the intention of the parties that barge method of transportation was intended to the exclusion of the more expensive

all-tank-car method, it being the claim of appellant that the jury should have been instructed hypothetically to render a verdict one way or the other upon the subject. It must be conceded that, if the question in respect to transportation and delivery was a debatable one, it would be error to remove the question from the jury. In such a case the matter should be submitted to the jury with hypothetical instructions to render a verdict upon the facts. Cal. Drilling Co. v. California Midway Oil Co., 178 Cal. 337, 177 Pac. 849; Brett v. Vanomar Co. (Cal. App.) 187 Pac. 758. Where, however, the evidence introduced to aid in the construction of a contract is undisputed, it is still the duty of a court to construe the contract in the light of such evidence; the question being still one of law to be determined by the court and the jury instructed as to the meaning and effect thereof. Green v. Soule, 145 Cal. 96, 78 Pac. 337; Pierce v. Merrill, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56; Aguirre v. Alexander, 58 Cal. 21. As heretofore indicated, no contention was ever made, either under the pleadings or at the trial, that an exclusive method of transportation was ever intended by the terms of the contract. At no time was it claimed that the contract did not contemplate shipments without the use of barges in conjunction with tank cars. The original answer proceeded under the theory that barging was the only feasible method of transportation, and that barges were not obtainable, and the amendment to the answer was had for the purpose of showing that transportation could not be made by this method on account of threatened prosecution. Under neither defense, however, was an issue tendered that the contract was ambiguous or that the parties intended to provide thereby that barges were to be used to the exclusion of an all-rail shipment or by any other reasonable and practicable method of transportation. The whole case was tried upon the issue whether transportation was possible or feasible, not whether the contract excluded transportation by tank cars as a method of delivery, but whether the transportation by tank cars was feasible. It is now claimed that the freight allowance indicated an exclusive delivery by means of barges in conjunction with tank cars. We have examined the record, and we fail to find where any such claim was ever made, and counsel have directed us to none. It is true, as pointed out by counsel, that it appeared in evidence that the original barge rate to Oakland long wharf was 15 cents per ton. It is also true that the manager of defendant company testified that the tank rate from that point to Agnew was 70 cents per ton, and that these two items would amount to 85 cents, the freight allowance fixed, which, added to the 50 cents per unit of potash, would equal the $1.18 combination price per unit of potash provided for under the contract. It is also true, however, that documentary evidence showed that the tank car rate from Oakland pier to Agnew was 75 cents, and not 70 cents; the combination of these charges being 90 cents. It further appears that the tank car rate was subsequently reduced 25 cents, to 50 cents per ton. However this may be, while these facts appeared in evidence during the course of the trial, it was at no time contended by defendant that they in any manner indicated that an exclusive delivery by barges in connection with tank cars was thereby intended. No such issue was ever raised at the trial. Plaintiff proved by sufficient testimony in response to the only issue raised, that the use of barges was unnecessary and that it was reasonable and feasible to make deliveries by tank cars exclusively. It also proved that defendant made no effort to obtain either tank cars or barges after March, 1918, although there is evidence to show that both were abundantly available. No attempt ever having been made by defendant to show what the parties intended by way of transportation of deliveries, or that any evidence indicated such intent, it was not entitled to an instruction upon this subject. The question was never treated by the parties as one of fact, but as one of law. Defendants cannot now urge that the court should have instructed the jury upon the question of what the parties may have intended. This question of intent could not be raised for the first time after trial. Hanson v. Fricker, 79 Cal. 283, 21 Pac. 751; Brett v. Vanomar, supra; Elsom v. Neff, 27 Cal. App. 174, 149 Pac. 375.

Counsel for defendants have cited us to numerous authorities to support their contention that this question of intent as to the method of delivery should have been submitted to the jury. A review of those cases would answer no useful purpose. In all of them an ambiguity in the contract involved existed in which disputed extrinsic facts were in issue, and their determination was properly a matter for the jury. No such condition is here involved. The case was not tried upon this theory. The jury was fully and fairly instructed upon the subject. We are therefore of the opinion that there is no merit in this contention.

[5-8] Further objection is made that the trial court erred in admitting in evidence contracts made by plaintiff for the sale of the potash which it manufactured from the slops purchased from defendant. These contracts showed that plaintiff had sold the potash salts for the entire period of its contract with defendant, to the American Agricultural Chemical Company, for $4 per unit. The admissibility of this evidence is assailed on the ground that such contracts constituted resale agreements not disclosed to defendant at the time it entered into the contract, for

which reason, it is argued, they can neither measure plaintiff's damage nor by evidence of market value. The objections arise upon the admissibility of the contracts and the instructions of the court to the jury upon the measure of damages in reference thereto. The general rule upon the subject is that, in the absence of notice of a resale contract of the commodity contracted for, a buyer cannot recover, as special damages, his loss of profit on such resale, but is limited in his damages to the market price of the product. 1 Sedgwick on Damages, § 163. This doctrine, however, applies only where the commodity has a fixed market price, and the buyer is in a position upon breach to supply himself with the article contracted for. It can have no application where, as here, the contracts are not, properly speaking, resale contracts. The subject-matter of these contracts dealt with the sale of potash, a manufactured product. The contract here sued on was one dealing with the sale of slops. This commodity was not obtainable elsewhere. There was, so far as the record shows, no market price for it. Defendants had knowledge that plaintiff had made the purchase thereof for a particular purpose, for the correspondence had between the parties with reference to the sale of the slops, at and before the time the contract was entered into, shows that defendant knew that plaintiff contemplated the manufacture of potash salts therefrom for which it had offers of purchase, and in the manufacture of which it intended to construct additional and costly improvements in anticipation of deliveries. In such a case the authorities are clear that where a breach occurs under such circumstances the vendor is liable on his contract for any damages resulting to the vendee arising from a failure to deliver the property where such damages are not remote or speculative, and that his contract is admissible to prove value. Lillard v. Kentucky Distilleries Co., 134 Fed. 168, 67 C. C. A. 74; Richner v. Plateau Live Stock Co., 44 Colo. 302, 98 Pac. 178; Equitable Gas Light Co. v. Coal Tar Co., 65 Md. 73, 3 Atl. 109; Hockersmith v. Hanley, 29 Or. 27, 44 Pac. 497. Here the contracts were offered and received, not for the purpose of proving the amount received for the product, but for the sole and limited purpose of tending to show that it could be sold and that it had some market value, and that plaintiff's profits were not problematical or speculative. This evidence was responsive to the issue that the product had a value. Nowhere in the record does it appear that the plaintiff claimed that his measure of damages was fixed by the price contained in the contract. Such a purpose was expressly disclaimed by counsel in his offer and by the court in the reception of the evidence. The trial judge, in referring thereto, frequently expressed his view that evidence of what an article could be sold for was some evidence of market value. Defendant complains of lack of instructions upon this question. The purpose of the admission was made perfectly clear to the jury, and if counsel desired any particular instruction upon the subject he should have asked for it. Here plaintiff was not seeking to recover any special damage, but simply the loss of certain and fixed profits arising from the breach, for which plaintiff is entitled to recover. National Oil & Refining Co. v. Producers, etc., Co., 169 Cal. 740, 147 Pac. 963. We are of the opinion that there was no error in this ruling of the court. Phillips v. Stark (Cal. Sup.) 199 Pac. 509; Meyer v. McAllister, 24 Cal. App. 16, 140 Pac. 42; Carey Coal Co. v. Beebe Concrete Co., 88 Kan. 515, 129 Pac. 191, 44 L. R. A. (N. S.) 499, Ann. Cas. 1914B, 806. If we assume, however, that the contracts were inadmissible for any purpose and were therefore improperly received, still we do not see how defendants can avail themselves of this alleged error. The substance and contents thereof were already in evidence without objection at the time of the formal offer. It was in evidence what the manufacturing cost of the potash salts amounted to, and also the profit derived therefrom, and that the American Agricultural Chemical Company bought and had offered to buy all this commodity that plaintiff could manufacture during the entire period of the contract, at the price of $4 per unit. This is all that the contracts showed. In addition thereto, both parties introduced evidence as to the market value of the product, and this evidence shows without conflict that the market price of potash at Agnew was, at the date of any of the contracts, higher than the price fixed therein. The admission of the contracts in evidence therefore was not prejudicial. The introduction of evidence that can have no material effect beyond that which is already in the record without objection is harmless and not reversible error. Mackenzie v. Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209; 4 Corpus Juris, p. 978.

[9, 10] And, finally, it is contended that the contract was not assignable, and the defendant Mason Company was not estopped by its deliveries under the extensions, to decline to assent to plaintiff's final attempt to renew the contract. We see no merit in this contention. The assignment shows that plaintiff was but the successor of its predecessor. The contract contained no provision against assignment and, furthermore, from and after the date thereof defendant company recognized plaintiff as the successor of its predecessor under the contract, for after the assignment all slops were billed by it to plaintiff, and payment was received by it from plaintiff, and deliveries were made pursuant to the various extensions until defendant's final refusal to make deliveries under the last renewal period. Under these circumstances, defendants are estopped to question the assignment. Randol v. Tatum, 98 Cal. 390, 33 Pac. 433.

Other points are governed by the views herein expressed, and do not require further discussion. There is ample evidence in the record to show that the undelivered units of potash which defendant failed to deliver, and upon which defendant made large profits, justified a verdict for an amount in excess of that herein rendered.

For the reasons given the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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56 Cal. App. 378

BERRY v. LEBUS et al. (Civ. 4147.)

(District Court of Appeal, First District, Division 1, California. Feb. 11, 1922.)

1. Perpetuities 🔑6(4)—Trust vesting remainders in children and issue of deceased children of cestui held valid.

A trust deed, vesting a cestui's interest in her children, and the issue of deceased children on her death, is valid whether a child be born before or after the creation of the trust; the absolute power of alienation not being suspended beyond the period permitted by Civ. Code, § 715.

2. Perpetuities 🔑6(2)—Provision for delivery of property to children of cestui on arrival at certain ages held not invalid.

A trust deed, directing delivery of the property in specified proportions to children of grantor's sister, after her death, on their arriving at the ages of 25, 30, and 35 years, *held* not to suspend power of alienation beyond the lives of persons in being in violation of Civ. Code, § 715, the effect thereof being merely to give to children in being at the creation of the trust the benefits provided for them while they lived.

3. Perpetuities 🔑6(6)—Trust deed directing delivery of shares to cestui's children on reaching certain ages held not invalid on provision terminating trust on death of all persons then in being.

A trust deed, providing for the termination of the trust and distribution of the principal of the estate on the death of the last survivor of persons in being therein mentioned is not invalid because of a direction that the property be delivered in specified proportions to the children of grantor's sister, after her death, on their arriving at the ages of 25, 30, and 35 years, on the ground that a child born after the creation of the trust might not arrive at the age designated before all lives then in being had become extinct, an interpretation which gives effect being preferred, under Civ. Code, § 3541, to one which makes void.

4. Wills 🔑629—Construction vesting gifts favored.

In case of ambiguity or inconsistency, the law favors a construction which will cause gifts to vest if the opposite construction will render the instrument void. Civ. Code, §§ 1317, 1326.

5. Trusts 🔑11(2)—Directing distribution held not invalid, even if construed as trust to convey.

Under Civ. Code, § 857, authorizing the creation of an express trust to convey, partition, divide, etc., a trust directing distribution of the property and delivery of their respective shares to the beneficiaries as they reached certain ages is not invalid, even if construed as a trust to convey.

6. Quieting title 🔑34(1)—Complaint to set aside trust held not to state cause of action to quiet title.

A complaint in an action to set aside a trust *held* not to state a cause of action to quiet title, so that, the validity of the trust being established, a general demurrer to the complaint was properly sustained.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Elizabeth Lebus Berry against Bertha Lebus and others. From an order sustaining a general demurrer without leave to amend, plaintiff appeals. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

O'Melveny, Milliken & Tuller, of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal from an order sustaining a general demurrer to the complaint without leave to amend.

The complaint alleges that the plaintiff is the daughter of Martha C. Lebus, deceased; that her maiden name was Elizabeth Lebus; that formerly she was the wife of C. S. Holman, but subsequently married Thomas H. Berry; that she has two children, one being of the age of 17 years and the other of the age of 14; that Martha C. Lebus died intestate in the city of Los Angeles in September, 1918, leaving as her only heirs at law said plaintiff and defendants Bertha Lebus, Orrie Lebus, and Clarence Lebus; that Bertha Lebus is the duly qualified and acting administratrix of the estate of the deceased. It further appears from said complaint that the deceased was, and her heirs at law now are, the owners and entitled to the possession of the property affected by the present litigation; that on the 22d day of September, 1917, Martha C. Lebus devised a plan for the creation of a trust in said property to endure beyond the lives in being at its creation and affected thereby, contrary to the provisions of section 715 of the Civil Code; that on the 22d day of September, 1917, said Martha C. Lebus executed to the defendant, the Title Insurance & Trust Company, a declaration of trust upon said property, and which is described in the complaint; that under the terms thereof upon her death said property was to vest in Bertha Lebus, Elizabeth L. Holman, Orrie Lebus, and Clarence Lebus, and in the event of the death of any of these prior to such vesting, except in the case of Elizabeth L. Holman, the interest of the one so deceased was to pass to her issue, or, if no issue, then to his devisees or legatees, or, in case of intestacy, then to those entitled to take under the laws of succession then in force in the state of California.

Paragraph 7 of the said trust is in part as follows:

> "Should said Elizabeth L. Holman not be living at the date of the death of Martha C. Lebus during the life of this trust, as aforesaid, or upon the death of said Elizabeth L. Holman after the vesting in her of said one-fourth of said trust estate, then said interest of said Elizabeth L. Holman in and to said trust estate shall thereupon pass to and vest in the children of said Elizabeth L. Holman, share and share alike—the issue of any child of said Elizabeth L. Holman, deceased, to take the share of the parent by right of representation, per stirpes and not per capita, or if there be no such issue of such deceased child of said Elizabeth L. Holman, then such share of such deceased child shall pass to and vest in the other children * * * of said Elizabeth L. Holman, share and share alike; and in the event there be no child or issue of child of said Elizabeth L. Holman to take said share of said Elizabeth L. Holman in and to said trust estate, then said share shall pass to and vest in the heirs at law of said Martha C. Lebus, ascertained by and in the proportions to which they would then be entitled by the laws of succession then in force in the state of California; each such vesting to be subject, however, to all of the terms and provisions hereof."

Paragraph 12 of said trust instrument reads as follows:

> "The shares of said trust estate hereunder (if any) vesting under the terms hereof in child or children of said Elizabeth L. Holman or issue of child or children of said Elizabeth L. Holman, as hereinbefore provided under section 7 hereof, shall be held hereunder and delivered by said trustee as follows:
>
> "$60,000.00—preferably in money or securities—shall thereupon or as soon thereafter as available under this trust (said trustee being authorized to sell property then held hereunder to obtain such sum) be set aside by said trustee and held hereunder until the date of the death of the last survivor of children now in being of said Elizabeth L. Holman; said sum to be invested and reinvested under the terms hereof during such period, and the net income arising therefrom paid to the children, or issue of deceased child or children of said Elizabeth L. Holman entitled thereto as hereinbefore provided under said section 7.
>
> "And the remainder of said shares first mentioned in this section shall be held by the said trustee hereunder for the persons entitled thereto, for payment of the net income arising therefrom to such persons as their interests from time to time appear; and delivery of the principal of each such share shall be made by said trustee as follows:
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> "One-third of the principal of each such share so having vested in a child of said Elizabeth L. Holman shall be delivered by said trustee to such child when such child shall have reached the age of twenty-five (25) years; one-third thereof when such child shall have reached the age of thirty (30) years; and one-third thereof when such child shall have reached the age of thirty-five (35) years."

Paragraph 15 of said deed of trust is as follows:

> "It is distinctly understood that it is not the intent hereof to create a trust extending beyond lives in being; therefore, in any event, upon the death of the last survivor of persons herein mentioned now in being, this trust shall cease and determine, and distribution of the principal of the entire net trust estate then held hereunder shall thereupon be made by said trustee to the persons or person then entitled thereto under the terms hereof."

[1] So far as this trust declares that a one-quarter interest in the property of Martha C. Lebus shall upon the death of Elizabeth L. Holman, pass to and vest in the children of the latter and to the issue of any deceased child, it is valid whether the child be born before or after the creation of the trust, for as to this disposition the absolute power of alienation is not suspended beyond the period permitted by the provisions of section 715 of the Civil Code, the trust declaring that the property shall pass to and vest in the children and grandchildren of Elizabeth upon her death.

[2] Nor, as claimed by counsel for the plaintiff, is the power of alienation suspended beyond the lives of persons in being by paragraph 12 of the trust deed, directing that the corpus of the property shall be periodically and in specified proportions delivered to the children of Elizabeth after her death upon their arriving at the ages of 25, 30, and 35 years, for as to children of Elizabeth in being at the creation of the trust the effect of this paragraph is merely that they shall receive the benefits provided for them if and only so long as they shall live; so, as to this feature of the case it cannot be seriously argued that there is any restraint on the power of alienation beyond the permitted duration.

[3] But it is argued by counsel for plaintiff that as to any child born to Elizabeth L. Holman after the creation of the trust (and who would be entitled to take benefits under it) such child might not arrive at the age designated for the payment or delivery to it of some portion of this property before all lives in being at the creation of the trust

had become extinct, in which event there would arise a period of time during which the restraint on alienation was attempted to be exercised beyond the duration of such lives in being.

Conceding this to be true, the result claimed by the plaintiff does not follow therefrom. This situation is precisely the one designed to be met by paragraph 15 above set out. The effect of said paragraph is to direct that in the event that any beneficiary shall, at the death of the last of the lives in being at the creation of the trust, not yet have reached an age entitling him under paragraph 12 to receive the whole of the proportion of the trust property given to him, the provision in question of paragraph 12 shall then be disregarded, final distribution made, and the entire trust come to an end. Reading the trust instrument as a whole, it is plain that there is a clear and emphatic intention not to suspend the absolute power of alienation beyond the period provided by law; and that the operation of any provision of the trust which might otherwise have this effect is curtailed and controlled by said paragraph 15.

[4] This construction of the instrument is supported by the authorities. Section 3541 of the Civil Code provides: "An interpretation which gives effect is preferred to one which makes void." As said by the Supreme Court in Phelps' Estate, 182 Cal. 752, 190 Pac. 17:

> "In a case of ambiguity or inconsistency the law favors a construction that will cause the gifts to vest, if the opposite construction will render it void."

See, also, Chaplin on Suspension, §§ 178, 223, 515; Gray on Perpetuities, § 633; Civ. Code, §§ 1317, 1326.

[5] The trust is not one to convey, but simply to make distribution. Upon the termination of the trust the trustee is directed to "distribute" the property in its possession to the persons entitled thereto, and in the event of the trust continuing until the beneficiaries reach the several ages indicated, then it is provided that their respective shares shall be "delivered" by the trustees to them. It is nowhere provided in the deed that the title vested in the trustee shall be conveyed to the beneficiaries. However, even if it could be properly said to be a trust to convey, it would not be invalid, for it was created in September, 1917, and section 857 of the Civil Code was amended in 1913 so as to provide that an express trust may be created "to convey, partition, divide, distribute or allot real property in accordance with the instrument creating the trust, subject to the limitations of the same title." This amendment being in effect at the date of the declaration of trust, it follows that, even if it could be held to be one to convey, it would nevertheless be valid.

[6] The complaint was clearly drawn to attack the validity of the trust, and there is no force in the suggestion of the appellant that the complaint states a cause of action to quiet title, and therefore the general demurrer should have been overruled.

Judgment affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

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56 Cal. App. 394

PEOPLE v. COCHRAN. (Cr. 806.)

(District Court of Appeal, Second District, Division 2, California. Feb. 11, 1922.)

1. Physicians and surgeons 🔑6(9)—Information charging treatment of the sick and afflicted presumed to refer to "persons," not animals.

In a prosecution for practicing without a license, an information charging that defendant unlawfully treated "the sick and afflicted" is not defective under Pen. Code, § 950, as insufficiently charging that he treated sick and afflicted "persons" as distinguished from the practice of veterinary surgeons.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sick.]

2. Physicians and surgeons 🔑6(1)—Treating sick and afflicted by physical means involves diagnosis.

One practicing a mode of treating the sick by adjustment of the vertebra may be prosecuted for practicing without a license; such treatment being by physical means, and diagnosis being involved in all arts of healing by physical means.

3. Physicians and surgeons 🔑6(9)—Information held sufficient to charge that defendant practiced a system of treating sick.

In a prosecution for practicing a mode of treating the sick without a license an information, charging that defendant "did * * * practice * * * a system and mode of treating the sick and afflicted," *held* sufficient to charge that the defendant practiced a "system."

4. Physicians and surgeons 🔑6(1)—Use of drugs not element of offense of practicing without license.

Under Medical Practice Act, in a prosecution for practicing a mode of treating the sick without a license, it is unnecessary to charge that defendant used drugs.

Appeal from Superior Court, Los Angeles County; Frederic W. Houser, Judge.

A. D. Cochran was convicted of the violation of the Medical Practice Act, and he appeals. Affirmed.

Maurice C. Spauling and E. D. Martindale, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was convicted of "practicing mode of treating sick without having valid unrevoked certificate of license from State Board of Medical Examiners." From the judgment pronounced and an order denying motion for new trial this appeal was taken.

[1] The charging part of the information reads as follows: "That the said A. D. Cochran, on or about the 16th day of December, 1920, at and in the county of Los Angeles, state of California, did willfully, unlawfully, and feloniously practice, attempt to practice, and advertise and hold himself out as practicing, a system and mode of treating the sick and afflicted in the state of California without then and there having a valid unrevoked certificate, authorizing him to practice a system or mode of treating the sick and afflicted in the state of California, from the State Board of Medical Examiners of the state of California."

The principal contention of the defendant and appellant is that the information does not state facts sufficient to constitute a public offense. Our attention is called to the fact that in addition to the Medical Practice Act (St. 1913, p. 722) there is a statute in force in this state regulating the practice of veterinary surgeons. We think no person of common understanding could fail to know from a reading of the information that it charges the defendant with having treated sick and afflicted persons in violation of the Medical Practice Act rather than having violated the statute concerning the practice of veterinary surgeons. This information complies with section 950 of the Penal Code, in that it is fully sufficient to charge a public offense.

[2] Appellant asks us to declare a legal distinction between "adjusting" and "treating" persons suffering from disease or discomfort. We are told that the defendant declared that he did not diagnose any case, and so informed the patients who came to him; that he only "adjusted the vertebra" in order that nature might correct the difficulty. It is urged that, unless a diagnosis is made, it cannot be said that a physician "treats" a patient. The proposition here argued is not an open question in this state. In People v. Jordan, 172 Cal. 391, 156 Pac. 451, the opinion of the Supreme Court announces the law to be that—

> "It is impossible to disassociate diagnosis from the practice of the art of healing by any physical, medical, mechanical, hygienic, or surgical means."

It is not contended that the adjustments given by the defendant did not involve *physical means.*

[3] Another ground argued for reversal is that the information is defective in not alleging that defendant practiced a "system." The offense charged to have been committed by the defendant is "practicing mode of treating sick," etc. Appellant relies upon Ex parte Greenall, 153 Cal. 767, 96 Pac. 804, as authority for the claim that this allegation is insufficient. In that case the allegation was merely that the defendant did willfully and unlawfully "treat the sick or afflicted." This was held insufficient. The Act of March 14, 1907 (St. 1907, p. 252) was there construed. It provided in part that—

> "Any person who shall practice or attempt to practice or advertise or hold himself out as practicing medicine or surgery, osteopathy, or any other system or mode of treating the sick or afflicted, in this state, without having, at the time of so doing, a valid, unrevoked certificate, as provided in this act, shall be guilty of a misdemeanor." Section 13.

The court held that the word "practice" as there used should be defined as containing the idea of being engaged in a line of business and that "treating" the sick did not necessarily exclude the proposition that the conduct charged as violative of the statute might be merely incidentally and gratuitously administering aid to one who was sick. But this same opinion recognizes the word "mode" as being the equivalent of "system." We quote from the opinion discussing this very subject where it states:

> "One who within this meaning," referring to the meaning above ascribed to the word "practice," " 'practices' medicine or surgery or osteopathy, or any other recognized mode of treatment of the sick, without a certificate, violates the provisions of the act."

However, it is difficult to understand how a criticism can be directed against the information in the instant case upon the ground now under consideration, for the charge is clearly made that Cochran "did willfully, unlawfully, and feloniously *practice, attempt to practice, and advertise and hold himself out as practicing, a system and mode* of treating the sick and afflicted in the state of California," etc. This language is almost identical with that held sufficient in People v. Ratledge, 172 Cal. 401, 156 Pac. 455, where the information charged that—

> Ratledge "did willfully and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing, a system and mode of treating the sick and afflicted in the state of California, without then and there having a valid, unrevoked certificate authorizing him to practice a system or mode of treating the sick and afflicted in this state from the Board of Medical Examiners of the state of California."

[4] Again the information is attacked because it does not specify whether or not appellant is charged with having used drugs. Under the act of 1913, applicable here, such an allegation is unnecessary to state an offense under its provisions. It prohibits practicing or attempting to practice "any system," etc.

The judgment and order appealed from are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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56 Cal. App. 304

PEZEL v. YEREX. (Civ. 3452.)

(District Court of Appeal, Second District, Division 2, California. Jan. 27, 1922. Hearing Denied by Supreme Court March 27, 1922.)

1. Sales 🔑441(3) — Judgment conclusive against warrantor who was warned to appear and defend.

Where one is responsible to another on a warranty and is notified of the suit against the person to whom he is liable over, and an opportunity is given him to defend, judgment obtained without fraud is conclusive against him whether he appeared or not.

2. Indemnity 🔑13(4)—Notice to one liable over to intervene and defend suit held sufficient.

Where the buyer of an automobile was sued by one to whom he sold it because of losing it on account of a defect in title, letters by the buyer and his attorney to the seller and urging him to take such action in the suit against the buyer as his attorney deemed advisable constituted a sufficient notice to appear and gave a sufficient opportunity to defend.

3. Sales 🔑441(3)—Warrantor liable over when notified to intervene and defend is bound by judgment as to matters decided which were within the scope of his warranty.

Where the seller of an automobile was warned by the buyer to appear and defend a suit against the buyer by one to whom he had sold it because of losing it through a defect in title, on his failure to do so the judgment was conclusive evidence, in a suit by the buyer against the seller, of matters put in issue and decided which were within the scope of his warranty.

4. Indemnity 🔑14—Complaint held to put in issue title of automobile sold by defendant to plaintiff.

In an action by a buyer of an automobile against the seller, who was notified by the buyer to appear and defend an action against him on account of a loss because of a defect in title by one to whom buyer had sold, an allegation that seller had "no title in or to or right to sell said automobile," when considered with the presumptions of right doing and innocence arising under Code Civ. Proc. § 1963, subds. 1 and 19, *held* sufficient to put in issue the title transferred to the buyer by the seller so as to make the judgment in the former action conclusive as to the matters decided therein within the scope of the warranty of the seller.

5. Sales 🔑442(12)—Seller of automobile not liable for attorney's fees to buyer in defending title in suit by vendee.

Under Civ. Code, § 3312, providing that damages for breach of warranty of title of personalty shall be the value and the costs which the buyer has to pay in an action by the true owner, damages which a buyer of an automobile could recover of a seller for having to pay damages in a suit by one to whom he had sold it on loss for defect in title does not include attorney's fees.

6. Costs 🔑146—Term covers taxable costs.

The term "costs" includes only taxable costs; that is, those expenses which are incurred by a party in prosecuting or defending actions or proceedings and which may be taxed against the losing party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

7. Sales 🔑255—Buyer must look to his own seller for breach of warranty of title.

If a buyer's title to personal property fails, he must look to his own seller, since the warranty of title to a chattel does not run with the article sold.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Oliver L. Pezel against I. A. Yerex. From judgment for plaintiff, defendant appeals. Modified and affirmed.

Harry K. Sargent, of Los Angeles, for appellant.

Fred Horowitz, of Los Angeles, and Walter E. Barry, of Ventura, for respondent.

FINLAYSON, P. J. This an action to recover damages for the breach of a warranty of title in the sale of an automobile by defendant to plaintiff. Judgment passed for plaintiff, and defendant appeals.

Defendant sold the automobile to plaintiff on February 1, 1919. The complaint alleges, and the answer admits, that by the contract of sale the defendant warranted that he had a good and unincumbered title. On March 1, 1919, plaintiff sold the machine to one E. S. Faxon, and warranted his title thereto to be good and unincumbered. On September 19, 1919, Faxon brought an action against the plaintiff here to recover damages for an alleged breach of the latter's warranty of title. In his complaint in that action Faxon alleged:

> "That defendant, O. L. Pezel [the plaintiff here], had, in fact, no title in or to or right to sell said Ford automobile, but the same belonged to the Ætna Insurance Company, who thereafter, on the 9th day of August, 1919, demanded possession of the same from plaintiff [E. S. Faxon], and that by reason thereof the plaintiff was compelled to, and did, deliver said Ford automobile up to said Ætna Insurance Company, and said Ford automobile was thereby and by reason thereof wholly lost to said plaintiff, and said plaintiff was thereby and by reason thereof deprived of the possession of said automobile."

In due time the action thus brought by Faxon was tried, the court found the allegations of his complaint to be true, and entered a judgment against the defendant there, the plaintiff in the present action, for the sum of $525 damages and $8 as costs, making a total of $533.

On September 20, 1919, which was the day following the filing of the complaint in the action by Faxon against the plaintiff here, the latter mailed to the defendant in the present action a letter which was received in due course of mail. In this letter plaintiff, after reminding defendant that the latter had sold the machine to the former on February 1, 1919, gave notice to defendant that he, the plaintiff, had resold the automobile to Faxon on March 1, 1919; that the Ætna Insurance Company, as the insurer of one J. A. Murphy, had demanded a delivery of the machine to it on the ground that it had been stolen from Murphy; and that Faxon, on September 29, 1919, had brought an action in the superior court for Ventura county against plaintiff on the latter's warranty of title. The letter states the purpose and nature of the action thus brought by Faxon, and concludes as follows:

> "You are therefore notified that in the event the said E. S. Faxon is successful in his suit against me that I shall institute suit against you to recover the amount recovered against me. Of course, these two trials means additional court costs and attorney's fees, while I believe that a good settlement could be made at this time. I would advise that you secure the services of an attorney and take such action as seems appropriate in the action against me."

The next day, October 1, 1919, plaintiff's attorney mailed to defendant at Ventura, and the latter received in due course of mail, a letter which, after reciting the fact that Faxon had brought an action against this plaintiff to recover damages for the alleged breach of the latter's warranty of title, and after stating that, if Faxon should be successful in his action against this plaintiff, it will be incumbent upon the latter to sue the defendant here, and he in turn his vendor, and that each successive suit will mean additional costs and attorney's fees, concluded as follows:

> "I would therefore suggest that you consult your attorney with a view of negotiating a settlement and obviate the additional costs as well as to take such action as he deems advisable in the pending suit. Will you kindly advise me of your decision in the matter?"

Defendant made no attempt to defend the action that had been brought by Faxon against this plaintiff. Indeed, defendant seems to have paid no attention whatever to either of the above-mentioned letters.

At the trial of the present action plaintiff, over defendant's objection, put in evidence the judgment roll in the action that had been brought against him by Faxon. The admission of this judgment roll is now assigned as error.

[1] It is well settled that, where a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit against the person to whom he is liable over, and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he appeared or not. Under such circumstances the person responsible over is no longer regarded as a stranger, because he has the right to appear and defend the action and has the same means and advantages of controverting the claim as if he were the real and nominal party on the record. 15 R. C. L. p. 1017. This principle of the conclusiveness of judgments as against persons responsible over is applicable to cases arising between the warrantor of title, express or implied, and the warrantee. That is, a judgment against a warrantee, in an action of which the warrantor was given proper notice, is conclusive against the latter, in the absence of fraud or collusion. The principle applies to cases of warranty of title to personal property as well as to those of warranty of title to land. Thurston v. Spratt, 52 Me. 202; Drennan v. Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354; 15 R. C. L. p. 1020.

[2] The principal ground of appellant's objection to the introduction of the judgment roll in the action by Faxon against the respondent here is addressed to the alleged insufficiency of the notice afforded by either of the two above-mentioned letters. It is strenuously insisted that, to make the judgment conclusive evidence against the person who is responsible over, the notice to him of the pendency of the action must contain an express request to come in and defend. The decisions upon the question as to the sufficiency of such notices are varied, extending from those which hold that mere notice of the pendency of the action will suffice (of which Drennan v. Bunn, supra, is an example) to those holding that the defendant in the action must give unequivocal, express, and certain notice to the person who is responsible over, requiring the latter to defend the suit, or giving him an opportunity to do so. Consolidated, etc., Co. v. Bradley, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409, a case involving a warranty of title to land, is a fair example of those cases which hold that the warrantor must be requested to come in and defend the action, or be given an opportunity to do so. Our attention has not been called to any decision in this state that is directly in point. We shall assume, however, that in this state the rule is every whit as strict as that announced by the Massachusetts court in Consolidated, etc., Co. v. Bradley, supra. There the court employed

the following language in announcing the rule:

> "Whatever may be the form of such a notice, we think that, under the circumstances in which it is given, it should call upon the person notified to come in and defend the suit, *or should offer him an opportunity of doing so.* * * * The decisions of different courts in this country are not uniform upon the requirements of such a notice, but the weight of authority in this commonwealth is that the notice must be such in substance as to give the person notified information that he is called upon to come in and defend the suit, *or that he is given an opportunity to do so*, and that if he does not defend it he will be held responsible for the result." (Italics ours.)

See, also, Hovey v. Smith, 22 Mich. 170, 177, and 15 R. C. L. p. 1018.

We think that the notices given in the instant case meet the most exacting requirements. Though in neither of the two letters was this defendant requested, in so many words, to come in and defend the suit which Faxon had brought against the plaintiff here, each letter advised this defendant that he would be liable if Faxon prevailed in his suit, and in each letter defendant was, in substance and effect, offered an opportunity to come in and defend the action. In each letter defendant is advised to consult counsel. In one letter he is urged to take such action in the suit brought by Faxon as seems "appropriate"; in the other he is advised to take such action "in the pending suit" as his attorney "deems advisable." By these letters the defendant was unequivocally invited to take any action in the pending suit that he or his counsel might deem appropriate or advisable. By this broad invitation defendant clearly was given an opportunity to come in and defend. More than that was not necessary. See Boston v. Worthington, 10 Gray (Mass.) 496, 71 Am. Dec. 678.

[3] It next is claimed that the complaint filed by Faxon did not put in issue the title that was warranted by this defendant when he sold the automobile to the plaintiff here on February 1, 1919. Without doubt, a warrantor who has been duly notified to come in and defend cannot be bound by a judgment beyond what was in controversy and determined in the suit. He is notified to defend against the claim which is set up and to be tried, and nothing more. Nor is the judgment evidence of matters not within the scope of his warranty. The judgment is, however, if due notice be given, evidence of matters put in issue and decided and which are within the scope of the warranty made by the one who is responsible over.

[4] Faxon's complaint, it will be recalled, alleges that his vendor, the plaintiff in the present action, had "no title in or to or right to sell said Ford automobile." This, of course, literally refers to the condition of the title as of March 1, 1919, the date when plaintiff sold the machine to Faxon; and therefore Faxon's complaint, on its face, put in issue the title as of March 1, 1919. But it does not necessarily follow that that title was not the selfsame title that was warranted by the defendant here when, on February 1, 1919, he sold the machine to this plaintiff. When considered in connection with certain facts and certain legal presumptions that legitimately arise out of those facts, Faxon's complaint does, we think, put in issue the title as it came to this plaintiff when defendant sold the car to him on February 1, 1919. Plaintiff is the immediate vendee of the defendant in the present action. There is no evidence that plaintiff sold the car to a third person prior to his sale to Faxon; nor, on the other hand, is there any direct evidence that he did not make any such sale. But, though there is no direct evidence that plaintiff had not sold the car, or incumbered his title thereto, before he made the sale to Faxon, there is a legal presumption that his sale to the latter was "fair," and that in selling the car to Faxon he committed no "wrong." It is a prima facie presumption that "a person is innocent of crime or wrong"; also that "private transactions have been fair and regular." Code Civ. Proc. § 1963, subds. 1 and 19. We think that, by the aid of these legal presumptions, plaintiff made out a prima facie showing that the title that was warranted by this defendant when he sold the car to plaintiff was the very title which the latter conveyed to Faxon, and therefore was the same title that was put in issue in the action brought by Faxon. By each of the two letters mailed to him the defendant here was notified, in substance and effect, that the action brought by Faxon put in issue the title that this plaintiff had deraigned from his vendor, the defendant here.

[5] What has already been said by us is a sufficient answer to appellant's claim that the lower court erred in denying his motion for a nonsuit, and likewise will suffice to dispose of every other point made by appellant save one, which is that the judgment is erroneous in so far as it includes attorney's fees incurred by the respondent in defending the action that was brought against him by Faxon—attorney's fees which the lower court found amounted to the sum of $150. We think that this last point is well taken, and that the judgment must be modified accordingly.

Section 3312 of the Civil Code reads:

> "The detriment caused by the breach of a warranty of the title of personal property sold, is deemed to be the value thereof to the buyer, when he is deprived of its possession, together with any *costs* which he has become liable to pay in an action brought for the property by the true owner." (Italics ours.)

If, instead of selling the car to Faxon, respondent had retained it, and if, while it thus was retained by him, he had been sued for its possession by the true owner, the Ætna Insurance Company, and had been deprived of its possession in that action, the case would have fallen squarely within the letter of section 3312, and the respondent here would have been entitled to recover the "costs" incurred by him in that action, but not attorney's fees.

[6] The term "costs" has a well-defined legal meaning, and includes only taxable costs—that is, those expenses which are incurred by parties in prosecuting or defending actions or proceedings and which may be taxed against the losing party. Morgan v. Haley, 107 Va. 331, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846, 13 Ann. Cas. 204. But, says respondent, section 3312 is not applicable here, because he is not suing for damages caused by being deprived of the possession of the automobile, but is suing for damages incurred in being compelled to defend the suit brought against him by Faxon. Regardless of the particular damages to which he may be entitled in order to compensate him for his injury, the fact remains that plaintiff's right of action grows out of defendant's breach of the latter's warranty of title.

[7] If a vendee's title to personal property fails, he must look to his own vendor, from whom he purchased and to whom he paid the consideration. He can recover damages for a breach of the contract of warranty that his immediate vendor made with him, and for none other. A warranty of title to a chattel does not run with the article sold. Where, as here, there have been successive sales, with successive warranties, and a breach arises from an outstanding title existing at the time of the sale by the original vendor, each sale is a separate transaction. Each vendor is liable for his own contract, and to the extent thereof, but not otherwise. And a vendee, though he in his turn has become a vendor, and as such has incurred a liability for the breach of his warranty, cannot enlarge his immediate vendor's obligation beyond that fixed by law. Smith v. Williams, 117 Ga. 783, 45 S. E. 394, 97 Am. St. Rep. 220. If the last of several successive vendees should recover a judgment against his immediate vendor for breach of warranty of title, and if each of the remaining vendees should successfully sue his immediate vendor, it is evident that if, in the suits thus brought by the successive vendees, each could recover attorney's fees, and if such attorney's fees could be carried forward so as to be finally paid by the original vendor, such fees might aggregate an amount which would assume an importance out of all proportion to the value of the article that was the subject of the successive sales and warranties.

Our conclusion is that a vendor can be held liable for the breach of his own particular contract of warranty only, and that for the breach of that contract he should not be held to a greater liability than that contemplated by section 3312, even though his case may not fall within the strict letter of that section. By the use of the word "costs" in that Code section, which, as we have shown, means taxable costs, we think it clear that the Legislature did not intend that attorney's fees should ever be a part of the damages recoverable for the breach of a warranty of title to personal property.

The judgment is modified by striking therefrom the sum of "$683," and inserting in lieu thereof the sum of "$533." As thus modified, the judgment will stand affirmed.

We concur: WORKS, J.; CRAIG, J.

56 Cal. App. 409

CARMICHAEL v. RILEY, State Controller. (Civ. 2400.)

(District Court of Appeal, Third District, California. Feb. 11, 1922.)

1. Waters and water courses ⚷228½, New, vol. 10A Key-No. Series—Compensation contract by reclamation board's general manager held binding on drainage district.

Where the state reclamation board authorized its general manager to make an offer to a landowner for a right of way for a levee through his land, including the removal of two buildings thereon by a drainage district which offer was accepted, and the district took possession and commenced the work, there was a valid contract, which was binding on the district as well as the landowner, though not reported to the board or ratified by it before one of the buildings was destroyed by fire.

2. Waters and water courses ⚷228½, New, vol. 10A Key-No. Series—Drainage district held to have ratified agreement by reclamation board's general manager.

A drainage district, which took possession of land for a right of way and constructed its works thereon, thereby ratified an agreement between the general manager of the state reclamation board and the landowner as to compensation, including payment of the cost of removing buildings by the district, as it cannot knowingly accept and retain the benefits of, and repudiate its liabilities under, an agreement made in its behalf, though unauthorized by the board.

3. Waters and water courses ⚷228½, New, vol. 10A Key-No. Series—Reclamation board's allowance of claim for value of barn destroyed by fire held ratification of general manager's agreement.

The allowance by the state reclamation board of a claim by the owner of land, taken for a levee right of way for the value of a barn thereon, which was destroyed by fire, during removal by the drainage district was a ratification of an agreement by the board's general manager to compensate the owner therefor, and is conclusive on the question of negligence as well as of the compensation due.

Application by D. W. Carmichael for writ of mandate to be directed to Ray L. Riley, as State Controller. Writ granted.

Dunn & Brand and Chauncey H. Dunn, Jr., all of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., R. T. McKisick, Deputy Atty. Gen., and Ralph Smith and Louis B. Diavila. both of Sacramento, for respondent.

FINCH, P. J. This is an original application for a writ of mandamus, directing respondent to draw his warrant for the sum of $5,000 in payment of petitioner's claim against the Sacramento and San Joaquin drainage district, allowed by the state reclamation board and approved by the state board of control.

October 23, 1919, the reclamation board adopted "Plans and Estimates of Cost for Feather River Project and Assessment Number Seven." These plans provided for the acquisition of rights of way and the construction of a levee through petitioner's and other lands and for the removal from the rights of way of buildings thereon, including two large barns on the right of way through petitioner's land, and estimated the cost of removing the barns at $4,000.

The rules adopted by the reclamation board, January 29, 1918, among other things, provide:

> "The executive department shall be under the immediate direction of the general manager, who shall report directly to the board. He shall have charge of all the administrative and operative work of the reclamation board and the Sacramento and San Joaquin Drainage District. * * * He shall be the representative of the board in all matters which do not require action by the board itself."

In the conduct of the affairs of the district, it was the practice for the general manager to negotiate with the landowners for rights of way, and report to the board for approval the prices per acre agreed upon. After such approval, the general manager proceeded with the removal of any buildings on the right of way in accordance with the general plan adopted by the board as stated. The cost of removal was thereafter presented as a claim and allowed by the board. The allowance of such claim was the only action taken by the board in any case relative to the removal of buildings, after the original adoption of plans and estimates as aforesaid, except where the owner desired money compensation for his buildings instead of their removal. In the latter case, the general manager reported to the board for approval, in the first instance, not only the agreed price of the land desired, but also the compensation agreed upon for buildings on the right of way.

About the first of June, 1921, the dredgers used in constructing levees had reached a point near the petitioner's land, and the board authorized the general manager to offer petitioner a stated price per acre for a right of way and to remove the two barns in accordance with the plans and estimates adopted. About June 3, 1921, the general manager made the offer to petitioner, and the latter accepted it in accordance with the terms stated. Petitioner was ill at the time, and, on account of such illness, he did not make a written conveyance of such right of way until about the first of the following August. The district, however, went into immediate possession of the right of way, cleared the land, constructed levees thereon, removed one of the barns and had commenced to tear down the other for the purpose of removing it when, through the alleged negligence of the drainage district, the latter barn was destroyed by fire about July 1, 1921.

July 30, 1921, the general manager reported to the board the price agreed to be paid for the right of way through petitioner's land, and the board thereupon, by order entered upon its minutes, ratified the agreement made by the general manager with petitioner as to the price to be paid for the land, and authorized warrants to be drawn therefor.

The minutes of September 6, 1921, show that on that day the general manager reported that the agreement with petitioner included the removal of the two barns; that the larger of the two "had been destroyed by fire just after the reclamation board forces had begun to tear it down for removal"; and that petitioner had offered to accept $5,000 in warrants in settlement for the loss. The board thereupon approved petitioner's claim for the sum of $5,000, as stated.

Petitioner relies on the case of Chapman v. State, 104 Cal. 694, 38 Pac. 458, 43 Am. St. Rep. 158, wherein the court, in deciding a similar question, said:

> That the cause of action "is not founded upon negligence constituting a tort, pure and simple and unrelated to any contract but is substantially an action for damages on account of the alleged breach of a contract. * * * The principle that a state is bound by the same rules as an individual in measuring its liability on a contract is well expressed by Allen, J., in his concurring opinion in the case of People v. Stephens, 71 N. Y. 549, in which he said: 'The state in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign, and another for the subject. But when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the contract in any form comes before the

courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor.'"

Respondent contends that the general manager was without authority to bind the reclamation board by his attempted contract with petitioner, relative to the right of way and the removal of the buildings; that such contract was not reported to the board or ratified by it prior to the time the barn was burned; and that since there was therefore no valid contract between petitioner and the district existing at the time of the destruction of the building, the payment of petitioner's claim would be in the nature of a gift or extra compensation, contrary to the express provisions of sections 31 and 32 of article 4 of the state Constitution.

[1] The board had authorized the general manager to make a definite offer to petitioner for a right of way through his land, including the removal of the buildings by the district at the latter's cost. The general manager made the offer, and petitioner accepted it on the authorized terms. The district immediately took possession and commenced the construction of its works and the removal of the buildings. It is not perceived what element of a valid contract is wanting. Had the transaction been between private individuals under the same circumstances, an action for specific performance to compel a conveyance would lie. No reason is suggested why a different rule should apply where an agency of the state is a party. If the petitioner was bound by the agreement then, of course, the district was bound.

[2, 3] If it be conceded that the agreement was unauthorized, yet, when the district took possession of the land and constructed its works thereon, it must be held to have ratified the agreement. It cannot knowingly accept and retain the benefits of an agreement made in its behalf, though unauthorized, and repudiate its liabilities thereunder. The allowance of petitioner's claim by the reclamation board, for the value of the barn destroyed, was a ratification of the agreement and was equivalent to a previous authority. Power v. May, 114 Cal. 207, 46 Pac. 6; Id., 123 Cal. 147, 55 Pac. 796; Buck v. City of Eureka, 124 Cal. 61, 56 Pac. 612; Crowe v. Boyle (Cal. Sup.) 193 Pac. 111; Sittig v. Raney (Cal. App.) 200 Pac. 824.

Having reached the conclusion that the district was bound by the terms of the agreement, it follows that the allowance by the board of petitioner's claim is conclusive upon the question of the district's negligence, as well as the compensation due petitioner therefor. Colusa County v. De Jarnett, 55 Cal. 373; McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113; McConoughey v. Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; McBride v. Newlin, 129 Cal. 36, 61 Pac. 577; County of Santa Cruz v. McPherson, 133 Cal. 282, 65 Pac. 574; County of Alameda v. Evers, 136 Cal. 132, 68 Pac. 475; County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125; Victors v. Kelsey, 31 Cal. App. 796, 161 Pac. 1006.

It is ordered that a peremptory writ of mandamus be issued by the clerk of this court, directed to the respondent above named, requiring and directing him as state controller of the state of California to draw his warrant or warrants on the state treasurer of the state of California for the aggregate sum of $5,000 against the Sacramento and San Joaquin drainage district fund, Feather River assessment No. 7, in favor of said D. W. Carmichael, in payment of the aforesaid claim.

We concur: HART, J.; BURNETT, J.

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56 Cal. App. 397

PEOPLE v. HUTCHINGS. (Cr. 799.)

(District Court of Appeal, Second District, Division 2, California. Feb. 11, 1922. Rehearing Denied March 13, 1922. Hearing Denied by Supreme Court April 10, 1922.)

1. Criminal law ⊂⊃1168(1)—Failure to prove unessential fact not ground for reversal.

In prosecution for larceny by trick and device, the state's partial failure to prove that a telephone pretended to have been used by defendant in his fake stockbroker's office was unconnected with outside wires *held* not ground for reversal, where it was not shown that without such proof there was no evidence from which the jury could infer defendant's guilt, and it appeared from defendant's statement that the fake telephone was used during the bunco-steering charged only but once.

2. Criminal law ⊂⊃1163(1) — Appellant must show prejudicial error.

Appellant must show, not only that there was error in some step leading to the judgment appealed from, but that the error was prejudicial.

3. Criminal law ⊂⊃1134(8)—District attorney's misconduct in assaulting defendant's counsel not reviewable on appeal from judgment, where presented only on motion for new trial.

Improper conduct of the district attorney in assaulting defendant's counsel at the trial during a recess, after the judge had left the bench, cannot be reviewed on appeal from the judgment, where the only record presenting it is in affidavits on a motion for new trial; such misconduct not being among the grounds for a new trial specified in Pen. Code, § 1181.

4. Criminal law 🔑1169(11)—Admission of evidence of similar offense held not reversible error despite partial failure of proof thereof.

In a prosecution for larceny by trick and device, the reception of evidence that defendant committed a similar offense on another occasion was not reversible error, though the evidence was insufficient to prove that telephone in the office through which the fake brokerage transactions therein charged were conducted had no connection with outside wires, where without such proof the jury could have inferred defendant's guilt.

5. Criminal law 🔑1130(2)—Admission of evidence of similar offense held not reversible error, where matter was not indicated in appellant's brief.

In a prosecution for larceny by trick and device, admission of evidence that defendant committed a similar offense on another occasion *held* not reversible error, despite a partial failure of proof that telephone instruments in an office through which fake brokerage transactions therein charged were conducted were not connected with outside wires, where it was not indicated in appellant's brief that telephones were used in connection with such deal.

6. Criminal law 🔑369(5)—Larceny 🔑14(1)—Offense held larceny by trick and device and evidence of similar offense admissible.

In a prosecution for larceny of a check by trick and device, where appellant's brief showed that his victim made no outcry or disturbance when the check was seized from him as he testified, and did not regard it as lost, but expected its return, that it was finally lost through defendant's tricks, and that he did not demand its return, but continued to deal with defendant, evidence as to a similar offense by defendant on another occasion was proper; the case being one of bunco-steering, or larceny by trick and device.

7. Criminal law 🔑1044—Sufficiency of evidence of similar offense not reviewable without motion to strike.

Whether evidence of a similar offense was sufficient to completely prove it cannot be considered on appeal, in the absence of a motion to strike after all the evidence has been heard.

8. Larceny 🔑40(8)—Refusal of instruction to acquit unless check taken would have been charged against maker's account if presented to bank held proper.

In a prosecution for larceny of money and the proof showed larceny of a cashier's check, where it was not contended that the evidence failed to show that defendant did not cash the check, the court properly refused to instruct that larceny of a check is not larceny of money and to acquit unless the check, if presented to the bank, would have been charged against the maker's account.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

E. A. Hutchings was convicted of larceny by trick and device, and he appeals. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WORKS, J. Defendants, by indictment of the grand jury, were charged with the larceny of $50,000 from one Norris. Trainor and Patterson were never apprehended, but Hutchings was tried and convicted. He appeals from the judgment of conviction.

[1, 2] The larceny charged against appellant and his coconspirators was accomplished through trick and device, by means of a fake stock transaction through a fake stockbroker's office. Appellant contends that the evidence fails to support the verdict of guilty, because of the alleged insufficiency of certain testimony introduced for the purpose of showing that a telephone instrument pretended to have been used by the broker in his office was a dummy; that is, that it was unconnected with wires leading to the outside world. A number of witnesses were called to establish the point, but appellant's insistence is that the subject was not entirely covered and that a reversal of the judgment on that account must follow. In support of his position appellant relies upon People v. Byrnes, 27 Cal. App. 79, 148 Pac. 944. That case was one in which proof of the nonexistence of a certain alleged telephone connection with a telephone exchange was a necessary link in the chain of evidence. Appellant does not show us that such a condition exists in the present case. Granting that there was a partial failure to prove that no telephone wires ran into the alleged broker's establishment—and a failure of proof in that regard is all that is claimed—there is no showing that without that proof there was no case made to the jury from which, properly, they might have inferred appellant's guilt and declared it by their verdict. Further, it appears from appellant's own statement of the facts proved at the trial and relied upon by the prosecution that the alleged fake telephone was used, during the bunco-steering of Norris, but once, and then for an inconsequential and immaterial purpose. In presenting this point counsel make no attempt to satisfy the well-known rule that an appellant, to be relieved from the effect of a judgment, must show, not only that there was error in some step leading to its rendition, but that the error was prejudicial. In respect of this point the evidence was sufficient to support the verdict.

[3] Appellant's next contention is that certain unusual conduct of the district attorney makes necessary a reversal of the case. During the trial the principal counsel for appellant addressed to a witness a question which without doubt was a reflection upon the integrity of the officer. The latter at once

made strenuous objection to the query on the ground that it reflected upon him, a course which was entirely proper, at least until the court could be satisfied that the question was propounded in good faith. Not content, however, with this legitimate discharge of his duty, the district attorney awaited an opportunity later to take more decided action in the premises. As soon as the trial judge had left the bench at the time for the next recess of the court, but while the courtroom contained many who were spectators at the trial, and in the presence of some of the members of the jury, the district attorney approached the counsel for appellant and committed an assault upon him.

Notwithstanding the unseemly conduct of this public officer, we are precluded from examining the point made by appellant because of it on this appeal. We are to observe that the assault occurred after the hearing of the cause had been recessed and after the trial judge had left the bench. It was therefore an act with which the judge had no opportunity to deal at the time, either by rebuke of the district attorney in the presence of the jury, or by way of admonition or instruction addressed to that body. The occurrence was called to the attention of the trial court only by means of a motion for a new trial, the record containing affidavits which were presented in support of the motion and which show the facts we have recited. The grounds upon which a new trial may be demanded in a criminal case are specified in Penal Code, § 1181, and there is not included among them such a ground as was covered by the affidavits presented to the trial court. People v. Amer, 151 Cal. 303, 90 Pac. 698. In the case cited there was a reversal of an order granting a new trial on the ground of the misconduct of a district attorney, the misconduct having been entirely apart from any error of the trial court. The Supreme Court said, in discussing the point before it, there being, however, no appeal from the judgment in the case, that on an appeal from a judgment misconduct of a district attorney unconnected with error of the trial court could be considered "when presented by a proper record, and the point saved for review by exception." This language was followed by the District Court of Appeal on a later appeal of the same case (People v. Amer, 8 Cal. App. 137, 96 Pac. 401), and the court even went beyond it, as it was said in the opinion, the italics being ours, that—

> "There is no authority whatever in the statute for holding that such misconduct of the district attorney, aside from any ruling of the court in reference thereto, can be properly reviewed on appeal from the judgment *unless it is a ground for a motion for a new trial.*"

It is significant to note that, after this decision by the District Court of Appeal, there was presented to the Supreme Court a petition for a transfer of the cause to that tribunal and that the petition was denied. Under the authorities noted it is plain to us that such a question as the one now presented cannot be reviewed upon an appeal from the judgment where the only record presenting it is to be found in affidavits attempted to be used upon a motion for a new trial; the question undoubtedly, under the first decision of People v. Amer, 151 Cal. 303, 90 Pac. 698, not being available upon a motion for a new trial. It must be manifest that, if such a point is not to be considered on motion for a new trial, affidavits attempting to present it for the purposes of such a motion are but so much paper and are not a "proper record" upon which it may be reviewed upon an appeal from the judgment. Respondent asserts, citing People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296, and People v. Perez, 9 Cal. App. 265, 98 Pac. 870, that appellant might have availed himself of the misconduct of the district attorney on a motion to set aside the judgment. If that position is justified, appellant then, upon an unfavorable ruling, might have appealed from the order denying his motion (People v. Perez, supra), thus saving the question. We are not, however, concerned with what appellant might have done. What we do hold, following the two opinions in People v. Amer, is that, in merely offering to us the affidavits which would not have availed him on his motion for a new trial, appellant does not offer us a "proper record" for the consideration of the question presented by him upon an appeal from the judgment. We should not leave this question without mention of the fact that, in People v. Pang Sui Lin, 15 Cal. App. 260, 114 Pac. 582, it was said of a question like the one now before us that "the ground herein considered cannot be regarded on the motion for a new trial, but can be reviewed only on an appeal from the judgment," the opinion of the Supreme Court in People v. Amer, being cited immediately at the end of the quoted passage. The latter part of the statement seems to represent an inaccurate estimate of the effect of the decision of the Supreme Court in that case. There was no petition for a transfer of People v. Pang Sui Lin to the Supreme Court.

[4, 5] Appellant makes the claim that the trial court erred in receiving evidence tending to show that on another occasion he had committed an offense similar to the one involved in the charge against him. This evidence concerned dealings between appellant and one Swanson, and appellant's claim that it was not admissible is based on several grounds. In the first place, it is contended that certain evidence introduced in connection with the Swanson affair is insufficient to prove that telephone and telegraph instruments located in the office through which Swanson dealt had no connection with out-

side exchanges or wires. This question is exactly like the one first discussed in this opinion and it is effectually concluded by what we there said. Moreover, there is nothing in appellant's brief to indicate that telephone or telegraph instruments were used in connection with the Swanson deal. This circumstance alone completely disposes of the argument presented on the question.

[6] It is insisted by appellant that the evidence shows that if larceny was committed by appellant it was of the ordinary type and not larceny by trick and device. On that account he contends that evidence as to the alleged victimizing of Swanson was not proper in the case, for he says that the rule allowing proof in a given criminal case of offenses similar to the one under investigation does not apply in cases of "straight" larceny. Appellant's contention that the evidence here shows a case of larceny other than larceny by trick and device is based upon the fact that Norris, the complaining witness, testified that appellant "snatched" from his hand the check representing the money claimed to have been stolen by the conspirators. It is true that Norris did so testify, but it is equally true that appellant's own statement of the evidence in his brief shows that Norris did not then regard the check as lost, that, in fact, he expected its return, and that the check was finally lost to him through the tricks and devices of the conspirators, many of which were practiced upon him after the seizure of the check. According to appellant's statement of the evidence, Norris made no outcry or disturbance when the check was seized, he made no demand for its return, and he continued to associate and deal with the conspirators in an endeavor to consummate the transaction by means of which he expected that they all would profit. The case is not one of "straight" larceny, but one of plain bunco-steering—larceny by trick and device.

[7] Another point made by appellant is that, where one is charged with a certain offense, evidence of other offenses of a like character to prove system and intent can only be received when such evidence tends to prove completely the commission of such other offenses. It is contended that the evidence concerning the Swanson affair is not sufficient to satisfy this rule; but if for the sake of argument we admit the correctness of the statement, although the Attorney General disputes it, there is still a point which appellant has not met. Where the district attorney desires to prove an offense similar to one under investigation and engages in an endeavor to do so, it cannot be known whether the evidence upon the subject is complete until it is all in. There is usually no place during its introduction at which a halt may be called on account of its insufficiency until the district attorney submits all that he has to offer. The defense may then test the question of the completeness of the evidence by moving to strike out what has been received, thus giving the trial court an opportunity to pass upon the point. This step appellant did not take. He allowed the evidence as to the Swanson affair to go to the jury without giving the trial judge an opportunity to pass upon its completeness. If a motion to strike had been made and had been well taken, the judge could have granted it and could have instructed the jury to disregard the stricken evidence. In support of his contention that the evidence concerning the Swanson affair was not complete, appellant relies upon People v. Whiteman, 114 Cal. 338, 46 Pac. 99, and other cases which have followed it, notably People v. Bird, 124 Cal. 32, 56 Pac. 639, and People v. Byrnes, 27 Cal. App. 79, 148 Pac. 944. In all those cases reversals were ordered, there is no doubt, because of the incompleteness of evidence offered to prove offenses similar to those under actual investigation in each case. In both People v. Whiteman and People v. Bird, however, the question so presented itself that it could be solved upon objection to particular items of evidence because of the insufficiency of evidence which was preliminary to those items and without the necessity of a motion to strike being presented after all the evidence on the subject was before the court. Each case was upon a charge of forgery, and in each case attempts were made to prove other forgeries. Checks, other than those upon which the charges were based, were offered as a part of the evidence of the other offenses, and they were objected to on the ground, in People v. Whiteman, that the offer was not supported by sufficient proof that they were forged, and, in People v. Bird, on the ground that if the checks were forged they were not shown to have been forged by defendant. Here appellant's contention, as we have already indicated, is that the "entire body" of the evidence concerning the Swanson affair is incomplete to show the commission of an offense like unto that with which appellant is charged. People v. Byrnes, supra, seems to have been based upon a state of affairs similar to that presented here, but the question which we have stated above, that is, that in such a situation a motion to strike is necessary, was not before the court. The Attorney General now raises that question without the citation of authority to support his view, and we ourselves have been unable to locate decisions bearing with directness upon the particular subject. In at least two states, however, a rule is in effect which gives the trial court an opportunity to pass upon the completeness of evidence proposed for the purpose of proving a similar offense. See Commonwealth v. Robinson, 146 Mass. 571, 16 N. E. 452; State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191. In the case last cited the Supreme Court of Missouri said:

> "We are of opinion that none of the testimony of other alleged crimes should have been given to the jury. Having been admitted, it should have been withdrawn from their consideration. We also think that the better practice would be that the court should, as a preliminary matter, when the state proposes to offer evidence of other crimes, either hear the evidence or satisfy itself as to its character and scope by inquiry of the prosecuting attorney, and determine whether there is sufficient evidence of the other alleged crime to justify its submission to a jury. * * * In a case like this, involving a large amount of testimony concerning other crimes which would occupy days in presentation, it would be impracticable to give a preliminary hearing to all the details. In such case the court may properly be guided by the offer of proof and by such testimony as can be conveniently presented; enough to satisfy the court that the evidence is relevant and of sufficient weight to authorize its submission to the jury."

While this language announces the rule that either preliminary proof of other offenses should be made to the trial court, or that it should be guided, at least in the case of lengthy trials, by an offer of proof, it will be observed that there is matter in the quotation which has some bearing upon the specific question we are at present endeavoring to solve. It is remarked that the evidence as to other offenses "having been admitted, it should have been withdrawn from their consideration," that is, from the consideration of the jury. The Missouri case, then, amounts to this: While a rule is laid down for the future guidance of trial courts in that state, so far as the case there under consideration is concerned, the court expressed the view that, the evidence having been received erroneously, it should have been withdrawn from the consideration of the jury. Here, strictly speaking, the evidence now in question was not "received" erroneously, so far as it went, for in a case like this it is proper to take evidence of similar offenses for the purpose of showing system and intent, and, as we have already remarked, objections to particular items of it could not have been sustained so long as the items tended toward the desired result; but being "incomplete," granting again the postulate of appellant that it was incomplete, it should have been withdrawn from the jury, and that could have been done, properly, only pursuant to a motion to strike made by appellant after the evidence upon the subject was all in. At any rate, the reasoning of the two cases cited from Massachusetts and Missouri supports the view that before a trial court can be charged with the commission of error in receiving evidence of other offenses it should be allowed the opportunity, in some appropriate fashion, to pass upon the sufficiency of the body of the evidence claimed by the prosecuting officer to amount to adequate proof of another offense similar in character to the one under investigation.

Returning again to the main point touched upon in the quotation we have made from the opinion in State v. Hyde, supra, we cannot feel that the rule laid down by the Supreme Court of Missouri for the future guidance of the trial courts of that state can in every case meet the exigencies of the situations which it is the purpose of that rule to safeguard. It will be remembered that the Supreme Court there said that the better practice would be, when the state proposes to offer evidence of other crimes, for the trial court, as a preliminary matter, either to hear the evidence, or to ascertain its character and scope by inquiring of the prosecuting attorney, or be guided by the offer of proof and by such testimony as can be conveniently presented, then, if the evidence seems sufficient, to allow it to go to the jury. Under such a practice it surely must sometimes transpire that the evidence finally submitted to the jury will not measure up even to that developed upon a preliminary hearing by the judge, and such a result will follow with great frequency upon a determination of the question of admissibility from mere inquiry of the prosecuting officer or from an offer of proof. In such instances it would not be proper, clearly, to permit the evidence to remain before the jury, and a motion to strike would be a correct means through which to take it from their consideration. In the last analysis, then, even under the practice advised in State v. Hyde, supra, the question of the admissibility of evidence of other offenses, or, rather, the question whether such evidence should be allowed to remain before the jury, would seem to depend for its settlement upon a motion to strike after the totality of the evidence upon the subject had been heard.

A somewhat cognate situation under our California practice immediately comes to mind in considering the present question. "It is the duty of a trial court to consider, in the first instance, whether a confession was freely and voluntarily made, as a basis for a determination of the question of its admissibility in evidence." People v. Zarate (Cal. App.) 201 Pac. 955. How can a solution of such a question be made to depend, where a district attorney is unfolding his proof as to the circumstances under which a confession was made, upon objection to each item of evidence as it is offered, on the ground that it fails to show that the confession was free and voluntary? Obviously, the sufficiency of the evidence presented as a foundation for the offer of a confession cannot be tested until all the evidence claimed as a sufficient foundation is before the court. Equally obviously, if opportunity is not given the court at that stage to pass upon the sufficiency of the foundation, the question is waived and the admissibility of the confession is forever determined. We are, of course, aware that the question now before us is in a certain respect different from the one just cited as an example; but the two are alike so far as the principle now under consideration is concerned. The evidence taken to determine whether a confession is free and voluntary is preliminary to the evidence of the confession itself, while the entire evidence of other offenses is preliminary to nothing whatever, being the evidence which the jury is to consider substantively. The sufficiency of the evidence laying a foundation for a confession cannot be tested until that evidence is all before the court, even though the matter may be settled by an objection to the evidence of the confession. Equally, it seems to us, the question of the completeness of the evidence offered to prove other crimes ordinarily cannot be settled until it is all in, although it cannot be determined by objection. As it cannot be so determined, it must be determined on a motion to strike. If it cannot be settled at that time and after that method, it cannot be settled at all by the trial court, and a determination on appeal that the evidence is insufficient fastens upon the trial court the responsibility for reversible error, although it had no opportunity to pass upon the question and therefore really committed no error. Such a result does not ordinarily follow from a proper exercise of its functions by a court of review, for the purpose of an appeal from a trial court is to secure a ruling upon questions which have been considered by that court. People v. Walton (Cal. App.) 199 Pac. 824. The trial court committed no error in receiving the evidence concerning the Swanson affair and in allowing that evidence to remain before the jury.

[8] The evidence having shown that the offense of the conspirators was the larceny of a cashier's check and the indictment having charged the larceny of lawful money of the United States, being the personal property of Norris, appellant asked the trial court to instruct the jury, in effect, that the larceny of a check is not a larceny of money, and that they must acquit appellant unless they found from the evidence that the check, if presented to the bank, would have been charged against the account of Norris. These requested instructions were refused, and appellant assigns the ruling as error. The court is justified in its refusal by the cases of People v. Whalen, 154 Cal. 472, 98 Pac. 194; People v. Leavens, 12 Cal. App. 178, 106 Pac. 1103; People v. Arnold, 20 Cal. App. 35, 127 Pac. 1060; and People v. Crane, 34 Cal. App. 599, 168 Pac. 377—appellant making no contention that the evidence fails to show that the conspirators did not convert the cashier's check into cash. People v. Crane has a particular bearing upon the question presented by appellant, and in instructing the jury the trial court carefully followed the doctrine of that case and of the others we have cited with it.

The trial court also refused certain instructions requested by appellant under the law of conspiracy, and it is contended that the refusal was erroneous. We can see no reason why the instructions should have been given.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

56 Cal. App. 224

HAWI MILL & PLANTATION CO., Limited, v. LELAND, Coroner, et al.

(Civ. 4068, 4069.)

(District Court of Appeal, First District, Division 1, California. Jan. 18, 1922. Hearing Denied by Supreme Court March 16, 1922.)

1. Execution 🔑55—Property replevied held not subject to seizure under execution.

Where after attachment the property was taken from the custody of the officer under claim and delivery bond given, it was not subject to subsequent seizure under an execution, in another proceeding by the attaching creditor; it being regarded as in the custody of the law until the replevin proceedings should be terminated.

2. Attachment 🔑300—Claimant parting with title may petition for writ of mandate compelling redelivery of property.

A claimant of attached property, who replevined it and was given possession thereof on giving a delivery bond, though he has parted with title thereto by transfer of warehouse receipts, retains a sufficient interest to enable him to petition for writs of mandate compelling redelivery of the property taken from him on execution against defendant, the original debtor in attachment.

3. Assignments 🔑120—Transfer of interest in property held not to deprive plaintiff of interest in suit.

That a plaintiff in replevin to whom the property has been delivered under delivery bond parts with the title thereto by transfer of warehouse receipts does not prevent an application for supplementary writs of mandate to protect his rights under the bond in view of Code Civ. Proc. § 385, permitting the continuance of the action in the name of the original party after a transfer of interest.

Petition by the Hawi Mill & Plantation Company, Limited, against T. B. W. Leland, Coroner of the City and County of San Francisco, and others, for supplementary writs of mandate to compel respondents to fully obey peremptory writs of mandate theretofore issued. Writs granted.

McCutchen, Olney, Willard, Mannon & Greene, of San Francisco, for petitioner.

Knight, Boland, Hutchinson & Christin, of San Francisco, for respondents.

RICHARDS, J. Ths is an application for supplementary writs of mandate to carry into full and further effect the peremptory writs of mandate issued out of this court in the above-entitled proceedings on October 25, 1921.

The facts leading up to the issuance of those writs and the supplementary facts occurring thereafter and upon which the present application is predicated are briefly stated as follows: On April 26, 1921, Geo. A. Moore & Co. started an action against Hidalgo Plantation & Commercial Company, La Zaculapa Plantation Company, and La Zaculapa Plantation & Harrison Company for the recovery of an alleged indebtedness of $88,607.92, in which action an attachment was issued and levied upon the two lots of coffee involved in the two proceedings before this court. Thereafter the Hawi Mill & Plantation Company filed third party claims with the sheriff levying said attachment as to both lots of coffee, who, after receiving an indemnity bond against said Geo. A. Moore & Co., refused to deliver up the same to the said claimant, upon which refusal the latter, on August 27, 1921, commenced two actions against said sheriff, and also against Geo. A. Moore & Co., to recover possession of said two lots of coffee and in these actions presented the statutory claim and delivery bonds sufficient in form to require the sheriff to deliver said property to the coroner, who was the statutory officer entitled to serve process and take delivery of said property in said actions. The defendants in these two replevin suits failed to present a valid redelivery bond within the time provided by the statute. In the meantime, and on the 16th day of September, said Geo. A. Moore & Co. commenced another action against the said defendants, who were the corporations made parties to its original action, and also against certain other defendants, who were alleged to be the trustees of said defendant corporations, the latter having forfeited their charters under the revenue and taxation laws of this state, to recover from said defendants the sum of $138,607.92. This sum, though larger than that sued for in the original action, is admittedly an indebtedness arising out of the same transaction; and in such suit the said plaintiff, Geo. A. Moore & Co., through immediate answers filed by said defendants admitting said indebtedness, procured a judgment in its favor to be entered on the same date of the filing of such suit for the amount of said indebtedness, and immediately thereafter, and on September 17, 1921, caused an execution to be issued and levied upon said two lots of coffee in the hands of the coroner at the time. Thereupon the original proceedings for the issuance of writs of mandate were instituted by the plaintiff in said replevin suits in this court to compel the delivery to it of the coffee involved in said suits under the provisions of section 514 of the Code of Civil Procedure. After a hearing upon the merits in both of said proceedings, this court issued peremptory writs of mandate, commanding the delivery of both of said lots of coffee to the plaintiff in said replevin suits. Thereafter, and on October 31, 1921, said writs of mandate were duly served upon the said sheriff, then in the possession of said property by virtue of said writ of execution, and also upon the defendants in certain proceedings, and the said sheriff thereupon and in response to said writs delivered said coffee to the petitioner in said proceedings, but immediately thereafter, and purporting to act under and by virtue of an alias writ of execution issued upon the last above-mentioned judgment, the said sheriff levied the same upon 1,971 bags of said coffee, and took possession of the same, which possession he still holds as such sheriff and by virtue of said alias writ of execution, and refuses to deliver to said petitioner herein upon its demand; hence the application for supplementary writs of mandate herein. In response to said application the respondents herein have filed answers alleging, in substance, that the two original lots of coffee were, on October 29, 1921, in storage in Southern Pacific Warehouse No. 2, then being operated by the Haslett Warehouse Company, a corporation. That on said 29th day of October, 1921, and prior to the service of the original writs of mandate, as above set forth, the applicant herein assigned and transferred all of its right, title, and interest in and to said two lots of coffee to one J. H. Beamer; and that immediately after the redelivery of said coffee to the applicant herein by the said sheriff in response to said writs the said Haslett Warehouse Company delivered to said Beamer 1,205 bags of said coffee, who thereupon received and removed the same from said warehouse; and said Haslett Warehouse Company at the said time also delivered to said Beamer its negotiable warehouse receipt for the removing of the remaining bags of said coffee, which negotiable warehouse receipt, the respondents allege, has by the said Beamer been assigned, delivered, and transferred to other parties. That by virtue of the foregoing facts the applicant herein has no longer any right, title, or interest in any portion of said two lots of coffee; that the alias execution aforesaid was levied by said sheriff upon said 1,971 bags of coffee after the aforesaid transfers of said coffee had taken place, and hence at a time when the said remaining portion of the coffee was subject to the levy of said alias writ.

The respondents further allege that on the 31st day of October, 1921, and after the aforesaid levy of said alias execution had been made, the said Geo. A. Moore & Co. commenced an action against said Haslett Warehouse Company under the provisions of section 18 of an act of the Legislature, approved March 19, 1909 (St. 1909, p. 440), and amended May 11, 1919 (St. 1919, p. 398) entitled "An act to make uniform the law of warehouse receipts," and that an answer had been filed therein by the said Haslett Warehouse Company to the effect that it held in storage said coffee subject to a negotiable warehouse receipt issued to one J. H. Beamer, but upon which the alias execution above referred to had been levied by the sheriff, who had placed one of his deputies in charge of said coffee, and had assumed control over the same; that thereafter said J. H. Beamer had presented his said warehouse receipt and demanded possession of said coffee, but that the said sheriff, acting through his said deputy, had refused to allow said defendant to make delivery of the same.

Upon the hearing upon these applications and the answer thereto, the applicant presented and filed a written joinder of said J. H. Beamer and Williams-Diamond & Co., to whom portions of said coffee were alleged to have been assigned, in the supplementary petitions of the applicant herein for a further writ of mandate and a request that the relief herein sought be granted to said applicant. There was also presented and filed at the same time a demurrer to the answer of the respondents upon the ground that the same did not state facts sufficient to constitute a defense on the part of said respondents, or any of them. A motion to strike out portions of said answers was also presented and filed. The matters thus put in issue may, we think, be fully tested out upon the demurrer to the respondents' answers; and, since they all relate to the fundamental question as to whether personal property, taken in an action upon claim and delivery and thereafter delivered to the plaintiff in said action under the provisions of section 514 of the Code of Civil Procedure, remain in custodia legis after its delivery by the officers executing the process to the plaintiff, so as not to be subject to a writ of execution issued on behalf of and at the instance of the plaintiff on the original attachment suit, which preceded and compelled the replevin suit, or issued or sought to be levied for the enforcement of a judgment obtained either in that original action or in any subsequent action by the same plaintiff for the enforcement of the same obligation. Upon the hearing upon and submission of the original applications herein for a writ of mandate, this court held that such personal property was in custodia legis while the same was in the custody of the officer executing the process in the claim and delivery action, and that the plaintiff in said action was entitled to have delivered to it said property by said officer, or by any one to whom he had delivered it, notwithstanding the fact that a writ of execution had been attempted to be levied upon said property at the instance of the plaintiff in the action or actions instituted by it to recover upon the original obligation of certain parties not parties to these proceedings, and in which action or actions the attachment or the later execution had been levied. This court, therefore, issued the original writs of mandate herein, directing the sheriff to deliver the said property, and the whole thereof, to the applicant herein. In these proceedings for the issuance of supplementary writs of mandate this court is asked to go at least so far as to define the rights of the applicant in respect to the property involved therein after the same has passed into its possession by virtue of the execution of the original writs of mandate. This the court is prepared to do.

An examination of the authorities bearing upon this question discloses the following condition and leads to the following conclusions: Prior to the adoption of the Code of Civil Procedure in the state of New York in 1848, the courts of that state had decided that personal property taken under a writ of replevin could not be levied upon through a writ of execution, the property being regarded as in custodia legis so long as the replevin suit was pending, the bond given therein being regarded as a substitute for the goods. In Acker v. White, 25 Wend. (N. Y.) 614, the execution creditor was not the original party whose attachment of the property had led to the replevin suit. The Code of Civil Procedure of the state of New York adopted in 1848, embodied the provisions of the earlier New York statute relating to actions in the nature of replevin under which the above case was decided. New York Code of Civ. Proc. § 206 et seq. to section 217. And these provisions have been substantially retained in the New York Code of Civil Procedure through its various enlargements and amendments down to the present time. The provisions of the New York Code of Procedure upon this subject were substantially incorporated in the California Code of Civil Procedure upon its original adoption in 1872, and have been since, in substance, retained therein. This derivation of the provisions of our Code from the New York Code renders very persuasive the decisions of the New York courts upon our courts in relation to this subject. The case of First National Bank, etc., v. Dunn et al., 97 N. Y. 149, 49 Am. Rep. 517, was an action wherein, after the sheriff had taken certain personal property upon a writ of replevin and delivered the same to the plaintiff in the replevin suit, he claimed the right to retake the same under and by virtue of a writ of execution which had been placed in his hands for enforcement against said property in another action. The New York Court of Appeals in that case, after an exhaustive review of the cases, not only in New York, but also in other jurisdictions, held that the property in question remained in custodia legis after it had passed into the possession of the plaintiff in the replevin suit so as not to be leviable upon at the suit of a subsequent execution creditor of the party from whose custody the property had been taken in the replevin suit. In so deciding the court cited with approval the case of Hagan v. Lucas, 35 U. S. (10 Pet.) 400, 9 L. Ed. 470, as deciding that property taken on a writ of replevin is in the custody of the law, both while held by the officer and after delivery to the plaintiff, and so remains during the pendency of the action of replevin awaiting the final disposition of the court in said action. The reasons given by both the New York and the federal courts for this holding are the same, and are that the law which requires the plaintiff in a replevin suit to give a bond for the return of the property to the person from whom it is sought to be taken as a condition of the plaintiff's present and temporary possession thereof during the pendency of the replevin suit, would be inconsistent and ineffectual if, after he had made himself and his sureties liable upon such bond for the return of the property, it could be taken from him through the levy of an execution issued in some other action, and the obligation of his bond thus rendered it impossible of fulfillment. As the court in the New York case last above quoted says:

> "Can a result so repugnant to equity and propriety be sanctioned? Is the law so inconsistent as to authorize the means by which the discharge of an obligation is defeated and at the same time exact a penalty for the failure?"

And the court further states in conclusion of the whole matter:

> "The whole action of replevin and its modern substitute are alike in the nature of the proceedings in rem. The court fastens upon the identical property and holds it subject to its own ultimate disposition. If by its own rules it cannot hold the res against other process, the action loses its character and becomes merely one in damages."

Other cases upholding the same principle are Pipher v. Fordyce, 88 Ind. 436; Rhines v. Phelps, 3 Gilman (Ill.) 455; Selleck v. Phelps, 11 Wis. 380; Stout v. Follette, 64 Ind. 365; Bates, etc., Natl. Bank v. Owen, 79 Mo. 429; Tremaine v. Mortimer (N. Y. Super. Ct.) 7 N. Y. S. 681; Williamson v. Nealy, 119 N. C. 339, 25 S. E. 953; Beagle v. Smith, 50 Neb. 446, 69 N. W. 956. It is true that there are cases holding to the contrary of the foregoing doctrine which have been quite industriously collated by the respondents herein, but these, we conclude from our examination, either represent views depending upon particular statutes differing from our own or represent the minority view of the courts upon this subject. The text-writers, considering this conflict in authority, have adopted the majority view of the cases as the sounder law. In Freeman on Executions (3d Ed.) section 135, we find it stated that:

> "The taking of property by an officer acting under a writ of replevin places it within the custody of the law, and therefore precludes it from being levied upon under an execution. No levy can be permitted which if effective might defeat the object of the action of replevin."

[1] In 23 Corpus Juris, at page 359, the rule is thus stated and as thus stated has exact application to the instant case, viz.:

> "Where, after a levy on property by attachment or execution, such property is released from the custody of the officer under a bond given to try the right thereto, * * * the property is still regarded as being in the custody of the law, and is not subject to seizure and sale under a junior execution."

[2, 3] The respondents, however, contend that if this doctrine is to be given full application to such a state of facts as is presented here, it would have the effect of preventing those who might have superior rights to those of the plaintiff in replevin from having recourse to such property, and would thus be a violation of the federal Constitution. We do not consider that the exigencies of this case call for such a conclusion. The bond which the plaintiff in replevin has given runs in favor of the defendant in that action, that is to say, the person from whose custody the property was taken, and requires the return of the property or its equivalent in money to such person in the event of the plaintiff's failure to recover judgment in said action. The person to whom such eventual return must be made is the sheriff, who, upon again receiving such property or its money equivalent, would hold the same in his official capacity and subject to whatever process was in his hands affecting the same, just as though no such replevin suit had been brought, and the rights, not only of the original attaching creditor, but also of all subsequent execution creditors who had placed their process in his hands, would be thus amply protected through the giving of the replevin bond. Respondents further contend that the facts set forth in the answer and admitted for the purpose of demurrer show that the applicant has parted with all of its right, title, and interest in the property in question by the transfer of the warehouse receipt therefor to Beamer and by the further transfer of the same by said Beamer to the other persons named, and that therefore the plaintiff is no longer a party in interest in this proceeding, and hence not entitled to a supplemental writ of mandate herein. There are several answers to this proposition; the

first being that the plaintiff, even if it had parted with its title to said property, would still have a sufficient interest in the proceeding to seek this remedy therein for the protection of its replevin bond. This must be so in order to avoid those very inconsistencies, which, as the foregoing cases indicate, would otherwise exist, since the purpose for which a party claiming to be the owner thereof has in view in seeking to obtain the possession of particular property by means of a replevin suit is that of putting said property to its ordinary uses in the way of its consumption or sale. To deny the plaintiff this consequential right through exposing the property to other process at once upon its leaving his own possession would be to deny to him the very fruits of his action and to render his remedy of claim and delivery a vain and useless form. The second reason is to be found in the terms of section 385, Code of Civil Procedure, which, in the case of a transfer of interest, permits the continuance of the action in the name of the original party. This section of the Code has been given special application to this proceeding by the fact that the persons to whom the plaintiff in the replevin suit is alleged to have transferred its interest in the property involved therein have appeared herein to join the applicant in the remedy herein sought, and to request that the applicant herein be given the relief sought, notwithstanding such transfer of interest. As to that portion of the respondents' answer which avers the institution of a suit against the warehouseman under the provisions of section 18 of the act entitled "An act to make uniform the law of warehouse receipts," we cannot conceive how the prosecution of such an action could possibly affect the right of the applicant in these proceedings under the principles above enunciated, defining its right to the custody and control of the property in question during the pendency of the replevin suit.

For the foregoing reasons we are of the opinion that the applicant herein is entitled to the relief prayed for in its supplementary application herein. Let writs issue accordingly.

We concur: TYLER, P. J.; KERRIGAN, J.

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56 Cal. App. 299

GUNBY v. SWARTS. (Civ. 4149.)

(District Court of Appeal, First District, Division 1, California. Jan. 26, 1922. Hearing Denied by Supreme Court March 27, 1922.)

1. Mines and minerals 🔑55(1)—Transaction held to culminate in meeting of minds on execution of mineral deed.

Where vendor signed mineral deed which had been sent him by purchaser and sent deed to title insurance company for delivery to purchaser on payment of purchase price, there was a meeting of the minds and the consummation of a completed agreement.

2. Mines and minerals 🔑55(2)—Purchaser of mineral rights under agreement held to take property subject to outstanding taxes.

Purchaser of mineral rights under agreement to pay vendor specified purchase price "net" took the property subject to taxes outstanding against its title.

3. Mines and minerals 🔑55(2)—Purchaser of mineral rights subject to outstanding taxes could not refuse payment of price to vendor on acquiring tax deed.

Purchaser of mineral rights subject to taxes outstanding against the title could not, on purchase of tax deed from state, refuse to pay vendor amount due under his contract with vendor, on the ground that he no longer asserted the title acquired from vendor.

Appeal from Superior Court, Los Angeles County; John D. Shenk, Judge.

Action by W. J. Gunby against Mina Agnes Swarts, executrix of the will of D. J. Swarts, deceased. Judgment for plaintiff, and defendant appeals.

Olin Wellborn, Jr., and Stephen Montelone, both of Los Angeles, for appellant.

James, Smith & McCarthy, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action to recover the sum of $4,750 as the purchase price of certain properties alleged to have been sold and delivered by the plaintiff to the defendant, the said properties consisting of certain oil and mineral rights in certain lands located in the county of Ventura, state of California. The plaintiff claiming to own these rights was at the time the negotiations for their purchase began a resident of Chillicothe, Mo. The defendant was at said time a resident of Hermosa Beach, Cal. The negotiations between the parties were conducted through the medium of letters and telegrams, and, since the only question involved in this case is as to whether the minds of the parties so met through the medium of these letters and telegrams and of the acts of the parties or their agents done in pursuance thereof as to have resulted in such a transaction as would give the plaintiff the right of recovery in this action, it will be necessary to follow the transaction through a résumé of what these documents contain.

The negotiations between the parties began with a letter from Swarts to Gunby dated December 21, 1916, wherein the former stated that he had learned that the latter owned mineral rights under a tract of land in the Ojai Valley, of which he had a chance to sell the surface to parties who desired also to secure these mineral rights. He therefore asked if Gunby would consider an offer of $20 per acre, allowing 5 per cent. commission on the sale. On January 11, 1917, Gunby replied to this letter indicating that an oil company of which he owned or controlled a majority of the stock owned the property, and that it would be willing to sell at $30 per acre net, but not with the 5 per cent. commission. To this letter Swarts replied, stating that he could handle the property at the price of $30 per acre, but would expect to receive the 5 per cent. commission, and suggesting that if this was satisfactory a deed be made in his name and forwarded either to Gunby's brother at Long Beach or the Ventura Abstract Company, subject to his approval, and to be delivered to him when the purchase price should be paid in full. In response to this letter Gunby replied that, while the title to the property was in him, the stockholders of the oil company had interests therein which led him to call a meeting of the stockholders on February 8th, with the object of authorizing a sale of the property at $30 per acre net, but that, having the proxies of over 75 per cent. of these stockholders, he would be prepared after that date to execute a quitclaim deed to the property upon the terms stated in his former letter. This communication was referred by Swarts to his attorney, Olin Wellborn, Jr., who it is admitted was the agent of Swarts to carry on the negotiations, and who on February 2, 1917, wrote to Gunby regarding an abstract to the property, to which Gunby replied on February 6th, stating that he had an abstract which he could send to them if desired, but that it was apparently incomplete. In the meantime Wellborn had been corresponding with the Ventura Abstract Company and had received a report showing the title to be in the Chillicothe Oil & Mining Company, but subject to many sales for taxes, all of which had been redeemed with the exception of the taxes for 1913–1916; the last two assessments being in the name of Gunby. On February 10, 1917, Gunby wrote to Swarts stating that the stockholders' meeting of the Chillicothe Oil & Mining Company had been held and that he had been authorized to make a deed to the property and that he was in a position to close the deal if they could get together on the price. To this letter Swarts replied on February 16th, stating that he could get a party to purchase the property at $30 per acre gross cost to them, but that Gunby should allow him a reasonable commission. Gunby replied by telegram on February 20, 1917:

> "Have offer of 4,750.00 net to me. If you want oil & mineral rights at this price, wire 500 earnest money. Will make Q. C. deed subject to taxes deposit deed in bank at L. A. to close 2—26—17. Answer."

To this telegram Swarts replied on the following day with a long telegram stating in substance that his attorney had not received the abstract, and that if Gunby would forward abstract to his attorney and deed to the Title Insurance & Trust Company of Los Angeles, with instructions he would deposit $500 in escrow with them at once and pay balance upon approval of abstract and deed, to which Gunby sent a telegram in reply as follows:

> "Deposit five hundred dollars, earnest money in Title Insurance and Trust Company, Los Angeles, Cal., to my credit, on contract purchase of oil and mineral rights at forty seven hundred fifty dollars net to me deed and abstract ready to send on report from bank of deposit in my name. Have bank wire."

Upon receipt of this telegram Swarts deposited $500 with the Title Insurance & Trust Company of Los Angeles with written escrow instructions directing the depositary to hold the same subject to purchase of the oil and mineral rights in question from Gunby by quitclaim deed at the total purchase price of $4,750, balance to be paid upon delivery of the deed and abstract of title satisfactory to him and requesting the depositary to wire Gunby that it had said sum on account of said purchase and requesting that he send deed and abstract for examination. The escrow instructions also contained the provision that the deposit was to be returned if the title proved unsatisfactory. The Title Insurance Company accordingly wired Gunby notice of its receipt of the $500 and requesting the forwarding of the deed and abstract with specific instructions as to the delivery of the same. To this wire Gunby sent a reply stating:

> "Sent papers by regis. mail today. Full instructions in letter. Notify Mr. Swarts, and send me five hundred as per my wire to him."

The letter of Gunby which followed on February 26th quoted his former telegram to Swarts as to terms of purchase, but complained that it did not appear that the money had been deposited to his credit but on account of purchase which was not according to his said telegram. However, he inclosed his deed, with instructions to deliver the same to Swarts upon his deposit in the post office of a draft for $4,750, all expenses to be paid by Swarts. The letter further stated that Swarts has had ample time to learn the status of the title and hence 24 hours was sufficient time to deposit the money, and that if he did not do so within 24 hours to return all papers to Gunby. To this letter the Title Insurance & Trust Company wired a reply on March 5, 1917, stating that there was an error in the recitals of the deed which required correction and that a new deed would be necessary, and that the attorney for Swarts stated that the balance of the money would be paid on receipt of the same. To this telegram Gunby replied by wire on the following day, saying: "You correct deed for me or return for correction." To which the Title Insurance & Trust Company replied, "Parties ready to close forwarding new deeds tomorrow for execution," and followed this message with a letter inclosing the new deed with instructions as to the form of its execution and request for its early return, in response to which Gunby wrote to the Title Insurance & Trust Company on March 12, 1917, transmitting new deed and directing its delivery to Swarts as per his letter of February 26, 1917. In this last letter it was noted that the matter of taxes had been omitted, and, if that implied that he was bound to pay them, not to deliver the deed, but to return the same to him at once, as his offer to Mr. Swarts was $4,750 net cash to him.

[1-3] It will be clarifying to pause at this point in the extended negotiations of the parties to point out that the minds of the parties apparently met at this stage of the transaction and that a completed agreement was thus consummated between them. The Title Insurance & Trust Company was the agent and representative of the defendant Swarts in all of the later stages of the correspondence, and its letters and telegrams had brought them to the point of a perfect understanding, by the terms of which Gunby was to convey by quitclaim deed in its hands all of his right, title, and interest in the oil and mineral rights in question and was to receive for such transfer the net sum of $4,750. Whatever objections the plaintiff had theretofore urged against the form of the original deposit as "earnest" money or "escrow" money had been waived by him, as had also his insistence that the transaction should be closed within 24 hours after his transmission of the original deed. As to the matter of the unpaid taxes there could be no issue, since the purchase price of the property was understood to be $4,750 net to the grantor of the quitclaim deed, which, even in the absence of the latter's express stipulation, could mean nothing less than that the grantee was to take the property subject to whatever taxes were outstanding against its title. It is nowhere contended that such was not the case. The reason why the transaction was not closed at once according to the understanding thus fully arrived at is disclosed by the later correspondence following the date of March 12, 1917, when the plaintiff's corrected deed was transmitted to the Title Insurance & Trust Company. It then for the first time developed that the deed from the Chillicothe Oil & Mining Company to Gunby was irregular for the reason that said corporation had forfeited its charter under the revenue laws of this state. This entailed considerable delay and much correspondence, resulting finally in the execution of several deeds from parties having apparent interests in the property, all of which were finally delivered to the defendant Swarts or his agents and which he has ever since retained. In the meantime, however, Swarts had procured to be executed to himself a tax deed from the state of California, issued in June, 1917, upon a tax sale of the said property for nonpayment of taxes, which, under the arrangement between the parties, he was obligated to pay. Having obtained this tax deed, he asserted, and now asserts, that he was no longer bound to accept or pay for the Gunby title as embodied in the several other deeds, which, as above stated, had been delivered to and accepted by him. We know of no law, and we are cited to no authority, which would justify such a position. In the purchase of the tax title to said property Swarts was merely paying the taxes due thereon which, as we have seen, he was bound to pay, and he cannot be permitted to make use of such tax title as an excuse for the violation of his agreement to purchase the regular chain of title to the property from the owner thereof. The findings and conclusions of the trial court are in accord with the foregoing and are, we think, fully supported by the evidence in the case.

No other ground of error being urged, the judgment is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

56 Cal. App. 384

PFAHLER et al. v. WORCESTER et al.
(Civ. 3511.)

(District Court of Appeal, Second District, Division 2, California. Feb. 11, 1922.)

1. Fraudulent conveyances 🔑145—Transfer of property not accompanied by delivery and change of possession fraudulent as to creditors.

Where a debtor of plaintiffs transferred property to one of defendants, and remained in possession of the property as manager for such defendant of the business in which it was used until after plaintiffs had got a judgment against such debtor, plaintiffs had a cause of action under Civ. Code, § 3440, providing that transfers of personal property are fraudulent if not accompanied by a delivery and followed by actual change of possession.

2. Fraudulent conveyances 🔑261—Insolvency of debtor need not be alleged in action to set aside transfer without change of possession.

In an action under Civ. Code, § 3440, to set aside transfer of personal property without change of possession, as being in fraud of creditors of the transferror, it is not necessary to allege that the transferror was insolvent.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by W. W. Pfahler and others against F. W. Worcester and others. From judgment for plaintiffs, defendants appeal. Affirmed.

R. Lee Bagby, of Casper, Wyo., for appellants.

Gordon Gray, of San Diego, and James D. La Motte, for respondents.

WORKS, J. [1] Plaintiffs, who were judgment creditors of defendant Worcester, brought this suit against him and his codefendants to set aside a transfer of certain personal property which Worcester had made to defendant Bower. The latter was at the time of the transfer a creditor of Worcester, and the transfer was attempted to be made in satisfaction of the debt, Bower acknowledging its payment at the time. Upon the date of the transfer Bower was an officer of defendant bank, that corporation being also a creditor of Worcester, although the conveyance seems to have been made in satisfaction of Bower's claim alone. The complaint is based upon Civil Code, §§ 3439, 3440, and 3442, concerning transfers of property in fraud of creditors. Judgment went for plaintiffs, and defendants appeal.

Appellant insists that Worcester had the right to prefer Bower as a creditor, and to indicate the preference by the transfer which was made to him. This contention is in the very face of one of the sections upon which the action is based (section 3440). That section reads, in part, as emphasized by the use of italics:

> "Every transfer of personal property, other than [certain kinds which do not concern us here] *is conclusively presumed,* if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, *to be fraudulent,* and therefore void, against those who are his creditors while he remains in possession. * * *"

Worcester was in possession of the property in question here at the time of the transfer to Bower, and was conducting his business by means of it. There was no change of possession, for Bower immediately employed Worcester as manager of the business, no notice of that fact, however, being conveyed to the outside world, and Worcester continued to conduct the business to all appearances as he had conducted it before the transfer. Worcester continued in possession of the property, and continued to operate the business in his customary manner until about four months after the transfer, when he disappeared. He has never since been heard from. During the entire time from the date of the transfer to the day upon which Worcester fled respondents were his creditors, and a week before the latter event their claim against him had ripened into judgment. Respondents therefore made a perfect case under the portion of the section which we have quoted.

[2] Appellants make the claim that a finding of the trial court that Worcester was insolvent at the time of the transfer is not supported by the evidence, but it is plain that insolvency need neither be alleged nor proved under the provisions of the part of section 3440 which we have above set forth. We have, however, examined the record and conclude that the finding of insolvency is amply supported by it. Appellants make this point, as well as others mentioned in their brief, upon the assumption that respondents must have made out a case under Civil Code, § 3442, and certain other sections mentioned in it, but section 3442, by express exception, has no application to the portion of section 3440 which we have quoted above. The complaint, it is true, alleges a cause of action under section 3442, as well as under the part of section 3440 to which we have referred. As a case was made out under the cause of action last mentioned, it is immaterial whether one was proven under section 3442.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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56 Cal. App. 344

HEWLETT et al. v. EVANS et al.

(Civ. 2392.)

(District Court of Appeal, Third District, California. Jan. 31, 1922.)

1. Mortgages 🔑114—Mortgagors held liable for expenses of mortgagee's contesting mortgagors' claim to reconveyance on payment of less amount than actually secured.

Under trust deed authorizing the mortgagee and trustees, or assigns, to prosecute any adverse claims at the expense of the mortgagors, mortgagors were liable, in view of Code Civ. Proc. § 1050, for the expense of action by assignees of trust deed against mortgagors to determine mortgagors' claim that they were entitled to reconveyance upon payment of less than the face value of the note secured by the trust deed, and mortgagors could not claim, although their adverse claim was decided against them in that action, that the action was brought upon a "flimsy basis"; they having appeared and contested it.

2. Mortgages 🔑218—Mortgagees held entitled to recover expenses of litigating mortgagors' own adverse claim, though such expense not adjudicated in adverse claim action.

Under trust deed authorizing the mortgagee and trustees, or assigns, to prosecute any adverse claims at the expense of the mortgagors, assignees of the trust deed could enforce payment by mortgagors of the expense of litigating the mortgagors' own adverse claim, in the same manner as that of enforcing payment of the principal debt, and it was not necessary that the assignees should litigate and settle such expenses in the adverse claim suit.

3. Judgment 🔑593—Grantors' liability under deed of trust for expenses incurred by holders in suing grantors to have deed of trust declared valid lien may be litigated in separate action.

Holders of deed of trust, authorized thereby to prosecute adverse claims at grantors' expense, may sue for expenses incurred in a previous action to determine the grantors' adverse claim as to amount secured, as against contention that the grantors' liability for expenses should have been litigated in the previous action, and that failure to do so or to have caused the property to be sold for the amount secured, including the expenditure, was a splitting of plaintiff's cause of action; plaintiffs having accepted the principal debt and reconveyed to defendants on condition that their claim for reimbursement should not be prejudiced.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Frederick Hewlett and another against C. W. Evans and another. Judgment for defendants, and plaintiffs appeal. Reversed, with directions.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellants.
L. J. Maddux, of Modesto, for respondents.

FINCH, P. J. The defendants' demurrer to the complaint, on the ground that the facts stated therein do not constitute a cause of action was sustained without leave to amend, and judgment was thereupon entered in favor of the defendants for costs.

From the allegations of the complaint it appears that on July 27, 1917, the defendants executed and delivered their promissory note for $16,000, payable three years after date, to R. O. Hobson, and, as security for the payment thereof, made and delivered to Joseph F. Carlston and Harry A. Mosher, as trustee, a deed to certain lands. November 14, 1917, Hobson assigned the note and security to plaintiffs.

> "On or about the 8th day of July, A. D. 1918, said defendants herein made known to said plaintiffs a claim on the part of said defendants, adverse to said plaintiffs, to a right to redeem the real property described in said deed of trust, upon the payment to them of a sum of money less, to the extent of $7,060.50 than the principal sum of said note, basing such claim upon the fact alleged by them that the consideration of said note had failed to the extent of said sum of $7,060.50; that the claim so asserted by said defendants herein was without any right or foundation whatever, notwithstanding which, however, it affected and clouded the said plaintiffs' right and title to said land and the merchantability of said note in their hands, and prevented and obstructed their alienation thereof. That on the 18th day of November, 1918, said plaintiffs herein instituted, in the superior court of the state of California, in and for the county of Butte, an action, as plaintiffs, against said defendants herein and R. O. Hobson, as defendants, praying for the judgment of the said last-named court against all said defendants to the effect that said plaintiffs had a good and valid lien under said deed of trust upon all the said real property therein described, securing the payment to them of the full amount of said promissory note, and all other moneys stated in and by said deed of trust to be thereby secured."

The defendants appeared and contested the action. The court rendered judgment in favor of the plaintiffs as prayed for. In the prosecution of the action the plaintiffs "were compelled to and did incur and pay sums of money amounting in all to the sum of $492.99. On the 27th day of July, 1920, the defendants paid the plaintiffs the principal and interest of said promissory note, but refused to pay the aforesaid expenses of said action." At that time "it was agreed between said plaintiffs and said defendants that the delivery by said plaintiffs of said note and deed of trust, together with reconveyance of the property described in said deed of trust then and there made to said defendants by said plaintiffs, was and should be without prejudice to said plaintiffs' claim under said deed of trust to reimbursement of the expenses aforesaid." It is further alleged that under the terms of the deed of trust the plaintiffs are entitled to the further sum of $200 as counsel fees. The deed of trust provides:

> "Said R. O. Hobson and said trustees, or the survivor of them their successors and assigns, are also hereby authorized at such times as they see fit, without notice to and at the cost of said grantors, to prosecute, resist, compromise, purchase and settle any adverse suits, taxes, liens, incumbrances or claims * * * and otherwise perform all other covenants herein agreed to be performed by said grantors.
>
> "And these trusts shall continue as security * * * for all money laid out and expended by virtue hereof * * * and also for the sum of $200 * * * as counsel fees, which shall become due and payable to said trustees or the survivor of them, their successors or assigns, upon default made or suffered by said grantors in any of the matters aforesaid."

Respondents advance two grounds in support of the judgment:

First, "that the plaintiffs had no right to bring, upon such a flimsy basis, an action and to claim any expenses or attorney's fees" incurred therein; secondly, "that the plaintiffs have no right to bring another action for expenses and attorney's fees; that these expenses and attorney's fees should have been litigated and settled in the first case; that appellants have no right to split their cause of action."

[1] Respondents cannot consistently maintain that the first action was brought upon a "flimsy basis." They appeared in that action and contested plaintiffs' right to payment of the full amount of the promissory note therein involved. The court adjudged that their claim was unfounded. The judgment rendered was a determination that plaintiffs' cause of action was well founded. That determination cannot be reviewed here. It may be remarked, however, that the natural effect of the claim made by the defendants was to lessen the market value of the plaintiffs' promissory note and security. Such claim furnished sufficient ground for the action. Ayres v. Bensley, 32 Cal. 628.

The plaintiffs were obligated by the trust deed to reconvey the property described therein upon payment of the indebtedness secured. The claim made by the defendants was in effect that the plaintiffs were obligated to make such reconveyance upon payment of a sum less than the face value of the note. Section 1050 of the Code of Civil Procedure provides:

> "An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation."

If the defendants had claimed that the plaintiffs were obligated to reconvey without payment of any sum, then the foregoing section would have been clearly applicable. No reason appears why it is not equally applicable where the claim is of the right to a reconveyance upon payment of less than the amount actually secured.

[2, 3] The trust deed authorized the holders thereof, at the cost of the defendants, to prosecute any adverse claims, and provided that it should secure "all money laid out and expended by virtue hereof." It is axiomatic that the plaintiffs were entitled to recover in some manner all reasonable and necessary expenditures made by them under the authority of the trust deed. Respondents do not contend to the contrary, but, in addition to their contention that the first action was unnecessary, they urge that, if the plaintiffs were entitled to recover such expenditures, they should have litigated their claim thereto in the action in which the same were incurred. If expenses had been incurred in an action, authorized by the trust deed, against a stranger, the plaintiffs could have enforced payment thereof in the same manner as of the principal debt. Huber v. Brown, 243 Ill. 274, 90 N. E. 748; Williams v. Prioleau, 123 Ark. 156, 184 S. W. 847; 27 Cyc. 1077, 1779. See, also, Jones v. Baxter (Cal. App.) 197 Pac. 361. No authority is cited, and none has been discovered for the application of a different rule where the adverse claim is made by the mortgagor or grantor. At the time of rendition of the judgment establishing plaintiffs' rights under the trust deed it was impossible to ascertain the total costs and expenses which would be incurred. In the event of an appeal from that judgment the plaintiffs would have been put to additional expense for attorney's fees which could not have been taxed as costs on appeal. A judgment for the expenses incurred in that action would have created a lien on the land conveyed by the trust deed, but the trust deed itself created a lien on the same land for the same expenses, and no reason appears why such lien may not be enforced in the same manner as that of the principal debt.

If it be contended that the plaintiffs should have caused the property to be sold to satisfy the whole amount secured by the trust deed, including the expenditures claimed, and that failure to do so constitutes a splitting of plaintiffs' cause of action, the answer is that the defendants agreed that the acceptance of payment of the principal debt and the reconveyance of the property should not prejudice "plaintiffs' claim under said deed of trust to reimbursement of the expenses aforesaid."

Plaintiffs' demand for counsel fees in this action is based upon the express provision of the trust deed that the same shall become due and payable "upon default made or suffered by said grantors in any of the matters aforesaid." Failure of the defendants to pay the amount of such expenditures so secured by the trust deed constituted such a default as to entitle the plaintiffs to recover counsel fees in this action to enforce such payment.

The judgment is reversed with direction to the trial court to overrule the defendants' demurrer to the complaint.

We concur: BURNETT, J.; HART, J.

(188 Cal. 423)

SAN BENITO COUNTY v. WAPPLE.
(S. F. 9813.)

(Supreme Court of California. March 17, 1922.)

Agriculture 🔑9—Determination by county supervisors whether horticultural commissioner or health officer shall act in destroying animal pests held condition precedent to official action.

Under Pol. Code, §§ 2322–2322e and St. 1909, p. 311, providing for the extermination of animal pests from the infested premises of private persons, and making the cost thereof a lien on the land, it is a condition precedent to such proceedings that the governing body of the county wherein the destruction is proposed, should exercise its discretion to determine by which set of county officials the proceedings shall be instituted; and where the record in such a proceeding shows that the complaint therein does not aver that such proceeding was preceded by such determination, the defect is fatal, and no lien attaches to the premises proceeded against.

In Bank.

Appeal from Superior Court, San Benito County; John L. Hudner, Judge.

Action by county of San Benito against George Wapple to establish a lien against real property. From judgment for defendant, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and George H. Moore, Dist. Atty., of Los Angeles (Moore & Snell and George H. Moore, all of Hollister, of counsel), for appellant.

Thomas E. O'Donnell, of Hollister, Maurice T. Dooling, Jr., and F. A. Devlin, both of San Francisco, for respondent.

PER CURIAM. This appeal is from a judgment in the defendant's favor entered after an order sustaining a demurrer to the plaintiff's amended complaint, without leave to amend. The action was instituted by the plaintiff under the provisions of sections 2322 and 2322a of the Political Code, for the purpose of having a lien, which was claimed to have been created and to exist in its favor, established and enforced against the defendant's lands.

The foregoing sections of the Political Code have reference to the powers and duties of county horticultural commissions in the matter of the inspection of premises, the soil or vegetation of which may be infected with vegetable diseases or infested with insect or animal pests, and of the eradication of such diseases or pests, after notice to the owner and failure on his part so to do, the expense of such eradication to become a charge against the premises, for which a lien may be filed and foreclosed by the county. This is such a proceeding and action. The defendant's demurrer to the amended complaint was sustained, without leave to further amend.

The questions arising upon this appeal are presented upon the judgment roll and involve the sufficiency of said amended complaint as stating a cause of action. There were numerous objections urged by the defendant, upon his demurrer to the sufficiency of such complaint, and which are reiterated here. Some of these stand at the inception of the proceeding on the part of the county horticultural commissioner of San Benito county, as a result of which the lien involved in this action is asserted and these will be considered first.

There are, and from a time antedating the inception of said proceedings were, in existence two separate enactments of the Legislature dealing with the eradication of animal pests upon the lands and premises of private persons. A brief history of these two enactments will serve to clarify the present situation. In the year 1907, the Legislature (Stats. 1907, p. 801) added chapter 4b to title 5 of part 3 of the Political Code, embracing sections 2322 to 2322e of said Code. This enactment embodied provisions for the appointment of horticultural commissioners in counties, and provided for the inspection by these of the premises of private persons infested with infectious vegetable diseases or with insects or other pests, and for their eradication by such officials, after a notice to such owners and failure, refusal, or neglect on the part of the latter so to do, the expense of such eradication to be made a charge against the premises in the form of a lien to be foreclosed in a civil action. In the year 1909, these provisions of said chapter of the Political Code were amended and somewhat amplified (Stats. 1909, p. 185), but remained applicable only to the eradication of vegetable diseases and insect pests. At the same session of the Legislature, another act was passed and approved (Stats. 1909, p. 311) relating to the inspection of premises infested with animal pests, by local boards of health and health officers, and for the extermination of same, after notice to and failure, refusal, on neglect of the owner of the premises so to do, the expense thereof to be paid by the county and to become a charge against, and a lien upon, the premises, recoverable in a civil action. This act specifically enumerated ground squirrels and gophers among the pests so to be exterminated. In the year 1917, the Legislature again amended and enlarged the provisions of chapter 4 of said title of the Political Code (Stats. 1917, p. 627), and in so doing extended the same so as to include the eradication of animal pests by horticultural commissioners, from the premises of private persons infested with the same, specifically naming ground squirrels and gophers as among such pests so to be exterminated. This act, in its amendment to section 2322 of the Political Code, contained the following proviso:

> "Provided, this act shall in no wise affect any other act or acts providing for the destruction of ground squirrels or applying to the proceedings thereunder, but it is intended to and does provide the alternative system of proceedings for the extermination of ground squirrels and gophers referred to in this act; and it shall be within the discretion of the governing body of each county, city and county, city or town herein mentioned to provide for the destruction of ground squirrels whether under the provisions of this act or under the provisions of such other act or acts; but when any proceedings are commenced under this act, the provisions of this act, and of such amendments as may hereafter be adopted, and no other, shall apply to all such proceedings and any provision contained in any other act or acts in conflict with the provisions hereof shall be void and of no effect as to the proceedings commenced under the provisions of this act."

It is manifest that the Legislature, in the adoption, in the year 1917, of the aforesaid amendments to the several sections of the Political Code embraced in chapter 4b of the said title thereof, had in view the statute of 1909, relating to the extermination of animal pests by county boards of health and health officers, and that by the foregoing proviso, it intended to keep alive the provisions of said former act. This being so, it is equally plain that the Legislature, in thus providing for an alternative system of proceedings for the extermination of ground squirrels and gophers from the infested premises of private persons, intended to avoid any clashing of authority in the administration of said acts or in the powers and procedure of the two sets of county officials charged respectively with the enforcement thereof. To accomplish this purpose, the foregoing proviso was inserted in said act, wherein it was expressly declared that it was—

> "within the discretion of the governing body of each county, city and county, city or town herein mentioned to provide for the destruction of ground squirrels whether under the provisions of this act or under the provisions of such other act or acts."

It was clearly the purpose of the Legislature, by this portion of the foregoing proviso, to commit to the governing body of each county wherein the provisions of one or the other of said enactments relating to the extermination of ground squirrels required enforcement, the discretion of determining in advance which of the aforesaid alternative systems or methods of procedure should be selected for the eradication of said animal pests and to which of said two sets of officials the work of extermination should be entrusted. This being so, it is evident that the activities of both of these sets of officials charged with the enforcement of said respective acts, in so far as they relate to the extermination of ground squirrels, must await and be preceded by the exercise of this discretion on the part of the governing body of the locality within which the infested premises lay. The concluding clause in said proviso above quoted, in order to be consistent with this view, must be so interpreted as to refer to such proceedings under said act of which it is part, as may be initiated by horticultural commissioners for the eradication of vegetable and insect pests, and which may be commenced by such officials without prior action on the part of the board of supervisors; and it would seem that in such cases the Legislature intended that, where the extermination of squirrels was not the main object of such proceedings, but merely an incidental element therein, the provisions of said act should apply in their entirety, and without previous action on the part of the board of supervisors. Any other interpretation would have the effect of practically nullifying the earlier portion of said proviso by permitting horticultural commissioners to forestall the exercise of any discretion on the part of the board of supervisors in the choice of methods for the extermination of ground squirrels.

In the instant case, the board of supervisors of the county of San Benito was the governing body thereof, whose duty it was to determine under which of said acts and by which set of officials proceedings should be instituted for the extermination of the ground squirrels which infested the lands and premises of the defendant herein. This being so, it follows that any attempted action on the part of the horticultural commissioner or his deputy, in the way of inspection or eradication of such animal pests, would be premature and ineffectual until such discretion had been exercised by said board of supervisors in determining which system and method of procedure should be adopted and to which set of officials the duty of inspection and extermination of these particular pests should be entrusted. It appears, from the record in this case, that the extermination of ground squirrels from the premises of the defendant was the sole object of whatever proceedings were attempted on the part of the horticultural commissioner or his deputy. There is absent from the amended complaint herein any averment that the proceedings alleged to have been taken with that sole object in view by the horticultural commissioner or his deputy, in relation to the lands and premises of the defendant herein, were preceded by any action on the part of the board of supervisors authorizing either of said officials to initiate or take such proceedings. This is a fatal defect in said pleading and one which was apparently irremediable by any further amendment thereof. Standing, as it does, at the very threshold of the proceedings alleged therein to have been taken affecting the property of said defendant, and asserted to have resulted in the imposition of the lien thereon, sought to be enforced in this action, the absence of such averment renders the entire proceeding void, and said lien entirely nugatory.

This conclusion renders unnecessary the consideration or determination of any of the other points presented upon this appeal, since they all involve the regularity of the proceedings of the deputy horticultural commissioner in the course of his alleged inspection and extermination of squirrels upon the defendant's property, and also the regularity of the steps taken to create the lien of which foreclosure is sought in this action. If the said horticultural commissioner or his deputy had no authority to so proceed, without the previous adoption by the board of supervisors of the system and method of procedure, from which said officials could alone derive their jurisdiction to act, it becomes quite immaterial what their course of action may have been or whether or not it was in accord with the provisions of the sections of the Political Code, above referred to, but which have not been made operative in their application to this particular case.

Judgment affirmed.

SHAW, C. J., and RICHARDS, Justice pro tem., and WASTE, SHURTLEFF, WILBUR, LAWLOR, and SLOANE, JJ., concur.

(188 Cal. 399)

FAWKES v. CITY OF BURBANK et al.
(L. A. 7223.)

(Supreme Court of California. March 14, 1922.)

1. Mandamus 🔑7—Issuance of writ is discretionary.

The issuance of the writ of mandamus, even where the technical rules of law authorize it, is to a large extent discretionary with the court.

2. Mandamus 🔑16(1)—Should not issue to require special election on consolidation with city to which majority are apparently opposed.

Mandamus to compel the board of trustees of a town to adopt a resolution and give notice of a special election for vote on consolidation with a city, for which more than one-fourth of the qualified electors had petitioned under Municipal Consolidation Act, § 5, as amended by St. 1915, p. 311, will be denied in the discretion of the court, even though the original resolution and notice were so defective as to render the election thereon void, where the result showed that a large majority of the electors were opposed to the consolidation and that the electors who voted for the consolidation were less than one-fourth of the total electors.

In Bank.

Petition for writ of mandamus by J. W. Fawkes against the City of Burbank and others, to compel the Board of Trustees of the city to issue a new call for a special consolidation election and to use a different ballot. Writ denied.

George P. Cook, of Los Angeles, for petitioner.

Victor T. Watkins, of Los Angeles, for respondents.

SHAW, C. J. This was a proceeding in mandamus begun in the second division of the district court of appeal of the second district. The decision by that court was vacated and the cause transferred to this court for rehearing and submitted on the briefs on file, without further argument.

The petition seeks to compel the defendants, constituting the board of trustees and clerk of the city of Burbank, to adopt a resolution and call a special election for the purpose of determining the question whether the city of Burbank shall be consolidated with the city of Los Angeles and assume its share of the bonded indebtedness of the city of Los Angeles.

On September 14, 1920, a petition was filed with the trustees, in pursuance of section 5 of the Municipal Consolidation Act, St. 1913, p. 581, as amended by Stats. 1915, p. 311, signed by not less than one-fourth of the qualified electors of the city of Burbank, asking the board to submit to the electors of the city the question whether such consolidation should be had, and setting forth the several items of the bonded indebtedness of the city of Los Angeles to be proportionately assumed by the inhabitants of the city of Burbank, amounting to over $50,000,000. Thereafter, on October 5, 1920, the trustees adopted a resolution calling for the election prayed for in said petition, to be held on November 16, 1920, and directing the clerk to give the notice accordingly. In pursuance thereof, the clerk proceeded to cause a notice of the election to be published in a newspaper printed in the city of Burbank, for a period of four weeks preceding the day of said election. Thereafter, on November 5, 1920, this petition for a writ of mandate was filed, and an alternative writ was issued by the district court of appeal. The petition alleges that the resolution and the notice are both defective, in that certain items of bonded indebtedness of the city of Los Angeles, to be assumed by the city of Burbank, are erroneously stated, so that the true amount of indebtedness to be assumed was not given therein, and that, for this reason, the said resolution and the said notice of election were ineffectual and void. Neither the order for the issuance of the alternative writ nor the alternative writ itself commanded the officers of the city of Burbank to desist from holding the election pursuant to the notice then being published. They merely ordered said defendants to show cause why a resolution should not be adopted and a notice given conforming to the facts, in compliance with the said petition for the election. The answer of the defendants, filed in the district court of appeal, admitted the alleged inaccuracy in the resolution and notice of election. By a supplemental answer the defendants showed that the election called by the resolution was held at the time required and in accordance with said resolution on the 16th day of November, 1920; that at said election 939 votes were cast upon the proposition submitted by the resolution calling the election and the notice thereof as published, and that of said number of votes 92 were in favor of the proposed consolidation, and 847 against said proposed consolidation; that at that time there were in all 1,397 qualified electors in said city entitled to vote at said election; that the petition for the calling of such election was signed by 355 of the qualified voters of said city, and that 249 of said voters who signed the petition voted at said special election.

The facts stated in the supplemental answer are not disputed. It therefore clearly appears that a large majority of the voters of the city of Burbank are opposed to the proposed consolidation. It also appears that, of the 355 persons who signed the original petition for consolidation, 249 voted at the election, and only 92 persons voted in favor of the consolidation. Assuming that the 92 persons who voted for consolidation were all signers of the original petition, at least 157 changed their minds and voted against consolidation; the result of which would be that not enough were left of the original signers of the petition favorable thereto to make up the one-fourth of the voters required by the statute to make a valid petition.

[1] Assuming, without deciding, that the defects in the resolution and notice of election would make the proceeding void, we nevertheless think that, under the circumstances here appearing, the writ of mandate should not issue. The issuance of such writ, even where the technical rules of law authorize it, is to a large extent discretionary with the court. In Wiedwald v. Dodson, 95 Cal. 453, 30 Pac. 581, the court had this question under consideration and laid down the rule as follows:

> "We think that the correct doctrine is expressed in High on Extraordinary Legal Remedies, § 9, where, speaking of mandamus, it is said that, 'The exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the court'; and that 'cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief.'"

Several other cases of this court state or apply the same principle. Boyne v. Ryan, 100 Cal. 267, 34 Pac. 707; Wilson v. Blake, 169 Cal. 454, 147 Pac. 129, Ann. Cas. 1916D, 205; Board v. San Diego, 128 Cal. 369, 60 Pac. 976; People v. Murphy, 20 Cal. App. 398, 129 Pac. 603; French v. Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756; Moore v. Conley, 163 Cal. 609, 126 Pac. 492.

[2] If the writ of mandate is denied, and the public sentiment of the city is really in favor of the consolidation, it will require but little expense to secure another petition of one-fourth of the voters and file the same with the board of trustees, whereupon a correct resolution can be adopted and a correct notice of election given calling the required election. On the other hand, if the writ is issued, the necessary result will be the incurring of the very considerable expenditure necessary for the publication of the notice and for the holding of the proposed election. In the face of the very pronounced sentiment against consolidation, we do not think the court should proceed to the length of issuing the writ. If the public sentiment is against it, it is useless to hold an election; and if the persons agitating for consolidation are doing so merely for the purpose of agitation, the court should not lend its aid in their behalf. The simpler and better method for all concerned is to leave the matter to the qualified electors of the city, to call a new election or not as may be desired.

The writ of mandate is denied.

We concur: SLOANE, J.; LAWLOR, J.; WILBUR, J.; WASTE, J.; RICHARDS, Justice pro tem.; SHURTLEFF, J.

188 Cal. 410

Ex parte POLIZZOTTO. (Cr. 2445.)

(Supreme Court of California. March 16, 1922.)

1. Criminal law ⚷395—Liquor seized without search warrant admissible in evidence.

Liquor unlawfully seized without a search warrant was admissible in evidence in a prosecution for unlawful possession of liquor.

2. Habeas corpus ⚷27—Unlawful seizure of evidence held not to go to jurisdiction.

That the court permitted the introduction in evidence of articles unlawfully seized without a search warrant did not go to the jurisdiction of the court to try the cause and could not be made available in habeas corpus.

3. Intoxicating liquors ⚷13—State and political subdivisions may make and enforce ordinances.

The state or any of its political subdivisions invested with local police powers may make and enforce ordinances in aid of the prohibition amendment to the federal Constitution.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Intoxicating liquors 🔑132—County ordinance not invalid for imposing penalty in excess of that imposed by Volstead Act.

A local ordinance concerning unlawful possession of intoxicating liquor, enacted by a county under its constitutional power to enact local police regulations, is not invalid because it imposes a punishment in excess of that imposed by the Volstead Act.

5. Intoxicating liquors 🔑17—Counties may enact ordinances under Constitution.

Counties are invested with power to enact ordinances prohibiting unlawful possession of intoxicating liquors by Const. art. 11, § 11.

6. Criminal law 🔑1213—Intoxicating liquors 🔑242—Punishment for unlawful possession of liquor held not excessive, cruel, or unusual.

The punishment by fine of $500, or imprisonment for six months, or both, for unlawful possession of intoxicating liquor, is not excessive, cruel, or unusual.

In Bank.

In the matter of the application of P. Polizzotto for a writ of habeas corpus. Writ denied.

James L. Crittenden, of Modesto, and C. F. Tramutolo, of San Francisco, for petitioner.

SHAW, C. J. The petitioner is imprisoned in the county jail of Stanislaus county upon a charge of violating an ordinance adopted by the board of supervisors of said county on January 19, 1921, declaring it to be a misdemeanor for any person to unlawfully have in his possession intoxicating liquor. The ordinance provides that any person guilty of such offense may be punished by a fine of not less than $250 nor more than $500, or by imprisonment not to exceed 180 days, or both.

The defendant was duly charged with violating said ordinance and has been tried and convicted of said offense. The punishment imposed by the judgment is a fine in the sum of $500 and imprisonment for the term of 120 days. The petition herein alleges that the liquor of which petitioner was found guilty of having possession unlawfully was obtained by the deputy sheriff of said county from the automobile of the petitioner while he was driving on the highway in said county, and without said officer having any search warrant for searching said automobile for that purpose.

The petitioner claims: First, that the entire proceeding culminating in his trial and conviction was invalid and void because of the fact that the liquor which constituted a part of the evidence upon which he was convicted was obtained by searching his automobile without a warrant; second, that the ordinance is void because, as it is claimed, the only government having power to enforce the prohibition amendment to the United States Constitution is the federal government, and that no local political subdivision of the state may make or enforce ordinances for that purpose; and, third, that the ordinance is void because the penalty prescribed therein for this offense exceeds that prescribed by the Volstead Act (41 Stat. 305). The punishment provided by the Volstead Act for having possession of intoxicating liquors contrary to the provisions of that act is a maximum fine of $500 for the first offense, no imprisonment being provided for. Apparently the offense charged against the petitioner was the first offense, although the petition does not expressly aver that fact.

[1, 2] 1. As to the claim of invalidity, based on the fact that the liquor was procured by searching the automobile without a search warrant, the objection is settled by the decision of this court in People v. Mayen, 205 Pac. 435, wherein we held that articles obtained from the defendant's premises without a search warrant could lawfully be introduced in evidence in the trial of an action against him involving the possession of such articles. Also it should be said that the objection, in any event, does not go to the jurisdiction of the court to try the cause, and, consequently, that it cannot be made available in habeas corpus.

[3] 2. The proposition that the state, or any of its political subdivisions invested with local police powers, may make and enforce ordinances in aid of the prohibition amendment to the Constitution of the United States, is settled in this state by the decisions of the District Court of Appeal of the Third District in People v. Collins, 202 Pac. 344; People v. Capelli, 203 Pac. 837. In each of said cases a petition to this court for a rehearing was denied. To the same effect, see Ex parte Kinney (Cal. App.) 200 Pac. 967; Ex parte Volpi (Cal. App.) 199 Pac. 1090; Ex parte Crookshank (D. C.) 269 Fed. 980; Woods v. City of Seattle (D. C.) 270 Fed. 315.

[4-6] 3. We do not think there is any merit whatever in the proposition that a local ordinance enacted by a county under its constitutional power to enact local police regulations, and which imposes penalties for an act also declared to be criminal by the Volstead Act, is invalid, if it imposes a punishment in excess of that imposed by the Volstead Act. The amendment to the United States Constitution gives the states concurrent jurisdiction with the United States to provide for the enforcement of the act. The decisions last cited fully establish the proposition that such concurrent jurisdiction may be exercised by the state, or any of its political subdivisions invested with its local police powers. Counties are invested with such

power by section 11, art. 11, of our Constitution. The only limitation put thereon by our Constitution is that such local regulations shall not be in conflict with general laws, and, with respect to the punishment, that it shall not be unreasonably excessive, cruel, or unusual in character. It is not claimed that there is a general law that conflicts at all with the ordinance adopted by Stanislaus county on this subject. It has often been held that a punishment by a fine of $500, or imprisonment for six months, or both, for an ordinary misdemeanor, is neither excessive, cruel, nor unusual. It is clear that if the local authorities have power to adopt ordinances to prevent violation of the prohibition amendment, there must go with it the power to impose penalties sufficient to make the ordinance effective, and the power to impose penalties for that purpose cannot be limited by an act of Congress in cases where the state has concurrent jurisdiction.

Inasmuch as we are satisfied that there is no merit whatever in the petition, we do not think it necessary to have a hearing in the matter.

The petition for a writ is denied.

We concur: SHURTLEFF, J.; WASTE, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

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188 Cal. 403

BLUE DIAMOND PLASTER CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 7065.)

(Supreme Court of California. March 14, 1922.)

1. Master and servant 🔑405(6)—Evidence in compensation case held to show willful misconduct of employer's predecessor.

Evidence that the employer's predecessor in the operation of the plant in which decedent was killed, had been repeatedly notified of the dangerous condition of its unguarded belts and pulleys, *held* ample to show willful misconduct by the predecessor which would have rendered it liable for excess compensation under the Workmen's Compensation Act, 1917, § 6b, if it had retained the plant until the accident.

2. Master and servant 🔑405(6)—Evidence in compensation case held to show misconduct of employer acquiring plant.

Where an employer acquired the plant almost four months before the accident in which an employee was killed, and retained the manager and superintendent who knew of the unsafe condition of its unguarded belts and pulleys, and the general manager of the purchaser had visited the plant and inspected the hoist where an unguarded belt was installed, a finding that the employer as well as its predecessor was guilty of willful misconduct, resulting in the death of the employee, will not be set aside.

3. Corporations 🔑428(9)—Knowledge acquired by officers before appointment and present in their minds when acting for a corporation is attributed to it.

Where general officers of a corporation had acquired, before their appointment, knowledge of dangerous conditions at the plant, and had such knowledge present in their minds when they were acting for the corporation, their knowledge is attributed to it.

In Bank.

Proceedings under the Workmen's Compensation Act by Marilyn Wallace to recover compensation for the death of her husband, Donald M. Wallace, opposed by the Blue Diamond Plaster Company, employer, and the General Accident, Fire & Life Assurance Corporation, Limited, insurer. The Industrial Accident Board awarded compensation in an amount exceeding by one-half the normal compensation, and required the employer and not the insurer to pay the excess, and the employer brings certiorari. Award affirmed.

Black, Hammack & Black, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondent Industrial Accident Commission.

Joe Grider, Jr., and Clarence B. Runkle, for respondent General Accident, Fire & Life Assur. Corporation, Limited.

Walter S. Clayson, of Corona, for respondent Wallace.

PER CURIAM. The petitioner in this proceeding seeks to have an award of the Industrial Accident Commission reviewed and annulled. The proceeding before the commission, in which said award was made, arose out of the following facts: Donald M. Wallace, who was an employé of the Blue Diamond Plaster Company, was killed on or about December 20, 1920, at the plant of said corporation at or near Corona, Cal., by coming into contact with an unguarded belt and pulley which were being operated at the time in the hoisthouse at said plant, in connection with machinery for the hoisting of supplies and materials from the railroad tracks to the quarry levels and various floor levels of the plant and also for the operation of a compressor therein. The machinery in this hoisthouse was in use regularly, though not constantly, in connection with the operation of the plant, and was set in motion and stopped by means of a clutch or controller which was located on one side of, and about 12 inches from, the belt, and which manipulators of the hoist could make use of either by going around the belt to the side on which the controller was placed or, as was more conveniently and frequently, if not customarily done, by reaching over the belt a distance of some 22 inches to the handle of the controller.

The deceased employé, Donald M. Wallace, while not regularly in charge of the hoist, did from time to time operate its machinery in connection with his other duties as occasion required, with the knowledge of the employer, and was engaged in so doing at the time of his death, which was occasioned by his being caught and crushed between the belt and the pulley. There was no witness to the casualty, and hence the exact manner in which he was thus caught and crushed was not known.

In the proceeding instituted by the widow of the deceased, claiming an award, it was asserted that the belt and pulley which were the immediate cause of the casualty were exposed and unguarded in violation of the duty which the employer owed to its employés and in further and express and willful violation of the safety rules and orders of the Industrial Accident Commission, and that the same constituted serious and willful misconduct on the part of the employer. Upon the hearing before the commission, it sustained this claim on the part of said applicant in its findings, to the effect that the maintenance of said unguarded pulley and belt by the employer was in direct and open violation of the provisions of sections 33, 34, and 35 of the Workmen's Compensation Act of 1917 (St. 1917, p. 831), and was also in violation of certain general safety orders of the commission which were in full force and effect at the time of said casualty, and that the said violation of said act and orders constituted serious and willful misconduct on the part of said employer and was the proximate cause of said casualty. The commission, accordingly, held that the applicant was entitled to have an award in the way of a death benefit, payable by reason of the injury to and death of the deceased employé, and was also entitled to have said award increased one-half under section 6b of the Workmen's Compensation Act, by reason of the fact that the injury to and death of said employé had been proximately caused through the serious and willful misconduct of the employer, said increase to be paid by such employer and not by the insurance carrier. From the award as thus made and increased the employer, after denial of its application for a rehearing before the commission, has presented this petition for a writ of review and for an order for the annulment of said award.

The particular portion of said award which is assailed in this proceeding, is that portion thereof wherein the petitioner is penalized for serious and willful misconduct in relation to the injury to and death of its said employé. It is here contended that the evidence educed before the commission fails to show the existence of any willful or serious misconduct on the part of said petitioner in relation to the producing cause of said casualty. The record before us does not, in our opinion, sustain this contention. The following facts were educed before the commission: Prior to September 1, 1920, the rock-crushing plant of the petitioner herein was owned and operated by the Temescal Rock Company, of which Mr. C. H. Haines was the superintendent and Mr. John Schreiner was general manager of production. While said plant was thus owned and operated, it was at various times visited and inspected by safety inspectors of the Industrial Accident Commission. These inspections began in the year 1916, the first of these occurring on July 21st of that year, and in which the safety inspector of the commission found the plant to be dangerous and unsafe in six particulars, three of these being with respect to unguarded belts. Notification of these specific defects was sent by the commission to Mr. John Schreiner, general manager of production of the plant, on August 17, 1916. On March 6, 1917, another official inspection was had, and the plant was again found to be in a dangerous and unsafe condition in respect to unguarded belts, and the notification sent by the commission to Mr. C. H. Haines, the superintendent of the plant, specified six requirements for safeguarding belts and pulleys in the plant. On April 18, 1918, another official inspection, this time in company with Superintendent Haines, was made, and the plant was found to be in a dangerous and unsafe condition in fourteen particulars, four of which related to unguarded belts and pulleys. On May 24, 1919, the plant was again inspected, and a list of requirements for correction sent to Superintendent Haines, in which was included "complete installation of safeguards." The particular belt and pulley in contact with which Wallace met his death was not installed until after this last inspection, but it may not be, and in fact is not, denied that both C. H. Haines, as superintendent, and John Schreiner, as manager of production, of said plant, while the same was in the possession and ownership of the Temescal Rock Company, knew fully what were the requirements and directions of the Industrial Accident Commission with regard to the dangerous nature and unsafety of unguarded belts and pulleys in direct relation to the operation of said plant. In addition to this showing, it appeared that, accompanying the notification sent to the said manager of the Temescal Rock Company in 1916, were copies of the general safety orders of the commission, having special reference to quarry operations and to the safeguarding of belts and pulleys therein.

On September 1, 1920, the Blue Diamond Plaster Company, a corporation, and the petitioner herein, purchased and took over from the Temescal Rock Company the plant in question, and thereafter continued to operate the same and was so doing at the time of the injury to and death of its said employé; and, in so doing, it retained and continued said C. H. Haines and John Schreiner in their former positions as the superintendent and manager, respectively, of said rock-crushing plant, and they held and were holding said positions up to and at the time of the injury to and death of said Wallace. It is in evidence that soon after the petitioner's purchase of said plant the general manager of the corporation, Mr. Hay, went over the said plant, and, after doing so, gave general instructions to its superintendent, Mr. Haines, with respect to safety appliances, and that he also instructed Mr. Pratt, the insurance broker who placed the insurance both as to fire and casualty upon the plant, to have an inspection thereof made with a view to compliance with all legal requirements as to safety devices; but the record shows that Mr. Hay did not follow up his suggestions either to the superintendent or to the insurance broker to the extent of seeing to it that the safety appliances were provided or such inspection made. The result was that the belt and pulley in the hoisthouse which caused the death of Wallace were left unguarded between the time when the petitioner acquired said plant and the date and occasion of the death of the employé.

[1] Had the Temescal Rock Company continued to be the owner and operator of the plant in question down to and including the time and event of said casualty, we entertain no doubt that it would have been liable to an award, not only for the death of its said employé, but also for the increase in the death benefit thus awarded provided for in section 6b of the Workmen's Compensation Act.

[2] The facts of this case, as above recited, present an even stronger reason for the application of said section than were presented in the case of E. Clemens Horst Co. v. Industrial Acc. Comm., 193 Pac. 105, 16 A. L. R. 611, wherein it was held that the failure to comply with the general safety orders of the commission with respect to the safeguarding of shafting, which the employer knew or should have known to be unsafe, would constitute such serious and willful misconduct on the part of the employer as to justify the increase in an award provided for in said section of the Workmen's Compensation Act. The petitioner herein, however, contends that, conceding that such would have been a proper application of the terms of said section to the Temescal Rock Company had it continued to be the owner of the plant in question up to the time of said casualty, there was not sufficient evidence before the commission to justify its application to the petitioner herein as the purchaser of said plant a short while before the accident which caused the death of said employé. The Blue Diamond Plaster Company purchased and took over the said plant from the Temescal Rock Company on September 1, 1920. The injury to and death of its said employé occurred on December 20, 1920, a little less than four months later. When the petitioner took over said plant and continued the operation thereof it retained in its employ in their former positions of superintendent and manager of production, respectively, Mr. C. H. Haines and Mr. John Schreiner, and these two executive and managing officers of the corporation were invested with the general conduct and control of said plant during the interval between the date of its purchase by the petitioner and the injury to and death of said employé. The evidence educed before the commission further showed that Mr. Hay, the general manager of said corporation, visited and inspected the plant shortly after its purchase, and, in the course of such inspection, visited and inspected the hoist, in connection with the operation of which the unguarded belt and pulley which were admittedly responsible for the death of said workman, were then installed. In addition to this evidence of an opportunity on the part of the petitioner, through its general manager, to have gained actual knowledge of the unguarded and dangerous condition of its appliances, there is the evidence, ample in character, of the previous knowledge of both Haines and Schreiner, not only of the unguarded condition of the said belt and pulley, but also of the terms of the general safety orders of the commission and of its express and repeated directions given to them and to each of them as the executive and managing officers of the former owner with relation to the safeguarding of the belts and pulleys of the plant.

[3] It is urged by the petitioner that this knowledge on the part of these persons, so retained in their positions under the petitioner's ownership of the plant, cannot be imputed to the petitioner. No authority is cited to sustain this contention which is at all pertinent to the situation as presented here. In the case of Cooke v. Mesmer, 164 Cal. 332, 338, 128 Pac. 917, 920, the rule is thus stated:

> "While the decided weight of authority is in favor of the rule that knowledge possessed by an agent, while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, although such knowledge may have been acquired before the agency was created, it is universally recognized that this rule is subject to the qualification that 'knowledge acquired by an agent before the commencement of the agency is not notice to the principal unless it is shown or appears that knowledge was present in his mind at the time he acted for the principal.' 1 Clark & Skyles on Agency, sec. 482."

The element, which was noted as lacking in the case above cited in order to the application of the otherwise general rule to its facts, is clearly present in the instant case, since the said officials of the petitioner herein both testified that they were at all times aware of the unguarded condition of said belt and pulley, but that they did not consider said condition to be unsafe or dangerous. Their mistake in judgment upon that subject cannot be held to relieve their employer from liability, in view of the other evidence before the commission to the effect that these unguarded appliances were dangerous and unsafe, and of the even more conclusive showing that this employé met his death in the course of his duties through contact with them in their unguarded condition. The following cases from other jurisdictions sustain the determination that the knowledge which a managing official of a corporation gained as to certain facts and conditions, while a like official of the predecessor of said corporation, is imputable to the latter. Blue Grass Coal Corp. v. Combs, 168 Ky. 437, 182 S. W. 207; Louisville, etc., Co. v. Central Ky. Tr. Co., 147 Ky. 513, 144 S. W. 739, Ann. Cas. 1915A, 857.

The other contentions of the petitioner have not, in our opinion, sufficient merit to warrant separate consideration.

Order of award affirmed.

SHAW, C. J., RICHARDS, Justice pro tem., and WILBUR, SLOANE, LAWLOR, SHURTLEFF, and WASTE, JJ., concur.

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188 Cal. 489

In re FULTON'S ESTATE.

HUNT v. CAMPBELL et al.

(S. F. 9860.)

(Supreme Court of California. March 24, 1922.)

1. Courts 🔑200½—Superior court had jurisdiction to determine that money claimed by administratrix personally was a part of the estate.

In a proceeding for the administration of an estate the superior court has jurisdiction to determine that the administratrix had in her hands money of the estate which she had not accounted for and which she claimed belonged to herself and not to the estate.

2. Executors and administrators 🔑314(5)—Order of distribution may be made immediately after order settling administratrix's account without awaiting expiration of time for appeal from order settling account.

Under Code Civ. Proc. §§ 1634, 1665, the account of administratrix and petition for distribution may come on for hearing at the same time, in which case the account should first be settled and, thereupon and without further delay, the order of distribution be made without awaiting the expiration of time for appeal from order settling the account.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Albert J. Fulton, deceased. From orders settling account of Eva F. Hunt as administratrix, and directing distribution to Ethel A. Campbell and others, as heirs, the administratrix appeals. Affirmed.

Eugene F. Conlin, of San Francisco, for appellant.

Perry Evans and Charles F. Craig, both of San Francisco, for respondents.

SHAW, C. J. In December, 1920, Eva F. Hunt, as administratrix of the estate of Albert J. Fulton, deceased, filed her final account as such administratrix, charging herself with the sum of $30 in money and claiming credit for $631.23 for money paid out on behalf of the estate. Thereupon, the respondents, heirs of the decedent, filed exceptions to the account, claiming, among other things, that the administratrix had received $5,327 belonging to said estate which was not included in said account. Upon due notice, the account was heard and settled by the court. The order settling the account was made on February 1, 1921. It declared that the said sum of money was in the hands of the administratrix and belonged to said estate, and charged her therewith. The balance therein charged against her was $5,282.25.

On February 11, 1921, the heirs aforesaid who had contested the account filed a petition for distribution of the estate. This petition came on for hearing on March 3, 1921, and thereupon distribution was ordered of the assets of the estate in accordance with the laws of descent. The said Eva F. Hunt appeals from the order settling the final account and from the order for distribution.

[1] The only point presented by the appellant in support of her appeal from the order settling the account is that, in a proceeding for the administration of an estate, the superior court has no jurisdiction to determine that the administratrix has in her hands money of the estate which she had not accounted for and which she claims belongs to herself and not to the estate. We do not find it necessary to discuss this question at any length. Precisely the same question was presented to this court in Stevens v. Superior Court, 155 Cal. 148, 99 Pac. 512, where the same objection was made to the jurisdiction of the court. It was there held that:

"The probate court must necessarily have the power to incidentally try and determine such an issue between the executor or administrator and the estate in the matter of the settlement of his exhibits and accounts. The amount of money belonging to the estate received by an executor or administrator is one of the matters he is necessarily required to state in his accounts, and the correctness of his accounts in that regard is one of the matters to be determined by the court as between him and the estate on the settlement thereof."

See, also, Estate of Cover (Cal. Sup., decided February 8, 1922) 204 Pac. 583.

[2] The only objection to the order of distribution is that it was prematurely made. This objection is based on the fact that the order settling the final account was made on February 1, 1921, and that the time for taking an appeal therefrom had not expired when the petition for distribution was filed on February 11, or when the order of distribution was made on March 3, 1921. There is no force whatever in this objection. Section 1634 of the Code of Civil Procedure authorizes the filing of a final account and a petition for final distribution at the same time, and provides that, on the settlement of said account distribution of the estate to the persons "entitled thereto may be immediately had without further notice or proceedings." Section 1665 provides further that, "upon the final settlement of the accounts of the executor or administrator, or at any subsequent time," upon the application of an interested party, "the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto." It necessarily follows from these provisions that the account and petition for distribution may come on for hearing at the same time, that the account should first be settled, and that thereupon and without further delay the order of distribution may be made, without awaiting the expiration of the time for appeal from the order settling the account. This is the common practice, even where there is a contest over the account. In the present case no difficulty arises from the practice. The appeal was taken from both orders, and, as no point is made which authorizes the reversal of either, the result will be an affirmance of both.

The orders appealed from are affirmed.

We concur: WASTE, J.; RICHARDS, Justice pro tem.; SHURTLEFF, J.; LAWLOR, J.; WILBUR, J.; SLOANE, J.

188 Cal. 437

WATER USERS' & TAXPAYERS' ASS'N of MERCED v. RAILROAD COMMISSION of CALIFORNIA. (S. F. 9997.)

(Supreme Court of California. March 18, 1922.)

1. Public service commissions 🔑6—No jurisdiction over corporate governmental agencies.

The provisions of the Constitution authorizing the Legislature to confer upon the Railroad Commission powers to supervise and regulate public utilities apply exclusively to private corporations and natural persons or associations of persons, and do not include corporate governmental agencies such as municipal corporations, even when engaged in the exercise of proprietary functions, nor irrigation districts.

2. Electricity 🔑11—Railroad Commission held authorized to approve contract for purchase of electricity by light and power company.

Under St. 1915, pp. 115, 134, 149, §§ 36, 51, the Railroad Commission *held* to have power to approve contract between a light and power company and an irrigation district, for the purchase from the latter by the light and power company of hydroelectric energy, as against the objection that the Commission had no power, in determining the basis of the price to be paid for such hydroelectric energy, to take into account properties and plant of the irrigation district which were not in existence at the time of such determination, when the cost of their construction and their output of hydroelectric energy could not be known.

In Bank.

Application by the Water Users' & Taxpayers' Association of Merced for certiorari to review an order of the Railroad Commission of the State of California, approving a certain contract for the sale of electricity. Writ denied.

John S. Partridge and K. C. Partridge, both of San Francisco, and A. L. Cowell, of Stockton, for petitioner Merced Irr. Dist.

Hugh Gordon and William W. Clary, both of San Francisco, for respondent.

PER CURIAM. This proceeding was instituted by the Water Users' & Taxpayers' Association of Merced, for the purpose of having reviewed and annulled certain proceedings before the Railroad Commission of California, leading up to and resulting in an order of said Commission approving a certain contract for the sale of electric energy, proposed to be entered into between the San Joaquin Light & Power Corporation and the Merced irrigation district. The questions to be disposed of arise upon the demurrers of the Railroad Commission and the Merced irrigation district. The averments of the petition, which are thus taken to be true may be summarized as follows: On June 28, 1921, the Merced irrigation district and the San Joaquin Light & Power Corporation joined in an application to the Railroad Commission, wherein it was stated, in substance, that the said irrigation district was proposing to construct a water reservoir and system for the conservation and distribution of water, and to establish and operate a hydroelectric generating plant in connection therewith at a certain point on the Merced river, and that the said irrigation district desired to acquire certain superior rights and privileges owned by the Light & Power Corporation in and to the use of the waters of the Merced river, and that said irrigation district also desired to sell, and the said Light & Power Corporation to purchase, energy generated by the said irrigation district's hydroelectric energy plant, and that for these purposes said parties were proposing to enter into two certain agreements which were attached to and made a part of said application, and the approval of which was sought thereby.

The first of these agreements recited: That the Light & Power Corporation owned certain interests in the lands along the banks of the Merced river, upon which it had constructed a certain hydroelectric generating plant to be used in connection with a certain dam and reservoir impounding the waters of said river, and from which it was entitled to have said waters conducted to the said plant. That the irrigation district proposed and desired to construct certain storage and diversion works upon said river above the said plant of the Light & Power Corporation, whereby, during certain seasons of the year, it would impound and withhold a certain portion or possibly all of the waters at such times flowing in said river in order that it might thereafter, for its own use and advantage, release said waters for the purpose of irrigating large areas of land in the county of Merced, whereby the said Light & Power Corporation might be deprived of the use, benefit, and advantage of such waters, which would, to the extent thereof, interfere with and lessen the hydroelectric energy output which it could otherwise produce by the use of said waters with its present installations. In order to reduce such disturbance of the Light & Power Corporation's rights and privileges to a minimum and to compensate it therefor, it was proposed to be agreed that, in case of the diminution of the hydroelectric energy output of the Light & Power Corporation in any calendar year, by reason of the said storage and diversion of water by the said irrigation district below a certain quantum measured in kilowatt hours, the irrigation district should compensate the Light & Power Corporation therefor by paying to the latter a sum of money determined according to the terms of, and at the rate fixed by, any contract which might exist between the parties for the purchase and sale of said hydroelectric energy so produced by the irrigation district, to be approved by the Railroad Commission; or, in the absence of such contract, at a rate to be fixed by the Railroad Commission. There are other provisions in this contract not necessary to be considered.

The second contract between the parties executed upon the same date, and evidently a part of the same transaction, provided, in the first paragraph thereof, that, as soon as the irrigation district had constructed, completed, and put in operation its hydroelectric energy plant, it would deliver and sell to the Light & Power Corporation the entire electric output thereof, except such an amount as should be required for the operation of said plant and of the pumping plants of said district, to be maintained and operated for storage, irrigation, and drainage purposes; and for which excess output of hydroelectric energy, the Light & Power Corporation agreed to pay according to meter measurements at a fair and reasonable rate, to be fixed and determined by the Railroad Commission. It was further provided that this contract should remain and be in full force and effect for 20 years, with the right of renewal by the irrigation district for an additional 20 years upon giving a year's notice of such intended renewal. In other words, the Light & Power Corporation was, by the first contract, to be compensated for its loss of generating power due to its transfer of its said water rights to the irrigation district, such compensation to be fixed according to the rate for hydroelectric energy purchased by it from the irrigation district, to be fixed by the second contract. The effect of these contracts would be that, when the irrigation district had built its dam and reservoirs for irrigation purposes, and had installed its hydroelectric energy plant in connection therewith, and had begun operations, and a loss in power and hence in output of electric energy resulted to the Light & Power Corporation, it was to be paid in money for such loss, and the amount of such payment was to be calculated upon the basis of the rate fixed by the Railroad Commission for such hydroelectric energy, as it was to purchase and receive from the irrigation district's hydroelectric energy producing plant. There would thus be a periodical balancing of accounts between the two parties to these contracts, the Light & Power Corporation being credited with its ascertained loss in water power and hence in hydroelectric energy, and being debited with the amount of its purchase of hydroelectric energy from the plant of the irrigation district, both credit and debit to be fixed according to the price established by the Railroad Commission for its said purchase of such hydroelectric energy.

The parties to these two contracts having applied to the Railroad Commission for the approval thereof and, as a necessary condition of such approval, for the fixation of the rate to be paid by the Light & Power Corporation for such of the hydroelectric energy output of the proposed plant of the irrigation district as it would be entitled to have and to use under the terms of the second contract. The petition of the parties to these two contracts having been filed with the Railroad Commission, the Water Users' &

Taxpayers' Association of Merced appeared before said Commission to object to the approval by it of said contracts or the fixation of any rate to be paid by the Light & Power Corporation for the use of the hydroelectric energy to be developed at the proposed, but as yet unconstructed, plant of the irrigation district. Said objection was based upon numerous grounds, not necessary to be here considered, but chiefly upon the grounds: First, that the Commission had no power to determine the rate to be paid by the Light & Power Corporation for the output of hydroelectric energy of the proposed plant of the irrigation district, which was as yet nonexistent, and the cost of construction of which, and hence of the production of such hydroelectric energy thereby, was not known or determinable in advance of such construction; second, that the only proper basis for the determination of such rate was that of the cost of construction and maintenance of said plant and of supplying such energy, and that this basis could not be available until such plant had been constructed and put in operation.

Upon the hearing of said application and the opposition thereto, the Railroad Commission considered the evidence educed before it as to the several matters in issue, but particularly as to the proper basis for the fixation of the rate to be paid by the Light & Power Corporation to the irrigation district for the hydroelectric energy which it would be entitled to receive under the second contract. Upon the submission of the matter, the Commission gave its decision approving said contracts and fixing said rate, and, in so doing, the Commission adopted, as the basis for its fixation of the rate to be paid by the Light & Power Corporation for said hydroelectric energy to be produced by the irrigation district, the cost to the Light & Power Corporation of developing equivalent power itself, either at its said plant or elsewhere, or of purchasing the same from similar hydroelectric energy developing plants in that region.

The applicant herein seeks to have the order of the Commission, approving said second contract, reviewed and annulled upon the grounds above stated, as constituting its chief objection before the Commission to the making of said order. In considering the merits of this contention, it is essential to have in mind the positions and relations of the several parties before the Railroad Commission and in this proceeding; and in so doing, to take note of the fact that the only one of the two parties to the contracts in question over which the Railroad Commission has or had jurisdiction is the Light & Power Corporation. It is a privately owned public service corporation and, as such, is brought within the jurisdiction and control of the Railroad Commission under the Public Utilities Act (St. 1915, p. 115). The proceeding before the Commission was one involving, by the terms of the first of said contracts, the transfer by the Light & Power Corporation of certain valuable rights and privileges of which it was the owner in the waters of the Merced river, and which were being utilized in the course of its production of hydroelectric energy at its plant upon said river for sale to its consumers. The propriety of such a transfer upon any terms of a portion of its producing capital was, of course, a matter for supervision and approval by the Railroad Commission under the terms of said act. This much is conceded by the applicant herein, both expressly and by the fact that it is not sought to have the action of the Commission in approving the first of said contracts reviewed or annulled. In addition to thus seeking to dispose of an essential portion of its working capital in the way of water rights and privileges, the Light & Power Corporation was attempting to acquire, by purchase, a certain quantum of hydroelectric energy, to be thereafter distributed by it to its consumers, and which purchase the Railroad Commission had, under the general provisions of section 31 of said act and also under the more particular provisions of section 36 thereof, the right to supervise. The jurisdiction of the Commission as to both these matters is not brought in question here.

[1] As to the irrigation district, it is conceded that primarily the Railroad Commission has no jurisdiction over it or over the propriety or reasonableness of its contracts with relation to its properties, present or prospective, or over the terms of sale or other disposition of said product, since an irrigation district is a public agency in the nature of a municipal corporation, and is not a privately owned public service corporation or a public utility, in the sense in which these terms are used in the Constitution or statutes of this state; and is not, therefore, as to its contracts or rates, within the jurisdiction or subject to the control of the Railroad Commission. In the case of City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 Pac. 25, 10 A. L. R. 1425, it was held that the provisions of the Constitution authorizing the Legislature to confer upon the Railroad Commission powers to supervise and regulate public utilities apply exclusively to private corporations and natural persons or associations of persons, and do not include municipal corporations, even when engaged in the exercise of proprietary functions. The principles therein enunciated have equal application to irrigation districts.

It will appear from the foregoing that the jurisdiction which the Railroad Commission has undertaken to exercise in regard to these two contracts between the Light & Power Corporation and the irrigation district is to be called in question only in so far as it affects the properties and agreements of the Light & Power Corporation.

It is next to be noted that the proceeding before the Railroad Commission was not one for the regulation or fixation of rates as between the Light & Power Corporation and its present or prospective consumers of hydroelectric energy. It was, in its inception, strictly a proceeding wherein the Light & Power Corporation was seeking the approval by the Railroad Commission of its proposed sale of certain water rights and privileges, constituting a portion of its working capital, and of its proposed purchase of a certain quantum of hydroelectric energy for future distribution. These two contracts were interrelated because the other party to each was the same, and also because the water rights and privileges which the Light & Power Corporation proposed to sell were to be used in part for the production of the hydroelectric energy which it proposed to buy. From this view of the nature and scope of the proceeding before the Railroad Commission it will appear that the question as to the basis, amount, or reasonableness of the rates to be ultimately charged the consumers of the hydroelectric energy of the Light & Power Corporation was only indirectly, and it may even be said remotely, involved; and this only because of the fact that the price which this public service corporation was to be permitted to pay for the quantum of hydroelectric energy to be supplied to it at some time in the future by the irrigation district, according to the basis determined by these contracts might affect the rate at which its entire output of such energy was to be retailed to its customers, when such quantum so purchased by it came into being as a result of these agreements. Assuming, however, that this interest of the ultimate consumers of the product of the Light & Power Corporation, though thus indirect and remote, was such an interest as would entitle them to call in question the action of the Railroad Commission in the premises, we shall consider the basis and soundness of their position as presented before the Commission and as reiterated here.

[2] The contention of the applicant herein is that chiefly insisted upon before the Railroad Commission and, while amplified in its petition herein into several heads, is reducible to a single proposition. It is that the Commission had no power in determining the basis for the price to be paid by the Light & Power Corporation for the hydroelectric energy to be purchased by it from the irrigation district, to take into account properties and plant of the latter which were not in existence at the time of such determination, when the cost of their construction and of their output of hydroelecric energy could not be known. We are referred to various sections of the Public Utilities Act (Stats. 1915, p. 115) as supporting this contention. We have examined the various sections of said act to which we have been referred, and we find nothing therein which purports to place any such limitation upon the powers of the Railroad Commission in dealing with such matters as were presented in the proceeding before it. Section 36 of said act, which purports to empower the Commission to hear and approve applications for the increase in the properties and equipment of public service corporations, places no such limitations upon its powers in that regard. Neither does section 51 of said act, which relates to the powers of the Commission in the matter of the approval of transfers of the properties of public service corporations, attempt to hamper the scope of its investigations for the purpose of determining whether to grant or refuse such approval. Nor do the cases to which we have been referred by the applicant herein sustain its contention with respect to the limited powers of the Commission in the above respects, since in each of said cases the questions discussed therein arose in direct controversies between public service corporations and their consumers of a particular product, wherein the cost of production of such product by such public service corporation was directly involved. This, as we have seen, is not such a proceeding, and the unreasonableness of attempting to apply the principles applicable to direct proceedings for the fixation of rates cannot be made more apparent than by a brief consideration of the respective positions of the parties to these contracts, as disclosed by the evidence educed before the Commission.

It was disclosed by such evidence that the Light & Power Corporation was, within the region in which it was operating, a growing concern, with the demand upon it for the supply of electric energy to its customers steadily and rapidly increasing to a degree requiring the extension of its facilities for the production of such energy. To meet this demand, it must either itself construct additional dams and reservoirs and install additional appliances for the increase of its output in electric energy, or purchase such energy from other producing plants, in which latter eventuality it would be obliged to pay a rate predicated upon the cost of such product elsewhere. The Commission took evidence as to the cost of the production of electric energy both in other plants of the Light & Power Corporation and in the plants of other like producers of electrical energy in the general region of the activities of said corporation. It was thus able to ascertain approximately what the cost to the Light & Power Corporation would be if it either undertook to produce the full amount of electric energy required to meet its increase in business, or to buy an equivalent amount from other like corporations within that region, engaged chiefly in the production of the same commodity. Had this been the actual situation, it is perfectly apparent that the Railroad Commission would have had jurisdiction to adopt such a basis for the fixation of such rates under the powers conferred upon it by the provisions of the Public Utilities Act. It was also shown before the Commission that the proposed production of hydroelectric energy on the part of the irrigation district would be in the nature of a by-product, the main cost of the production of which would be that of the construction and operation of its dams for impounding and supplying water for irrigation purposes to its customers for that commodity within its district, and for which it would be compensated in its returns from said water users. It would therefore be in a position, upon the construction of its said works, to produce hydroelectrict energy at a much lower cost to itself than could be done by other producers of a like commodity in the region producing the same as their chief activity and not as a mere by-product, and it would thus be able to dispose of the excess of its said by-product not required in connection with its main objects as a distributor of water, at a greater profit to itself than that which would ordinarily be derived from the production and sale of the like commodity when produced elsewhere. This was, however, a fortunate condition operating to the advantage of the irrigation district in its dealings either with the Light & Power Corporation or any other purchaser of its said product; and as such it cannot be held to have deprived the Commission of the power to adopt, as a basis for the cost to the Light & Power Corporation of said electric energy, the price which it would otherwise have been obliged to pay had it purchased the same elsewhere.

There are certain other facts to be taken note of in this connection. The irrigation district, as a prerequisite to the establishment of its plant for the impounding and distribution of water upon the Merced river, was compelled to negotiate with the Light & Power Corporation for the transfer to it of the superior rights of the latter in the waters of said river, and in the course of such negotiations to compensate the Light & Power Corporation for whatever loss it should sustain in its lessened power of production of hydroelectric energy, through the deprivation of these waters. The measure of this loss would, in reason, be the cost to the Light & Power Corporation of replacing this lost energy either by purchasing it elsewhere at the market value thereof in the region, or by producing the same itself at substantially the cost of production by similar plants in that region. The irrigation district was able to consummate this negotiation by reason of the fact that, by installation of appliances for the creation of hydroelectric energy at the point of location of its said irrigation works, it would be in a position to not only compensate the Light & Power Corporation for its water rights thus needed in its own enterprise, but also to supply the latter with the increased amount of such energy, which its own expanding business required. The interests of these two institutions, as disclosed before the Railroad Commission were thus intermingled. It was essential to the irrigation district, on the one hand, to obtain the superior water rights and privileges which the Light & Power Corporation held, and it was equally essential to the Light & Power Corporation, on the other hand, to receive in compensation for the surrender of these rights and privileges the quantum of hydroelectric energy which it could have produced through their retention, and to be also able to obtain the added quantum of such energy which it was presently to need in its expanding business and which it would otherwise have to acquire at the general cost of production in that region. The natural solution of such a situation was that of having the irrigation district install, in connection with its water impounding and distributing system, the appliances required for the production of the quantum of hydroelectric energy which the Light & Power Corporation was to lose, and also the added quantum which it was presently to need. In the achievement of this twofold object, it was, of course, necessary for the irrigation district to dispose of its said product at a price which would yield it a profit justifying such additional expenditure. The water users of such district, who were also its organizers, would naturally expect such price to be that obtainable for the like product in that region, regardless of the cost of its production as a mere by-product.

It would seem clear that, under the foregoing situation and relation of the parties, it would have been inequitable, if not entirely impractical, for the Railroad Commission to adopt, as the basis for the fixation of the selling price of the same product, the mere cost of its production as a by-product. Such a basis would be clearly unfair to the Light & Power Corporation as the basis for fixing the price to be paid to it for its water rights and privileges, which the irrigation district was proposing to acquire, not merely for the production of hydroelectric energy, but for use in its general irrigation activities. Such a basis would seem to be even more manifestly unfair to the irrigation district as the basis of the selling price of its hydroelectric energy, which it would otherwise be entitled to dispose of at the market price of such commodity in the region, regardless of the cost of its production as a by-product. The water users and the taxpayers, creating and controlling the district, would doubtless object to the adoption of any such basis, even to the extent of withholding their consent to the installation of the appliances necessary to the production of electric energy upon such a small margin of profit. The Railroad Commission was entitled to take into account all of the foregoing considerations, in the adoption of a basis for the fixation of the price which the Light & Power Corporation would be permitted to accept for the transfer of its water rights and privileges and, on the other hand, would be authorized to pay the irrigation district for its proposed output of hydroelectric energy. Its discretion in that regard is beyond the power of review by this tribunal.

The contention of the applicant herein that the powers of the Railroad Commission in the matter of the fixation of rates, as between public service corporations and their consumers, should be limited to facts and properties in existence at the time such powers are sought to be exercised, has no application to the situation here presented. The Railroad Commission was not asked to fix any rates as between the Light & Power Corporation and its customers in the proceeding before it. The problems involved in such a proceeding will not arise until such future time as it shall begin to receive the quantum of electric energy to be delivered to it under these contracts and shall begin to distribute the same to its consumers. If, at such time, a controversy should arise between it and its consumers regarding the reasonableness of its rates, the Railroad Commission will then, and in a proper proceeding, pass upon and determine the reasonableness of the rates to be charged upon such distribution. It is true that the question of the reasonableness of such future rates is, in a sense, indirectly involved in the present proceeding, since the price which the Light & Power Corporation is required to pay for such of its hydroelectric energy as it is to eventually receive under these contracts will, to some extent, determine the rates at which it will dispose of its output derived from this source. The parties to these contracts have, however, apparently provided for this eventuality by the following proviso in the second contract between said parties:

> "All electric energy to be sold and delivered hereunder shall be sold and delivered at a fair and reasonable rate to be fixed and determined by the Railroad Commission of the state of California, but, inasmuch as irrigation district reserves the right to withhold from the effect and operation of this contract so much energy as it may require in and about said operations as more particularly set forth in the first paragraph of this contract, and inasmuch as the rate to be fixed in the first instance shall be upon the assumption that the entire output of its hydroelectric generating plant will be delivered to power company, the parties hereto agree that the reservation and use of power for any other purpose than the operation of said hydroelectric generating plant and storage, or any other change in conditions that, in the opinion of either party hereto, effect the value of the energy delivered to power company hereunder, shall be the proper cause and occasion for an application to the Railroad Commission of the state of California to alter and adjust rates then in existence, so that the same shall thereafterwards fairly reflect the effect of the above changed conditions."

Reading this clause in the contract in connection with the provisions of the Public Utilities Act investing the Railroad Commission with power to regulate the rates of public service corporations, it would seem that the rights of the future consumers of the product of the Light & Power Corporation, to be hereafter supplied as a result of the consummation of these agreements, are not sufficiently shown to be affected by these proceedings as to justify a present objection to the same or to the action of the Commission taken therein, upon the sole ground of lack of jurisdiction.

It may be said in conclusion, that the water users and taxpayers of the Merced irrigation district have no such interest merely as such in these proceedings as would entitle them to bring in question the action of the Railroad Commission therein. The irrigation district, as such, is not, as we have seen, subject to control by the Railroad Commission. Nor is its power through its proper officials to enter into these contracts involved in this proceeding or affected by any action taken by the Commission regarding the same. All questions as to the powers of the officials of the irrigation district to enter into said contracts or to fix the terms thereof are purely questions of administration, as between said district and the taxpayers and water users creating it and controlling its affairs, and with these the Railroad Commission has nothing to do and has done nothing. The only interest which the water users and taxpayers within the said irrigation district, either individually or in association, could have in the instant proceeding or in any later proceeding for the fixation of rates to be charged by the Light & Power Corporation, might consist in the fact that some of these are, or may become, customers of said corporation and consumers of its product at some future time, when the reasonableness of its rates for its output of hydroelectric energy, derived from sources which are not yet in being, may be called into question. Assuming the possibility or likelihood of such an interest, it would still seem clear that the present assertion of the right on the part of the applicant herein to call in question the action of the Railroad Commission in approving the contracts in question is, to say the least of it, premature, and that, whatever question may hereafter arise with respect to the fixation of rates to be charged by this public utility for the distribution of a product, the sources of which are not as yet in being, were not presented in the proceeding before the Railroad Commission, and were not acted upon by that body, and hence are not the subject of review in the present proceeding before this court.

Writ denied.

SHAW, C. J., RICHARDS, Justice pro tem., and SLOANE, WASTE, WILBUR, SHURTLEFF, and LAWLOR, JJ., concur.

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TOWN OF ANTIOCH v. WILLIAMS IRR. DIST. et al. (S. F. 9737.)

(Supreme Court of California. March 23, 1922.)

1. Navigable waters 🔑40—Rights of city bordering on stream only those of diverter and user of water for beneficial purposes.

The rights in a stream or body of water which attach to land because it abuts thereon are not of a political nature, but are private rights, vested exclusively in the owner of the abutting land, and extend only to the use of the water upon the abutting land and none other; and the status of a city bordering on a stream, and its rights in the stream, are those of a diverter and user of the water thereof for beneficial purposes and nothing more.

2. Pleading 🔑370—Affidavit as to matters not alleged presented no issue.

An affidavit, filed at the trial, stating certain facts, did not make an issue as to such facts, where they were not alleged in the complaint and nothing was claimed therein by reason thereof.

3. Waters and water courses 🔑133—Appropriation valid without posting statutory notice.

Where there has been an actual appropriation of water of a stream, a right to it is acquired without posting a notice of appropriation, as provided in Civ. Code, § 1415.

4. Waters and water courses 🔑152(3)—Diverter of water may enjoin subsequent diversion.

One who acquires the right to divert water from a stream by prescription may enjoin a subsequent diversion at points above his place of diversion, whenever he can show that such subsequent diversion above will so diminish the flow of the water that not enough will come down to supply the quantity to which he has acquired the prior right, or otherwise injure his water right.

5. Navigable waters 🔑2—City has no power to protect uses of stream for navigation.

It is immaterial, as far as concerns the rights of a city seeking to enjoin diversion of water, that the action of the defendants impairs the availability of the stream for navigation, since a city has no power to supervise, control, regulate, or protect the uses of a stream for navigation, such being a matter for appropriate action by the proper state or federal authorities.

6. Waters and water courses 🔑142—Appropriator of waters entitled to preservation of stream's natural state of purity.

An appropriator of water from a stream, for domestic and similar uses, has the right to enjoin a pollution of the stream above him, so that the water may flow down to his place of diversion in a condition as suitable for those uses as it was in at the time he acquired his right to take it.

7. Waters and water courses 🔑143—Appropriator of water at point near meeting of river and sea waters must take notice of policy of law which favors use of water for irrigation.

Any person who appropriates water from a river at a point near to the meeting place of the river waters and sea waters must take notice of the conditions and of the policy of the law which favors, in every possible manner, the use of the waters of the streams for the purpose of irrigating the lands of the state to render them fertile and productive, and discourages and forbids every kind of unnecessary waste thereof.

8. Waters and water courses 🔑142—Diverter not entitled to have sufficient flow to hold back salt water tides.

An appropriator or diverter of fresh water from a stream at a point near its outlet to the sea does not, by such appropriation, acquire the right to insist that subsequent appropriators above should leave enough water flowing in the stream to hold the salt water of the incoming tides below his point of diversion.

9. Constitutional law 🔑70(1)—Whether rice culture wastes water a legislative question.

In an action to restrain diversion of waters by appropriators above, a contention that use of water for rice culture is a waste thereof, and should be prohibited, involves a legislative question which the court cannot consider.

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by the Town of Antioch against Williams Irrigation District and others, in which W. H. Metson and Mary H. Curtis intervened. From an order restraining them during the pendency of the action from diverting certain waters, defendants appeal. Reversed.

Mastick & Partridge and John S. Partridge, all of San Francisco, for appellants Metson and Curtis.

Goodfellow, Eells, Moore & Orrick, of San Francisco, and Thomas Rutledge, of Colusa, for appellant Williams Irr. Dist.

Goodfellow, Eells, Moore & Orrick, and Hankins & Hankins, all of San Francisco, for appellant Glenn-Colusa Irr. Dist.

Bacigalupi & Elkus, of San Francisco, and Frank Freeman, of Willows, for appellant Provident Irr. Dist.

Bacigalupi & Elkus, of San Francisco, and Frank Freeman, of Willows, for appellant Maxwell Irr. Farms Co.

Moody & Bell, of Willows, for appellant Princeton-Codora-Glenn Irr. Dist.

Moody & Bell, of Willows, for appellant Jacinto Irr. Dist.

Haven, Athearn, Hall & Chandler, of San Francisco, Devlin & Devlin, of Sacramento, and Thomas Rutledge, of Colusa, for appellant Reclamation District No. 108.

Haven, Athearn, Hall & Chandler, of San Francisco, for appellant Tisdale Irrigation & Drainage Co.

Carr & Kennedy, of Redding, for appellant Anderson-Cottonwood Irr. Dist.

Hiram W. Johnson, Jr., and Haven, Athearn, Hall & Chandler, all of San Francisco, for appellant River Farms Co. of California.

Hankins & Hankins, of San Francisco, and Thomas Rutledge, of Colusa, for appellant Maxwell Irr. Dist.

Frank Freeman, of Willows, for appellant Sacramento Valley Sugar Co.

Devlin & Devlin, of Sacramento, for appellant Sutter Basin Improvement Co.

Devlin & Devlin, of Sacramento, for appellant Chicago-California Development Co.

Lilienthal, McKinstry, Raymond, Haber & Firebaugh, of San Francisco, for appellant Alameda Sugar Co.

A. A. De Ligne, of San Francisco, for appellant Farm Land Investment Co.

W. H. Carlin, of Marysville, for appellant Cordua Irr. Dist.

Cooley & Lachmund, of San Francisco, for appellants Mouton Water Co. and Colusa Delta Lands, Inc.

Brown & Albery, of Colusa, for appellant Cheney Slough Irr. Co.

Brown & Albery, of Colusa, for appellant Roberts Ditch Irr. Co.

Brown & Albery, of Colusa, for appellant Colusa Irr. Co.

Bacigalupi & Elkus, of San Francisco, and Frank Freeman, of Willows, for appellant Colusa Irrigated Farms Co.

Raymond A. Leonard, of Oroville, for appellant Honcut-Yuba Irr. Dist.

Elmer W. Armfield, of Woodland, for appellant Conaway.

Theodore Chester, of Sacramento, for appellant Spencer.

Devlin & Devlin, of Sacramento, for appellant Swanston.

W. H. Carlin, of Marysville, for appellants Phelan and the Alice Phelan Sullivan Corporation.

Garret W. McEnerney, of San Francisco, for appellant Parrott Investment Co.

Thomas Rutledge, of Colusa, for appellants Sartin, Terrill, Muma, Wohlfrom, Wohlfrom, Gordon and Scheimer.

A. E. Chandler, Stanley Moore, and Andrew F. Burke, all of San Francisco, of counsel, for all appellants.

Greene & Sinclair and B. D. Marx, all of Berkeley, for respondent.

Attorneys appeared as amici curiæ as follows:

J. M. Walthall, of Modesto, for Modesto Irr. Dist.

P. H. Griffin, of Modesto, for Turlock Irr. Dist.

A. L. Cowell, of Stockton, for Merced Irr. Dist.

Haven, Athearn, Chandler & Farmer, of San Francisco, for Medano Irr. Dist.

Haven, Athearn, Chandler & Farmer, of San Francisco, for Madera Irr. Dist.

Purcell Rowe, of San Francisco, for Blanche Erskine Boest.

F. A. Denicke, of San Francisco, for Tyler Island Farms and Thomas McCormack.

T. L. Smart, of San Francisco, for Libby, McNeill & Libby.

Keogh & Olds, of San Francisco, for Liberty Farms Company, R. K. Malcom, John H. Barcher, and Charles Jones.

Hadsell, Sweet & Ingalls, of San Francisco, for California Delta Farms.

George Lull and Robert M. Searls, both of San Francisco, for city and county of San Francisco.

L. D. Bohnett, of San Jose, for State Water Commission.

SHAW, C. J. This is an appeal by 27 defendants in the above-entitled action from an order of the superior court, made on January 7, 1921, restraining them and each of them, during the pendency of the said action, or until the further order of the court, "from diverting so much water from the Sacramento river and its tributaries, to nonriparian land, that the amount of water flowing past the city of Sacramento, in the county of Sacramento, state of California, shall be less than 3,500 cubic feet per second." The injunction was granted in pursuance of an order upon said defendants to show cause why such injunction should not be ordered. The order to show cause was issued upon the complaint in the action and upon an affidavit filed therein on behalf of plaintiff, verified by George L. La Montagne, president of its board of trustees. Antioch is a city of the sixth class. The record is exceedingly voluminous, embracing six large volumes containing 3,150 pages of typewriting. The facts which are necessary to be stated to present the questions that are decisive of the appeal may however be set forth in comparatively short space.

The complaint states at some length the facts that the boundaries of the city of Antioch extend to the water's edge of the San Joaquin river, and that it claims rights therein both by virtue of its riparian situation and by virtue of a diversion and appropriation of the waters of that river. Upon the hearing, however, it was conceded that the rights of the city of Antioch in said river, whatever they may be, are founded solely on its diversion and appropriation of the waters thereof to the public use of supplying itself and its inhabitants with water for domestic uses and other purposes.

The city of Antioch, continuously and under a claim of right, for more than five years before the action was begun, has been diverting from said river, at a point immediately above the city limits, and applying to said public use, a quantity of water equal to a continuous flow of a little less than one cubic foot per second. To be suitable for the main purpose to which this water is devoted, that of domestic uses, it is, of course, necessary that the water be fit for use as a beverage and for cooking and washing. It is not claimed that there is not always ample water in the river to supply the above-mentioned amount for the use of the plaintiff. The complaint made is that the diversions of water from the Sacramento river, at points from 10 to 200 miles above the city of Sacramento, by the appellants have caused the water of the San Joaquin river, at the city's place of diversion therefrom, to be so polluted with the salt waters of the ocean, forced up the San Francisco bay and into the lower part of the San Joaquin river by the impulses of the tides, that it is unfit for domestic uses, and that thereby the rights of the city, under its diversion and appropriation, are practically destroyed.

It is necessary here to state some additional facts to explain how this pollution comes about and why diversions from the Sacramento river may or do affect the volume and quality of the water flowing down the San Joaquin river by the city of Antioch into Suisun bay, which is the common receptacle of both rivers. The Sacramento river flows from the northerly part of the state southerly into Suisun bay at Collinsville. The San Joaquin river flows from the southerly part of the state and also enters said bay at Collinsville, immediately adjoining and south of the mouth of the Sacramento. Antioch is situated on the San Joaquin river, about four miles above its entrance to said bay. Suisun bay is really the upper end of the San Francisco bay. For many miles above the entrance of the two rivers into said bay, the land between them is flat and is threaded with sloughs in which water either stands or flows. From the Sacramento river at two points, one about 8 and the other about 23 miles above its mouth, sloughs diverge, into which parts of its waters escape and flow through the said sloughs and into the San Joaquin river at points several miles above the place of the diversion by the city of Antioch.

When the current of the water of the two rivers is sufficiently strong, the influx of the incoming tides from the ocean is held back so that, in times of ordinary low water in the rivers, the salt water does not reach and mingle with the fresh water of the San Joaquin river at a point above its entrance into Suisun bay. As the volume of the waters of the two rivers decrease, the point in the San Joaquin river, where the salt water begins to mingle with the fresh water, ascends the stream. The claim of the city is that hitherto, until the excessive diversions of the defendants, the point at which this mingling of the salt and fresh water takes place has always been far below its place of intake from the river, but that, owing to the great diversion of water from the Sacramento river by the appellants during the years 1919 and 1920, the water flowing in the Sacramento river in the extreme dry season of each year was diminished so that it did not exceed, at the lowest stages, 420 cubic feet per second, and less of its water passed through the said sloughs into the San Joaquin river, with the result that the tides impelled salt water further up said river and the mingling of the salt and fresh water took place at a point above the intake of the city's municipal water system, in consequence whereof the water furnished by it to its inhabitants was made salty and unfit for any use, and that, in order to prevent the salt water from ascending to the said place of intake, it was necessary that there be kept flowing in the Sacramento river during the dry season not less than 3,500 cubic feet of water per second at the city of Sacramento.

Before proceeding with the main point above stated, we may briefly dispose of some other questions which have been presented by the respective parties.

[1] The fact that the city of Antioch is situated upon the San Joaquin river is wholly immaterial in the consideration of its rights in this case. The rights in a stream or body of water which attach to land because it abuts thereon are not of a political nature, but are private rights. They are vested exclusively and only in the owner of the abutting land and they extend only to the use of the water upon the abutting land and none other. There are cases in some of the eastern states which, upon somewhat strained reasoning, have held that a municipality, whose boundaries extend to a stream of water, has some rights, by reason of that situation, to apply the water of the stream to public uses within the city, rights similar in nature to that of a riparian proprietor to use the water of such stream upon his land. We need not go into the discussion of the soundness of the reasoning of those cases. The litigation

which has arisen in this state from the doctrine of riparian rights has been of great volume, and it is sufficient to warn us that we should not extend the doctrine so as to make it political and confer it upon cities abutting on a stream, but owning no land abutting thereon. Such cases are contrary to the common-law doctrine, as settled in this state, whereby such rights are confined exclusively to the owner of the abutting land and are wholly of a private nature. The status of the city of Antioch in this action, therefore, and its rights in the San Joaquin river are those of a diverter and user of the water thereof for beneficial purposes, and nothing more. San Bernardino v. Riverside (Cal. Sup.) 198 Pac. 787, clauses 1, 3, 9, and 10a.

[2] An affidavit was filed, at the hearing in the court below, stating that the city owns a small tract of land bordering on the river, upon which its pumping plant is situated, and that it makes some use of the water of the river on that land for the flushing of its filters there in use as a part of its works. But the complaint does not allege any of these facts and does not claim protection for that right. Hence, if that is a riparian use, it is not here in issue.

[3] The fact that the city has never posted a notice of appropriation, as provided in section 1415 of the Civil Code, is likewise immaterial. "Where there has been actual appropriation of water, a right to it is acquired, without following the course laid down in the Code." De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; Watterson v. Saldunbehere, 101 Cal. 112, 35 Pac. 432. See, also, Duckworth v. Watsonville Water & Light Co., 158 Cal. 211, 110 Pac. 927; Haight v. Constanich, 194 Pac. 28 (Cal. Sup.)

[4] Appellants make the claim that the city, by its diversion and use of the water of the river, could not acquire any right thereto against other persons who afterwards began to divert water at points further up the stream. They base this claim on what they say is a "fundamental axiom, based upon natural laws, that prescription does not run up stream." We know of no such rule existing anywhere, and no authority is cited in support of it. To the contrary, the rule has long been settled that one who has acquired the right to divert water from a stream by prescription may enjoin the subsequent diversion of water from the stream at points above his place of diversion, whenever he can show that such subsequent diversion above will so diminish the flow of the stream that not enough water will come down to his dam to supply the quantity to which he has acquired the prior right, or otherwise injure his water right. McDonald v. Bear River, etc., Co., 13 Cal. 220; Phœnix Water Co. v. Fletcher, 23 Cal. 481; Natoma, etc., Co. v. McCoy, 23 Cal. 490; Hill v. Smith, 27 Cal. 476; Junkans v. Bergin, 67 Cal. 269, 7 Pac. 684; Lower Kings, etc., Co. v. Kings River, etc., Co., 60 Cal. 408; Huffner v. Sawday, 153 Cal. 92, 94 Pac. 424.

[5] We may also appropriately say that, although both the San Joaquin river and the Sacramento river are navigable streams, the rights of the public have no bearing on the question here involved. If the action of the defendants impairs the availability of the streams for navigation in any respect, it is for the public authorities to maintain any appropriate action to prevent the same. The public authorities referred to are those of the United States and the state of California, respectively. The city of Antioch has no power to supervise, control, regulate, or protect the uses of the stream for navigation, and it does not claim such right or power.

[6] The law in regard to the right of an appropriator or diverter of the waters of a stream, as against subsequent appropriators above, to have the water of the stream at his point of diversion preserved in its natural state of purity, so far as may be necessary for the purposes to which he is devoting it at the time such subsequent appropriations begin, is well established.

In Farnham on Water Rights, that author says that the first appropriator of water from a stream—

> "is entitled to have the flow of the water continue without unreasonable diminution in either quantity or quality so as to interfere with his rights" (3 Farnham on Water Rights, § 674, p. 2090); and "whether or not some pollution of the water of the stream will give him a right to complain will depend upon the use to which he is putting the water. If he appropriated his supply for domestic purposes, he has a right to have the quality remain such that that use may continue; and therefore the prior appropriators of the waters of a stream for domestic and culinary purposes are entitled to an injunction restraining the pollution of such waters by the operation of an ore crusher on the stream above, rendering the waters destructive to both animal and vegetable life. In any case the deterioration of the quality of the water so as to render it less fit for the use of the first appropriator gives him a right to complain" (Id. § 674a, p. 2093).

Mr. Wiel, speaking of the relative rights of prior and subsequent appropriators, says:

> "The prior appropriator has an exclusive right to the purity of the stream as he found it, and cannot in any degree be subordinated to later claimants on the ground that such subordination is necessary to allow use by the subsequent appropriator." 1 Wiel on Water Rights, § 524.

In this state in one of the early decisions, it was said that, in view of the importance of the rights granted by the government to all persons to extract ore from mineral lands, and of the conditions existing in the mining regions, the deterioration of the quality of the water by a later appropriator for mining purposes on the stream above "should be considered as an injury without consequent damage," when complained of by an earlier appropriator for mining purposes below, whose appropriation was said to be otherwise first in time and first in right. Bear River, etc. Co., v. New York M. Co. [1857], 8 Cal. 327, at p. 336, 68 Am. Dec. 325. In July of the following year, in Mokelumne, etc., Co. v. Woodbury, 10 Cal. 185, the same doctrine was followed. But in Pilot, etc., Co. v. Chapman, 11 Cal. 162, decided in October, 1858, the court said that the Bear River Case "went quite as far as it ought to have gone, when confined to the express points there announced, and we certainly feel no disposition to extend it further." See, also, Butte, etc., Co. v. Vaughn, 11 Cal. 153, 154, 70 Am. Dec. 769. In Phœnix Water Co. v. Fletcher, 23 Cal. 486, it was held that the prior appropriator was entitled to protection against acts of subsequent appropriators which materially deteriorated the quality of the water for the uses to which he wishes to apply it, and the doctrine in the Rear River Case was declared to be "clearly erroneous." The rule stated in Phœnix W. Co. v. Fletcher has been uniformly approved and followed ever since. Hill v. Smith, 27 Cal. 482; Hill v. Smith, 32 Cal. 167; Junkans v. Bergin, 67 Cal. 269, 7 Pac. 684; People v. Elk River, etc., Co., 107 Cal. 214, 40 Pac. 486, 48 Am. St. Rep. 121; Peterson v. Santa Rosa, 119 Cal. 392, 51 Pac. 557. The two cases last cited refer to the rights of riparian owners to prevent pollution. But in the first decision in Hill v. Smith, supra, the question was somewhat elaborately considered, and it was stated that the relative rights of riparian proprietors against each other in regard to the pollution of the stream by the upper proprietor and the corresponding rights of a prior appropriator against a subsequent appropriator above him on the stream were based upon the same principles. Obviously, the rule must be the same except that the rights of a riparian proprietor to the use of the water of the stream do not depend on the use which he may have previously made thereof.

At the outset of our consideration of the main point in the case, we must therefore admit that, under the law of this state, an appropriator of water from a stream for domestic and similar uses has the right to enjoin the pollution of the stream above him, so that the water may flow down to his place of diversion in a condition as suitable for those uses as it was in at the time he acquired his right to take it. If this were an ordinary case of pollution above, whereby the water flowing down to the lower and prior appropriator was defiled or contaminated, the rule thus fixed by our decisions, which in effect follow the common law on the subject, would govern the case and the plaintiff would clearly be entitled to the injunction granted, or to some restraint that would have the effect of preserving the water in its original purity.

[7] But, in its origin and cause, the case at bar is wholly unlike the cases by which the rule just stated was established. Nothing has been placed in the stream above by the defendants that in the least affects the purity of the water flowing therein. All that they have done is to deplete the stream by taking out water for irrigation, and they have done this under provisions of the Civil Code which give them the right to take it from the stream for beneficial uses, subject to the lawful rights of prior appropriators below and to the rights of riparian proprietors. The pollution of the water complained of is caused by the fact that the depleted volume of the stream does not hold back the rising tide of salt water from the bay below as effectually as the natural volume might do. The case is unprecedented in character. Neither the effects of the application of the rule aforesaid to such a case, nor the conditions here existing, have ever been considered in any decision on the subject. The question is open for the adoption of such rule as we may deem just.

The place where the river water meets and overcomes the inflowing tide is not fixed. It changes with the rise and fall of the rivers and tides. The tides vary in height. The rivers vary much more in their volume and height. Hence, it follows that where there is fresh water one day there may be salt water a week, or even a day, thereafter. At a point near to that meeting place, the diversions of the riparian owners, of which no complaint is here made, may change the character of the water at any time. Dry seasons advance the point of meeting further up the stream, and wet seasons drive it further into the bay. Any person who appropriates water from one of these rivers at a point near to that meeting of the waters must take notice of these conditions, and his rights will necessarily be restricted thereby. He acts at his peril with regard to them. He must also take notice of the policy of our law, which undoubtedly favors, in every possible manner, the use of the waters of the streams for the purpose of irrigating the lands of the state to render them fertile and productive, and discourages and forbids every kind of unnecessary waste thereof.

The record in this case shows that, in the extreme dry season in the year 1920, the flow of the river at the city of Sacramento was reduced to 420 second feet, largely by the diversions of the defendants. The claim of the city of Antioch is that, for its protection, the flow at that point must be maintained at 3,500 second feet. In effect, therefore, its claim is that 3,080 second feet of water otherwise available for irrigation above must at all times be kept flowing down the river into the bay, without any other beneficial use whatever, in order that the city of Antioch may be able to take less than one second foot of fresh water therefrom at its pumping plant near the mouth of one of the rivers. Not only this, but, if its claim is allowed, every other prior user of water who takes it out near to the meeting place of the waters must be allowed the same right. And, as the close proximity of the place of diversion to the meeting of the waters would not divest or affect the right as against subsequent appropriators above, one whose pump was a hundred yards above the highest known rise of the salt water would have the right to keep practically the entire river flowing down to his pump so as to keep the salt water therefrom. Thus a single appropriator of water for the domestic use of one family, taking probably less than a fiftieth part of a second foot of fresh water for actual use, would, in practical results, appropriate or control 3,080 second feet of water of the river to supply his pipe with that infinitesimal quantity, and in that way he would keep more than 300,000 acres of fertile land in the valley above dry and unproductive. By a valid appropriation of one miner's inch he would, in effect, appropriate all the water flowing in both of these large rivers. It would be hard to conceive of a greater waste for so small a benefit. It may without exaggeration be said that the full use of the waters of the rivers and mountain streams for irrigation, power, and like beneficial purposes, is absolutely necessary to the continued growth and prosperity of the state. The interior valleys are rapidly growing in population, and their capacity for production is being developed, chiefly, by irrigation of the land. The necessity for the most economical and careful use of the limited supply of water obtainable in this arid climate has often been adverted to in the decisions of this court from the beginning of its settlement by white men, and, as it grows and increases in population and production, the necessity increases correspondingly. Nevertheless, the plaintiff contends that, under the principles of the common law, bearing upon the subject of water rights by appropriation, as established in this state, the city of Antioch, as a prior appropriator from the stream, has the right to enjoin a pollution of the water thereof, artificially produced after its use thereof began, from any causes whatever, even under the circumstances above detailed, except where it is caused by the exercise of riparian rights.

In this state the climate, the original ownership of the land, the policy of the governments of the United States and the state, the original owners, regarding the use and occupancy thereof for mining purposes by persons not in privity with them, and the necessity of water for placer mining and irrigation, are all so different from the conditions existing in Great Britain, where the common law had its origin, that the court from the first has had some difficulty in applying it here without producing the injustice or wrong which it is the chief purpose of the common law to prevent or redress. It has frequently been necessary to invoke the maxim of jurisprudence that "when the reason of a rule ceases, so should the rule itself," and this maxim has been incorporated into the Civil Code. Section 3510. It is as much a part of the common law as are the rules concerning the right of appropriation of water. In the early history of our jurisprudence there was much doubt whether there were any principles of the common law whereby the relative rights of individuals who took water from the streams for the purpose of mining and who took up mining claims whereon to use the water and extract gold thereby were to be defined and controlled. The early decisions display some confusion and conflict of ideas on the subject. It was doubted whether the law of riparian rights could be applied, since the use was generally on land not riparian, and it was finally held, as above shown, that the rules as to riparian rights, modified to suit the new conditions, could be resorted to for a guide in determining such relative rights. Hill v. Smith, 27 Cal. 482. There was dispute on the question whether the so-called rights of appropriators of water, who took it without express leave of the paramount owner, or the rights of the miners to their mining claims, taken and held by mere prior occupancy, constituted property which the prior appropriator or occupant was entitled to call upon the courts to protect. It was not until a number of years after the settlement of the state that the courts placed the doctrine that such rights were entitled to protection as property rights upon the true basis, that is to say, upon the doctrine of the common law that, where the true owner did not interfere between rival claimants, there could be property rights in mere possession and use, good against every one not in privity with the true owner, and that the prior possessor had a right to maintain his possession against all intruders, not claiming under the true owners. This is the sole basis of the right of appropriation, as distinguished from the right of a riparian owner. He is, in the first instance, always a trespasser with respect to the riparian owners, and his right against a subsequent appropriator is superior solely because he is first in time and because the subsequent appropriator is also a trespasser with regard to the true owner, that is, the riparian proprietor. In the case of the state and the United States this rule is modified by the fact that they have each, as riparian owners, consented to the taking of the water. Palmer v. Railroad Comm., 167 Cal. 168 to 173, 138 Pac. 997. The law of the rights of appropriators of water in this state, especially those who, like the city of Antioch, do not appropriate water under the Civil Code rules, is, therefore, the creation of the courts in the endeavor to adapt and modify the rules of the common law so as to suit the peculiar conditions existing here. The question remains whether, in view of the unprecedented conditions of the case at bar, the rules, applying to the ordinary pollution of water by the deposit of deleterious matter in the stream above the injured party, are to be applied here.

Such questions do not often arise and the doctrine above adverted to should, of course, always be applied with caution. Similar unprecedented conditions were presented in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, and the numerous cases following it. It was there said that:

> "Whenever it is found that, owing to the physical features and character of this state, and the peculiarities of its climate, soil, and productions, the application of a given common-law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which the law is founded, and which its administration is intended to promote, require that a different rule should be adopted."

That case involved conditions prevalent over a large portion of the state not interested in the property rights there determined. This case presents perhaps the only instance in the state where the question at issue has arisen or can arise. The rule we may adopt here can scarcely be a precedent for any case except one arising upon these two rivers, concerning a similar claim of some prior appropriator near the outlets thereof.

In addition to the facts and conditions already mentioned, there are others to be considered which make the practical application of the rule contended for by the plaintiff still more difficult and uncertain. The year 1920 was one of the driest that has occurred in the history of the state. In an average season the plaintiff would have suffered no injury from the diversions complained of. The Sacramento and San Joaquin rivers are by far the largest in the state. They each traverse wide valleys in which are many hundreds of thousands of acres of land suitable for irrigation, and comparatively barren without it. They are each fed by large tributaries heading high up in the mountains. In these tributaries and in the main streams, many appropriations of water for irrigation have already been made, and in the tributaries of the Sacramento river there are possibilities of many more, particularly if storage reservoirs are resorted to. It is certain that such appropriations and uses of the waters of those streams will be made or attempted in the future. If this rule should be adopted, it is obvious that no one could safely attempt such enterprises, or invest money therein, without previously ascertaining whether there are any appropriators of fresh water from the river near to its outlet into the bay, a hundred or more miles below, who might be affected injuriously thereby, and thereupon coming to terms with all such appropriators concerning the resulting damage to be claimed and paid. There would be great difficulty in ascertaining the facts, and still greater in coming to an agreement. A private appropriator could not condemn the right and must agree or act at his peril. A public enterprise must needs agree or enter into a costly litigation to condemn the right. The damage from any particular diversion or storage out of so many could not be ascertained with any degree of even approximate accuracy. The result, in actual practice, would be either that the appropriators near the outlet would have to abandon all claims of damage, or the proposed diversion or storage enterprises must be abandoned. Antioch carries its water from its pump to its reservoir by a six-inch pipe. By moving its pump a few miles up the river it could obtain water free from saline solution. It is not altogether improbable that, if it had devoted the same amount of energy and expenditure to a change of its place of diversion as it has to the present litigation, it would have had the water uncontaminated by salt with less delay than had already occurred and at no more expense. And from the large number of attorneys who have appeared for the numerous defendants and the time they have expended in the case up to date, it is also possible that, if they had acted in concert to make the change of place for the plaintiff, some expense might have been saved, and the litigation avoided entirely. It is evident, from all these considerations, that to allow an appropriator of fresh water near the outlet of these two rivers to stop diversions above so as to maintain sufficient volume in the stream to hold the tide water below his place of diversion and secure him fresh water from the stream at that point, under the circumstances existing in this state, would be extremely unreasonable and unjust to the inhabitants of the valleys above, and highly detrimental to the public interests besides.

[8] Our conclusion is that an appropriator of fresh water from one of these streams, at a point near its outlet to the sea, does not, by such appropriation, acquire the right to insist that subsequent appropriators above shall leave enough water flowing in the

stream to hold the salt water of the incoming tides below his point of diversion. Further than this we need not go.

The respondent cites the decisions of the courts of Texas in Bigham Bros. v. Port Arthur Channel & Dock Co., 100 Tex. 192, 97 S. W. 686, 13 L. R. A. (N. S.) 656, and Houston Transportation Co. v. San Jacinto Rice Co. (Tex. Civ. App.) 163 S. W. 1023. It is claimed that they lay down a rule contrary to the conclusion above stated. In the Bigham case, the plaintiffs owned land on Taylor slough, 20 miles above its mouth. It is a fresh water stream flowing into Sabine Lake. Sabine Lake also receives the waters of the Nechez river and the Sabine river, and these streams keep its waters fresh. The lake is connected with the Gulf of Mexico by a channel known as Sabine Pass. Taylor's bayou empties into Sabine Lake several miles above the point where the pass debouches therefrom. Under natural conditions the salt water from the gulf flowing up the pass during the rising tides caused fresh water of the lake to rise and flow up Taylor's bayou, and carried no salt water up the bayou, or, at all events, not as far as the plaintiffs' farm. The defendant desired to establish docks and wharves in a place free from winds and waves, and, for that purpose, it constructed a canal 9 miles long, from a point on the pass across the intervening land to a point on the bayou, 2,000 feet above its entrance into the lake. The effect was that the salt waters of the gulf, when raised by the tides, flowed directly from the pass into the canal and thence into the bayou in such quantity and with such force that they were carried to plaintiffs' land, and the water thereof at that point was thereby made unfit for plaintiffs' use for the irrigation of their riparian land. The court, in effect, held that this was an unlawful alteration of natural conditions, sufficient to constitute a nuisance to plaintiffs and a taking of their property for public use without compensation, contrary to the Texas Constitution. In the other case the defendant had begun the removal of a sand bar which had naturally formed in the gulf across and in front of the mouth of the San Jacinto river, in such a manner that it prevented the tides from flowing directly into and up the river with enough force to reach the plaintiff's land, which abutted on the river 6 miles above its mouth. The removal of the bar would remove this obstruction to the flow of salt water and would cause such water to pass up the stream to and beyond the land of plaintiff, to the damage of plaintiff's rights as a riparian owner on the stream. It was held that this also was an unlawful and actionable injury.

It is clear from this statement that the facts of these cases were not the same as those controlling the present case. The opinions show that the reasons we have discussed were not suggested to or considered by the Texas courts. The facts there considered were not essentially different from any other unlawful interference with natural conditions in such a manner as to directly affect and damage the property of another, in which case the right of action of the injured party is well settled everywhere. The conditions of the case before us, as we have endeavored to show, are of a character so peculiar, extraordinary, and unprecedented that the reasons upon which interferences with natural conditions to the injury of another are held to be unlawful are not applicable, and the damage therefrom, if any there be, does not constitute an actionable injury.

In the argument there is considerable discussion in regard to the supposed effect of the doctrine we have laid down upon the lands along and near the sloughs and river channels of the delta lands above the mouths of the two rivers. There were no allegations in the complaint concerning these lands, No owner of such land, by intervention or otherwise, sought relief at the hand of the court below, and that court, so far as appears, did not consider the effect on such land. It did not find any facts relating thereto, the pleadings alleged no facts bearing thereon, and none are presented in the record for our consideration. There is, therefore, nothing for this court to say on the subject. We know of nothing relating to such lands that would require a conclusion different from that which we have stated.

[9] A good deal is said in the briefs by the respondent to the effect that the water diverted by the defendants is all used for the cultivation of rice and that rice growing requires such an excessive quantity of water, as compared with any other crop, that it practically amounts to a waste, and that its cultivation ought not to be tolerated in California, where water for other crops and uses is so indispensible and so scarce. Rice is not grown by irrigation, in the ordinary sense of that word, but by flooding. The ground must be kept covered with water so that, for weeks at a time, the rice fields, in this case, embracing over 300,000 acres, it is claimed, present the appearance of a large lake. In some instances and in some soils the growing of rice, so it is said, requires nine times as much water as ordinary crops. It may be that, under these circumstances, rice culture in this state should not be encouraged, or that, in the exercise of the police power, the use of the waters of the state in that business might be lawfully forbidden. But that is a legislative question which the court cannot consider. The making of such a rule is beyond our power. The rule here declared is and must be general in its application, and it protects all other

beneficial uses of water on land in the Sacramento and San Joaquin valleys as well as that of the rice growers.

The order appealed from is reversed.

We concur: LAWLOR, J.; WILBUR, J.; WASTE, J.; SHURTLEFF, J.; SLOANE, J.; LENNON, J.

56 Cal. App. 481

PEOPLE v. JURADO. (Cr. 845.)

(District Court of Appeal, Second District, Division 1, California. Feb. 16, 1922.)

1. Criminal law ⚷1159(3)—Appellate court does not weigh conflicting evidence.

The appellate court does not weigh conflicting evidence on issues of fact.

2. Homicide ⚷340(4)—Where jury convicted of manslaughter, instructions as to murder not prejudicial.

In a prosecution for murder, where defendant was convicted of manslaughter only, an instruction that, under certain circumstances, the crime would be murder in the first degree did not injure defendant.

3. Homicide ⚷294(2)—Instruction relating to drunkenness properly given.

In a prosecution for murder, where there was some evidence that defendant was drinking wine at the house of the deceased on the night of the killing, instruction relating to drunkenness of an accused person at the time of alleged commission of the offense was properly given.

4. Homicide ⚷300(8)—Instruction on self-defense held proper.

In a prosecution for murder, in view of accused's testimony that he did not use a knife during an attack by deceased made upon him earlier in the evening, and that he defended himself with his hands only, and that he left before deceased had been injured, and that some hours later deceased was found with knife wounds in his body, the giving of an instruction concerning self-defense was not error.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Juan Jurado was convicted of manslaughter, and he appeals. Affirmed.

H. M. Dalton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was charged with the crime of murder, and found guilty of manslaughter. He appeals from the judgment, and from an order denying his motion for a new trial.

[1] The brief for appellant reviews at length the evidence presented at the trial; it being contended that the evidence is insufficient to justify the verdict. But the evidence is legally sufficient to justify the verdict. Among other things, one who claimed to be an eyewitness to the attack which resulted in the death of Jose Monges stated facts which, if true, would have warranted a verdict of murder in the first degree. Apart from this testimony, there is evidence of other circumstances which might have discredited the witness last mentioned, and yet would have been sufficient to support the verdict of manslaughter. It is not for this court to weigh conflicting evidence upon issues of fact.

The remaining points relate to claimed errors in the instructions given to the jury. In no instance is it asserted that a proposition of law is erroneously stated in any of these instructions. We are told that certain instructions are "erroneous, misleading, and prejudicial" in that there was no testimony in the case which called for or justified them; that other instructions were misleading and prejudicial, in that they were given more than once; and that the repetition of practically the same instruction tended to the prejudice of the defendant. This is the substance of the argument. It seems unnecessary to enter into an extensive review of the facts in order to show that there was evidence which made it appropriate for the court to instruct the jury on the matters covered by the instructions toward which these objections of appellant are directed.

[2-4] The fact that the court instructed the jury that under certain circumstances the crime would be murder in the first degree did not injure the defendant, since in fact he was convicted of manslaughter only. The instruction relating to drunkenness of an accused person at the time of alleged commission of the offense was properly given, since there was some evidence that the defendant was drinking wine at the house of the deceased on the night when the killing took place. Neither do we see any prejudicial error in the instruction given concerning self-defense as a justification for the killing of an adversary. According to his own testimony, appellant did not use a knife during the attack which he says deceased made upon him early on the night in question. He says that he defended himself with his hands only. He claims to have left the house at a time when Monges had not yet been injured. Some hours later in the same night Monges was found with knife wounds in his body, as a result of which he died.

We are satisfied that the law of the case was fairly presented to the jury, without prejudice to any substantial right of the defendant.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

(56 Cal. App. 466)

WALL v. CALHOUN et al. (Civ. 3700.)

(District Court of Appeal, Second District, Division 1. California. Feb. 16, 1922.)

1. Corporations 🔑88—Evidence justified conclusion that money was a loan, and not to apply on stock subscription.

In an action for money lent, evidence *held* sufficient to justify conclusion that plaintiff made a loan to defendant corporation, and that the company did not receive it on account of a stock subscription.

2. Appeal and error 🔑1011(1)—Finding on conflicting evidence not disturbed.

Where evidence was conflicting, the trial judge's conclusion must be taken on appeal as a correct determination of the facts.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Genevria E. Wall against Margaret Calhoun and others. From judgment for plaintiff, defendant Clover-Leaf Chocolate Company appeals. Affirmed.

Hocker & Austin and Overton, Lyman & Plumb, all of Los Angeles, for appellant.

Percy Hight, of Long Beach, for respondent.

JAMES, J. Plaintiff sued to recover the sum of $1,200 with interest, which she alleged under different counts of her complaint as having been, respectively: (1) Loaned by her to the defendants; and (2) received by the defendants for her use and benefit. The findings of the court were in support of the latter cause of action and against the defendant corporation only. The corporation defendant has appealed from the judgment.

[1, 2] So far as we can determine from the record, the only question involved under the evidence was as to whether the $1,200 was received from the plaintiff by the defendant corporation as a loan, or as on account of a subscription for corporate shares. There was a conflict of the evidence on this question. Defendant Alexander, prior to the transactions herein considered, was engaged in business as a candy manufacturer. Needing more capital with which to conduct that business, he interested defendants Calhoun and Rebecca Anderson, and they invested a considerable sum of money in the business. At the time this was done, however, a corporation was formed under the name of Clover-Leaf Chocolate Company. Defendant Calhoun became president of this corporation, Rebecca Anderson vice president, Alexander secretary, treasurer, and general manager. Rebecca Anderson was the mother of defendant Calhoun. The latter did not take active charge of the business. Being away from the town wherein it was conducted, a portion of the time at least, she procured her brother, William A. Anderson, to come from the East and actively engage in the business, representing the Calhoun and Anderson interests. At the time of the transactions had with the plaintiff, the corporation had not issued its stock and had not applied to the corporation commissioner for a permit to sell it. However, it conducted its candy manufacturing business under the corporate name. There came a time when more money was needed to satisfy creditors of the corporation and to purchase necessary supplies. Alexander first procured from the plaintiff $200, which he testified was loaned to the corporation and used in its business. Negotiations were then entered into with the plaintiff, with a view to having plaintiff and another person invest $2,500 each in the business. Plaintiff testified that she was unable to procure the $2,500 necessary to carry out that plan; that W. A. Anderson, representing that the corporation was in dire need of the money, asked her whether she could not procure $1,000. This she did, and both her testimony and that of Alexander was to the effect that it was understood that this $1,000 was to be loaned to the corporation. She asked for some security, and Anderson wrote out a paper, which recited that Rebecca W. Anderson and William A. Anderson agreed to "go security" for $1,200 until 1,000 shares of stock of the defendant corporation was turned over to plaintiff. The testimony was that plaintiff objected to this document, and insisted that she was loaning the money and not buying stock, and would not agree to the terms of the writing as to the payment in stock to be made her, whereupon W. A. Anderson agreed to fix it up; that she kept the paper for several days, and returned with another, phrased in such a manner as to meet the conditions of the loan transaction, and containing the statement that she might have the option to accept either cash or stock in the amount of $1,200. Anderson refused to have his mother sign the document, objecting to the condition that the $1,200 should be repaid in cash, whereupon plaintiff shortly thereafter demanded the return of her money, and brought this action. It will at once be seen that there was ample evidence to justify the trial court in concluding that the transaction was one wherein the plaintiff loaned $1,200 to defendant corporation. Where the evidence is conflicting, the trial judge's conclusion must be taken as a correct determination of the facts. That the corporation received the money and used it in its business, no question is made by any witness. Counsel for appellant cite a provision of the Corporate Securities Act, prohibiting corporations from selling or negotiating the sale of their securities until a permit has been issued, but we fail to see how any condition of that law can affect the rights of the plaintiff to the judgment awarded her. From the findings of the court the corporation borrowed the money from her, and did not receive it on account of a stock subscription.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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56 Cal. App. 431

PEOPLE v. WOOD. (Cr. 852.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1922.)

1. Rape 🔑19—One knowingly procuring a room for another to commit statutory rape is guilty as a "principal."

Pen. Code, § 31, providing that all persons directly committing or aiding and abetting in the commission of a crime are principals, and section 971, providing that persons directly committing or aiding or abetting in the act constituting the offense shall be tried and punished as principals, abrogate the distinction between an accessory before the fact and a principal, so that one knowingly procuring a room for a man and girl for the purpose of statutory rape is himself guilty of such offense as a principal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

2. Witnesses 🔑278—In a prosecution for procuring a room for witness to commit statutory rape, excluding cross-examination that witness would marry prosecutrix held not error.

Where defendant was prosecuted for procuring a room for a state's witness to aid the latter in committing statutory rape, exclusion of cross-examination whether witness was going to marry the prosecutrix or had expressed such desire, *held* not error.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

M. Wood was convicted of statutory rape, and he appeals. Affirmed.

Rowen Irwin, of Bakersfield, and Farnsworth, McClure & Burke, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

SHAW, J. Defendant and one James Moore were jointly charged by information with the crime of committing statutory rape. As to Moore the information was dismissed, and upon trial defendant was convicted. He has appealed from a judgment whereby he was sentenced to imprisonment in the county jail for a term of nine months.

[1] Appellant's chief contention is that the verdict is not warranted by the evidence. While it is conceded that defendant did not have sexual intercourse with the girl involved, it conclusively appears from the evidence that at about 2 o'clock in the morning, defendant meeting Moore and his companion together, he, at the request of Moore, procured a room for their use, to which he conducted them, and where they spent the remainder of the night until 6 o'clock, at which time, as agreed, defendant returned and awakened them. That, as shown by the evidence, he knew the illegal purpose for which the room was to be used, and knowingly both aided and abetted Moore in the commission of the crime, conclusively appears.

Section 31, Penal Code, provides that—

> "All persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed."

And by section 971, Penal Code, it is provided that—

> "All persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals."

Under these provisions of the Code, it is manifest that it was the intention of the Legislature to make one who aids and abets another in the commission of a crime a principal therein, and to abrogate the distinction between an accessory before the fact and a principal. Not only as declared by statute is the evidence ample to justify the verdict found by the jury, but the case is not unlike that of People v. Lewis, 9 Cal. App. 279, 98 Pac. 1078, wherein a conviction rendered under similar circumstances was upheld.

[2] James Moore appeared as a witness for the state, and, on cross-examination by appellant, was asked if he was going to marry the prosecuting witness, and also asked if it was not a fact that, expressing a desire to marry the girl, the district attorney objected to his so doing until after the trial of the case, to both of which questions objection was sustained. We are unable to perceive any error in the rulings. The answers of the witness, whether negative or affirmative, could not affect the question of defendant's guilt; and since, as appears from the record, no promises were made to Moore in consideration of his testimony, the answers could have no effect upon the credibility of his testimony.

The appeal is wholly without merit.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

56 Cal. App. 460

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. TUCKER et al. (Civ. 3583.)

(District Court of Appeal, Second District, Division 1, California. Feb. 15, 1922.)

1. Appeal and error 🔑1011(1) — To present case of conflicting evidence opposing evidence must be substantial.

To present a case of conflicting evidence, the trial judge's decision as to which is conclusive, the opposing evidence must be substantial; a mere scintilla of evidence or evidence establishing ground only for suspicion or conjecture not being sufficient.

2. Appeal and error 🔑1011(1)—Evidence held so conflicting as to render court's decision conclusive.

Evidence as to the cause of a collision between motor trucks *held* so substantially conflicting as to render the trial judge's decision conclusive.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Ocean Accident & Guarantee Corporation, Limited, against J. P. Tucker and others. Judgment for defendants, and plaintiff appeals. Affirmed.

George H. Moore and Hubert Starr, both of Los Angeles, for appellant.

H. T. Morrow, of Los Angeles, for respondents.

JAMES, J. Plaintiff herein, having insured a business firm against loss which might be sustained by reason of collisions occurring between motor trucks operated by it and other vehicles, brought this action to recover damages from the defendants. A truck belonging to the insured collided on a public highway with a truck belonging to defendant J. P. Tucker. The former's truck was damaged in an amount in excess of $1,700, which amount the insurer paid and thereby, under the terms of its policy, acquired the right to bring this action. The judgment of the court was in favor of defendants, from which judgment plaintiff appealed.

[1, 2] It is contended upon this appeal that there was ample evidence submitted by the plaintiff to show that the accident was caused through the negligence of Tucker's driver, and that there was no substantial evidence introduced in contradiction thereof. Briefly stated, the contention of appellant is that there was no conflict presented by the evidence, and hence that the court was left without judicial discretion entitling it to determine the case in the manner it did. We have carefully examined the record, which exhibits the testimony introduced by the respective parties. The rule is, without question, as appellant's counsel state, that in order to present a case of conflict the opposing evidence must be of a substantial kind; that a mere "scintilla" of evidence or evidence which establishes ground only for suspicion or conjecture, is not sufficient. But we do not think that this case was left in that situation when it was submitted to the trial judge for decision. The two trucks, that of the insured and defendant Tucker, traveling in opposite directions, collided while passing each other on a paved highway, which was 18 feet wide and, so far as the evidence shows, practically straight. The truck of the insured was a heavy one and was carrying a load at the time, while Tucker's truck, a smaller one, was empty. As the trucks were passing each other, the left front hub caps on the machines came in contact, causing the bodies of the machines to collide, with the result that both were considerably damaged. The evidence was that the extreme width of both machines was seven feet. This distance was included within the axle length and from hub cap to hub cap. A witness who was riding with the driver of the insured's truck, and who was sitting on the left-hand side thereof, being the side nearest the approaching truck, testified that the machine upon which he was riding was clearly on the right-hand side of the center of the paved highway; that the approaching truck when within 20 feet or so of the passing point swerved over to the center of the roadway; and that the collision followed. There was other testimony of measurements which were made immediately after the collision which, considering marks left upon the pavement, located the wheels of the insured's truck on the right-hand side of the center of the highway. These measurements were made from the marks which the wheels had apparently left before being diverted from their course by the collision. On behalf of the defendant Tucker there was testimony to the effect that, judging from marks made by the wheels of the latter's truck, the left wheels, immediately preceding the accident, were 6 inches away from the center line of the road. The hub projection on both machines was approximated as being 4 or 5 inches. The driver of the Tucker truck testified that he did not swerve or change his direction preceding the accident unless he might have done so to "dodge some chuck hole," and that, as the two machines approached, their left wheels were running close to the center of the road; that he judged there was room enough to pass; and that the trucks maintained that position up to the time the collision occurred. He was asked the question as to whether he could state the position of his truck with respect to the center of the roadway, and replied:

> "My right front wheel, that was the side that was next to the edge of the road, and it was not, I believe, over 8 inches from the edge of the road."

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

As the total width of the truck was 7 feet, by the addition of this 8 inches it would be made to appear that the Tucker truck was occupying 7 feet and 8 inches of the 18-foot highway and hence must have been entirely at the right of the center thereof at the time. We have suggested enough, we think, as to what the record shows with respect to the evidence, to demonstrate that the court had before it a situation of substantial conflict. It follows that the decision of the trial judge as to the facts must be here deemed conclusive. We think that in the court's rulings on the admission and rejection of testimony no substantial error was committed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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56 Cal. App. 414

ANDREWS et ux. v. SAN DIEGO ELECTRIC RY. CO. (Civ. 4145.)

(District Court of Appeal, First District, Division 1, California. Feb. 14, 1922.)

Carriers ⚷318(10) — Verdict, finding that street car started while passenger was alighting, sustained.

In an action for injuries to a street car passenger, evidence *held* to sustain a verdict finding that the passenger was thrown to the ground when the car started while she was in the act of alighting therefrom, and not, as contended by defendant, that she attempted to alight while the car was in motion.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Thomas Andrews and wife against the San Diego Electric Railway Company to recover damages for personal injuries. Judgment for the plaintiff, and defendant appeals. Affirmed.

Read G. Dilworth, of Coronado, and Titus & Macomber and V. F. Bennett, all of San Diego, for appellant.

E. B. Drake, of Los Angeles, and E. V. Winnek, of San Diego, for respondents.

KERRIGAN, J. This is an appeal from a judgment entered upon a verdict in favor of the plaintiffs in an action for damages for personal injuries suffered by plaintiff Celia E. Andrews in a so-called "step accident" alleged to have occurred through the negligent operation by the defendant of one of its street cars in the city of San Diego.

The simple questions in the case for the jury were, Did said plaintiff attempt to alight from the car while it was in motion, or was the car started while she was in the act of alighting?

There is evidence in the record supporting both an affirmative and a negative answer to each of these questions. The victim of the accident testified in part as follows:

> "Q. In other words, the car stopped you mean when it came up to Ninth street? A. Yes, sir. * * *
>
> "Q. Well, then, what did you do, if anything, towards getting off? A. Stepped down from the platform on to the top step of the car.
>
> "Q. What happened then? A. The car started and threw me to the ground. * * *
>
> "Q. Did you know that it was going to start? A. No, sir. * * *
>
> "Q. Now, did any one say anything, was anything said to you by any one at the time you were disembarking or leaving this car? A. As I was falling from the car some one said, 'Don't get off, lady.'
>
> "Q. What was the car doing at the time you were told not to get off? A. It had started. * * *
>
> "Q. Now, after that occurred, I mean after the conductor or whoever it was made the remark, 'Don't get off, lady,' or words to that effect, were you able to recover yourself and keep from falling at that time? A. No, sir."

The evidence of other witnesses called by the plaintiffs corroborated this testimony. Defendant appears to contend that the evidence shows without conflict that the car had traveled 50 feet—the length of the car—between the time it had stopped, started, and stopped again, and that the injured plaintiff, who got off at the middle of the car, and who was found lying alongside of it 25 feet from such point of exit, must of necessity have stepped off the car while it was in motion. But in this respect we think defendant is in error. There is a conflict in the evidence upon this point, some of the witnesses testifying that the car had moved forward about 25 feet only from the time plaintiff arose from her seat for the purpose of alighting until the car stopped again.

Nor is there any merit in the claim of defendant that the undisputed evidence, showing that as the plaintiff lay upon the ground her feet were pointed towards the front of the car, proves conclusively that she attempted to alight after the car had started. In fact, as counsel for the plaintiffs well says, it would tend to show the contrary; for if the car was standing and then started up while the passenger was upon the step in the act of alighting, it would jerk her feet from under her, resulting in a fall with the feet forward; while, on the other hand, if she did not attempt to leave the car until after it was in motion, the effect would be to retard the motion of her feet and allow the rest of the body to move forward, resulting in a fall head forward, i. e., in the direction of the moving car. But in any event these matters were for the consideration of the jury; and an examination of the record leaves no doubt in our minds that the verdict is supported by the evidence.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

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56 Cal. App. 428

PEOPLE v. ELLENA. (Cr. 830.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1922.)

1. Criminal law 🔑1186(4)—Defective information not misleading as to crime charged, not reversible error.

An information, defective because of typographical errors, but sufficient to apprise defendant that he was charged with the sale of wine contrary to an ordinance, stating the number and title thereof, and alleging the act to be contrary to the form, force, and effect of the statute, whereas it was in violation of an ordinance, *held* not to have misled or prejudiced defendant so that it must be upheld under Const. art. 6, § 4½.

2. Intoxicating liquors 🔑236(13)—Evidence held to show that liquor sold was intoxicating.

Evidence *held* sufficient to show liquor sold was intoxicating, aside from evidence that the wine contained alcohol when analysis was made about 80 days after its sale, objected to because wine may have been unfermented at time of sale.

3. Criminal law 🔑459—Witness tasting liquor and knowing its taste is qualified to state its character as wine.

A witness partaking of the liquor sold, and knowing the taste thereof, is qualified to testify to its character as wine.

4. Criminal law 🔑304(20)—Courts take judicial notice that wine contains varying quantities of alcohol.

The character of wine is so well known that courts will take judicial notice that it contains alcohol in varying quantities.

5. Intoxicating liquors 🔑242—Part of judgment providing that defendant be imprisoned for nonpayment of fine for longer term than he could have been sentenced for the crime is void.

Pen. Code, § 1205, provides that a judgment that defendant pay a fine may direct imprisonment until fine is satisfied, but must specify the extent of imprisonment which must not exceed one day for every $2 of fine, nor extend beyond term for which defendant might be sentenced to imprisonment for the offense, so that a judgment fixing a $600 fine for an offense where power to imprison is limited to seven months, while valid as to the fine, is void as to provision for imprisonment for 300 days if not paid.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

John Ellena was convicted of violation of a county liquor ordinance, and he appeals. Reversed as to imprisonment for nonpayment of fine, otherwise affirmed.

Jesse R. Shafer, of Los Angeles, and A. S. Maloney, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

SHAW, J. Upon an information charging him therewith, defendant was convicted of the violation of an ordinance of San Bernardino county which made it unlawful for any person within said county, outside of municipal corporations, to sell, offer for sale, deliver, or give to another intoxicating liquor of any kind or in any quantity whatsoever, subject to certain exceptions not here involved. The ordinance defined the term "intoxicating liquor," as used therein, to include any and all spirituous, vinous, and malt liquors, without regard to alcoholic content; and further provides that any person violating any of the provisions of the ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $600, or by imprisonment in the county jail of San Bernardino county for not more than seven months, or be punished by both such fine and imprisonment.

Upon trial defendant was convicted, as charged in the information, of the sale and delivery of wine, contrary to the provisions of the ordinance, and thereupon it was adjudged "that the said John Ellena be punished by payment of a fine of $600 and, in default thereof, by imprisonment in the county jail of the county of San Bernardino, one day for each $2 of said fine." From this judgment he has appealed.

[1] His first contention is that the information fails to state facts sufficient to constitute a public offense. While, due to typographical errors or otherwise, the information is defective, nevertheless it is clearly sufficient to apprise defendant of the fact that he was charged with a violation of the ordinance in that he, at a specified time and place, had sold, furnished, and delivered intoxicating liquor, to wit, wine, contrary to the ordinance, the number and title of which was stated, all of which it is alleged in the information was contrary to the form, force, and effect of *the statute* in such cases made and provided. Of course, the offense charged was not contrary to the statute, but in violation of the ordinance. In no event could the alleged defects in the information have misled defendant or have resulted in any prejudice to him. Hence, under section 4½ of article 6 of the Constitution, we must hold appellant's contention upon this point without merit.

[2-4] It is next insisted that the evidence is insufficient to support the verdict. It ap-

pears the wine was sold and delivered by the defendant on January 5, 1921, and that no analysis thereof was made until about March 26th following, at which time, as shown by the analysis, it contained from 7 to 13 per cent. alcohol. Appellant's contention is that at the time of its purchase it may have been unfermented grape juice from which there was an absence of alcoholic content. Omitting, however, all reference to the testimony as to the analysis made of the beverage, there was sufficient evidence upon which the jury were entitled to base their verdict of guilty. The purchaser thereof and another with him at the time of the purchase tasted the contents of the containers, and testified that they knew the taste of wine, and that the beverage so purchased and delivered to them was wine, the character of which, as said in People v. Mueller, 168 Cal. 526, 143 Pac. 750, is so well known that a court will take judicial notice of the fact that it contains alcohol in varying quantity, and that a witness partaking of the same and knowing the taste thereof is qualified to testify to its character as wine.

It is further insisted that the evidence fails to show the offense to have been committed in San Bernardino county and outside of a municipal corporation. There is no merit in this contention, since it appears that the wine was purchased at defendant's home near Etiwanda, in San Bernardino county, which place was not an incorporated city or town.

[5] Lastly, it is insisted that the judgment was excessive, in that it provided for a fine of $600 as provided by the ordinance, and, in default thereof, that defendant be imprisoned in the county jail one day for each $2 of said fine, the effect of which was, unless the fine be paid, to subject defendant to imprisonment for a term of 300 days, whereas under the provisions of the ordinance the power to imprison defendant was limited to not more than seven months. Section 1205 of the Penal Code provides that—

> "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. But the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

And in People v. Pera, 36 Cal. App. 292, 171 Pac. 1091, which was a similar case involving a like question, the court held that the judgment, in so far as it imposed the imprisonment, was void for the reason that the imprisonment imposed was for a term in excess of that fixed as a penalty for the offense. The limit of imprisonment under the ordinance was 210 days, notwithstanding which fact the sentence, upon default in payment of the fine, was 300 days. Hence it follows that the court, under the ordinance, had no power to render a judgment whereby defendant was sentenced, in default of payment of the fine, to serve 300 days in jail.

From what is said it follows that, in the opinion of the court, the information, though irregular in form, was sufficient to fully acquaint defendant of the charge upon which he was to be tried; that the evidence was sufficient to justify the verdict; that the judgment, in so far as it imposed the fine of $600, was regular and valid, but, in so far as it adjudges that in case of default in payment of the fine, defendant should be imprisoned for 300 days, it is void. It is therefore ordered that that part of the judgment providing that defendant, in default in the payment of the fine imposed, be imprisoned in the county jail of the county of San Bernardino one day for each $2 of said fine be reversed and annulled; otherwise the judgment is affirmed. People v. Pera, supra.

We concur: CONREY, P. J.; JAMES, J.

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56 Cal. App. 436

RENFRO v. HARE. (Civ. 3686.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1922.)

Appeal and error ⚷781(5)—Appeal in election contest dismissed as presenting merely moot question, where respondent was recalled and appellant elected as successor pending appeal.

Appeal from judgment for plaintiff in action involving election contest will be dismissed, where, pending appeal, the plaintiff was recalled and the defendant was elected as his successor, and will not be decided merely for the purpose of incidentally determining who shall pay the costs on appeal.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Consolidated actions by W. S. Renfro against C. A. Hare. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Jackson Mahon, of Bakersfield, for appellant.

Rollin Laird and Rowen Irwin, both of Bakersfield, for respondent.

CONREY, P. J. This is an appeal by the defendant from a judgment rendered in two consolidated cases involving a contested election for the office of councilman of the Fourth ward of the city of Bakersfield. Since the cause was submitted for decision, it has been suggested by counsel for respondent that, since the judgment was entered, a recall election has been held in which respondent was recalled and appellant was elected as his suc-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

cessor; that therefore the appeal now presents only a moot question. While conceding the facts so stated, counsel for appellant declines to consent to a dismissal of the appeal.

As the appeal is no longer a contest involving the determination of adversary rights, it must be dismissed unless, as suggested, we are required to retain and decide the questions presented solely for the purpose of incidentally determining who shall pay the costs on appeal. It is settled to the contrary in this state. Nelson v. Nelson, 153 Cal. 204, 94 Pac. 880.

The appeal is dismissed.

We concur: SHAW, J.; JAMES, J.

56 Cal. App. 484

PEOPLE v. KING. (Cr. 1017.)

(District Court of Appeal, First District, Division 2, California. Feb. 16, 1922.)

1. Criminal law 🔑1032(5)—Defect in indictment for rape held not to require reversal in absence of demurrer.

Omission of the word "did" from an indictment for rape, "then and there willfully, unlawfully and feloniously have and accomplish an act of sexual intercourse, etc.," did not require a reversal of a conviction, where no demurrer was interposed and the first objection to its sufficiency was made upon appeal, as the error could not have misled the accused.

2. Criminal law 🔑1186(3)—Error in indictment which does not prevent full information as to charge not reversible error.

Any error in an indictment which does not prevent a defendant of common understanding from being fully informed as to the charge against him, and enabled to prepare for his defense, and is not prejudicial to his substantial rights, is not cause for reversal in view of Pen. Code, §§ 960, 1258, and 1404, relating to disregard of technical errors.

3. Criminal law 🔑564(1)—Evidence held sufficient to prove venue in rape case.

In prosecution for rape, evidence *held* sufficient to prove the venue laid in the information.

4. Rape 🔑54(1)—Story of prosecutrix held not so improbable as to require corroboration.

In prosecution for rape upon stepdaughter, story of prosecutrix *held* not so improbable as to require corroboration.

5. Rape 🔑54(1)—Testimony of prosecutrix need not be corroborated.

Testimony of prosecutrix in rape case need not be corroborated unless improbable.

6. Criminal law 🔑1169(5)—Striking out evidence and instructing jury held to remove any prejudice from admission of evidence.

Any error of the court, in a prosecution for rape, in admitting testimony as to other similar acts of accused with the prosecutrix, was cured by striking such testimony from the record upon motion by accused and instructing the jury not to consider it.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Hayden King was convicted of rape, and appeals. Affirmed.

Alfred J. Hennessy and Marion J. Mazuran, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal from a judgment of conviction of the crime of rape and from the order of the trial court denying a new trial. The offense was committed against the stepdaughter of defendant, a girl of the age of 15 years.

Defendant's first contention is that the information is insufficient. The allegation of which complaint is made is as follows:

"The said Hayden King on or about the 1st day of May, A. D. nineteen hundred and twenty-one, at the said city and county of San Francisco, State of California, then and there willfully, unlawfully and feloniously have and accomplish an act of sexual intercourse with and upon one. * * *"

The omission of the word "did" before the words "have and accomplish" is asserted to be fatal to the information. At the trial, the defendant waived the reading of the information, a copy of same was given him, and thereupon he entered a plea of "not guilty." No demurrer, either general or special, was interposed, nor was there any motion in arrest of judgment, and the first objection to the sufficiency of the information is made upon appeal. The jury was carefully instructed as to the statutory definition of rape and the law governing the commission of the same, and, in the light of such instructions, brought in a verdict finding the defendant "guilty of the crime of felony, to wit, rape, as charged in the information."

[1, 2] Under all these facts, we think the omission of this word from the information does not warrant a reversal of the judgment. In the first place, the error was clearly a clerical one and could not have misled the defendant in any way. An error which does not prevent a defendant of common understanding from being fully informed as to the charge against him and enabled to prepare for his defense is clearly not prejudicial. Bishop's New Crim. Proc. §§ 356, 357. Furthermore, it is apparent that the information would have been beyond criticism had the verbs "have" and "accomplish" been used in the past tense. In other words, had the information read: "The said Hayden King had and accomplished an act of sexual in-

tercourse. * * *" We are confronted, then, with a mere grammatical error, the use of the present tense of a verb instead of the past tense. Such an error will not vitiate the information in a case like the present where the meaning is apparent and where the defendant could not have been and was not misled. Bishop's New Crim. Proc. § 354.

The authorities cited by appellant from other jurisdictions are not even of persuasive force upon this question in California, for the reason that this precise objection has been considered and passed upon adversely to appellant's contention by our Supreme Court in the case of People v. Haagen, 139 Cal. 115, 72 Pac. 836. In that case, as in the present case, the information omitted the word "did" and charged that the defendant "willfully and unlawfully *have* in his possession and *sell* a certain quantity of fresh salmon, contrary. * * *" It was there held that in the light of the provisions of sections 960, 1258, and 1404 of the Penal Code, the contention of the appellant with reference to this matter was without merit because he had not been prejudiced in respect to a substantial right. The same reasoning applies in the present case and the objection urged by the appellant is without merit.

[3] The second objection made by the appellant is that the evidence is insufficient to prove the venue laid in the information. This objection is without merit in view of the following: All the testimony is to the effect that the assault took place at "1250 O'Farrell street," but appellant contends that there is no testimony in the record that this street is in the city and county of San Francisco. We find that the prosecutrix testified:

> "Q. And when did you come to San Francisco? A. I went to Stockton on about the 22d of February, and they (her mother and sisters) moved to San Francisco on the 28th. Q. And you came down about that same time, did you? A. Yes. Q. And at that time you had moved to 1250 O'Farrell street? A. Yes. Q. And lived there, then, through March and April? A. Yes."

The sister-in-law of the defendant testified that the defendant and his wife moved to 1250 O'Farrell street on February 27th; that they moved "here" on said date; that for several days previous defendant had been searching for an apartment in San Francisco. Mrs. Kate O'Connor testified that she was a policewoman of this city and county; that on May 1, 1920, she received "a call or instruction to go to 1250 O'Farrell street, in this city" and out of the call developed the prosecution in this case.

It is quite apparent from the foregoing, as well as from numerous other matters appearing in the record, that 1250 O'Farrell street, the place where the offense was committed, is in the city and county of San Francisco.

[4] The further points urged, that the girl's story is improbable and that it required corroboration, are without merit. The girl told a convincing story. Her mother was married to the defendant and had left the city on the night of the assault, stating that she was going to Los Angeles. Her young daughter and defendant had accompanied her to the railroad station. After the mother's departure, the defendant took the girl to a theater and later to a restaurant, and the two returned to their apartment about midnight. There was no other person in the apartment. At the trial, the child told in detail of the assault and of how she had cried and pleaded with the defendant to leave her alone. These outcries were heard by a woman in the apartment below, who had no interest in the matter at all and who did not know the defendant. This woman, totally disinterested, and whose testimony stands uncontradicted, testified that she had heard the arrival home about midnight and, shortly afterwards, the sobbing and pleading in a girl's voice, to which the defendant had answered that if she would lie still he would not hurt her. She reported this matter, on the following morning, to the manager of the apartment, who investigated and notified the police. This woman and the woman who was managing the apartment had absolutely no interest in the matter, and their testimony is of much persuasive force. It is true that the prosecutrix, upon first being questioned by the manager of the apartment and by the policewoman, stated that her crying and pleading was because the defendant had been trying to force her to take some medicine, and at that time denied that defendant had committed the offense of which he was convicted. Later, however, she told the whole story at the detention home, and also stated that the defendant had coached her to tell the first story which she had told; that she had consented to do so and to shield him because he had told her that she would be sent to a reform school if the facts become known. We see nothing improbable in the record. There is not the slightest evidence of malice, nor of any motive on the part of the prosecutrix to testify falsely; on the contrary, she was desirous of shielding the defendant, and the facts were developed through the report of the woman who had heard the sobbing and crying of the child on the night of the assault.

[5] It was not necessary for the story of the prosecutrix to be corroborated. People v. Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

The testimony regarding the consummation of the act itself is ample, and the point made by appellant in reference to this matter is without merit. The girl testified fully as to the details of the accomplishment of the act charged against the defendant, and she also stated, in response to a question by the court, that she understood the meaning of the term "sexual intercourse," and that the defendant had accomplished it with her. It is true, as contended by appellant, that the medical testimony in the record is uncertain and unsatisfactory, as it necessarily must be in cases of this nature not involving actual violence. Standing alone, it might leave a doubt as to the accomplishment of the act at the time charged; but, in our opinion, the record is sufficient upon this question, quite independently of the medical testimony.

[6] The trial court admitted testimony relating to other similar acts of the defendant with the prosecutrix. The respondent contends that such testimony was admissible as showing an adulterous disposition, under authorities which are cited to us; the appellant, on the other hand, contends that the testimony was improperly admitted, being evidence of other crimes. It is unnecessary to discuss this evidence in detail, or to pass upon its admissibility under the facts of this case, because the court upon motion of counsel for the defendant, struck from the record all such testimony and very carefully and fully instructed the jury that it was not to consider such testimony and that none of these matters were a part of the record against the defendant. We must assume that the jury obeyed these instructions.

There are no other matters requiring discussion. We find no error in the record which would warrant a reversal of this judgment, and the same is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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56 Cal. App. 445

PEOPLE v. DINGLE. (Cr. 843.)

(District Court of Appeal, Second District, Division 2, California. Feb. 14, 1922.)

1. Municipal corporations 🔑707 — Evidence held to sustain conviction for driving automobile while under the influence of intoxicating liquor.

In a prosecution for driving an automobile while under the influence of intoxicating liquor in violation of St. 1919, p. 214, § 17, evidence *held* to justify conviction in that it was sufficient to show that defendant was so far under the influence of intoxicants that to an appreciable degree he had lost the ability to drive the car in the manner that an ordinarily prudent and cautious person in the full possession of his faculties, and using due care, would have driven it under like conditions.

2. Municipal corporations 🔑707—Statute denouncing driving of automobile while "under the influence of intoxicating liquor" construed.

Where intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair to an appreciable degree his ability to operate an automobile in a manner that an ordinarily prudent and cautious man in the full possession of his faculties using reasonable care would drive a similar vehicle under like conditions, the driver is "under the influence of intoxicating liquor," within St. 1919, p. 214, § 17, denouncing the driving of an automobile while "under the influence of intoxicating liquor."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Under the Influence of Liquor.]

3. Criminal law 🔑730(3)—Efforts of prosecuting attorney to introduce inadmissible evidence held not ground for reversal.

In prosecution for driving automobile while intoxicated, in which the proprietor of a resort testified that defendant while therein shortly before his arrest drank nothing but near-beer and walked and talked properly, the action of the prosecutor in exhibiting to witness during cross-examination a bottle with label stating alcoholic contents thereof to be 25 per cent. *held* not misconduct constituting ground for reversal, though prosecuting attorney failed to connect up the evidence with defendant, where the evidence was stricken and the jury charged to disregard it; it being apparent that the evidence had been offered in good faith in view of efforts of the prosecutor to introduce testimony as to a similar bottle having been found in defendant's car.

4. Criminal law 🔑1186(4)—Judgment not reversed for effort of prosecutor in good faith to introduce certain evidence in absence of miscarriage of justice.

A conviction cannot be reversed for a mistaken view as to the admissibility of evidence which the prosecutor is honestly seeking to lay before the jury, unless from an examination of the record the appellate court is of the opinion that a miscarriage of justice has been caused.

5. Criminal law 🔑1172(7)—Instruction too favorable to defendant not ground for reversal.

In prosecution for driving automobile while under the influence of intoxicating liquor, instruction that defendant must have been "in such condition from the use of intoxicating liquors that it so affected his acts or conduct or movements that the public or persons coming in contact with him could readily see and know that it was affecting him in this respect," *held* not ground for reversal, being too favorable to defendant, in that defendant might have been under the influence of liquor without such condition being readily perceptible to persons with whom he came in contact.

6. Municipal corporations 🔑707—Refusal to charge jury to acquit defendant unless satisfied that he was intoxicated while driving along specified portion of street held proper.

In prosecution for driving an automobile upon the public highway while intoxicated, refusal to instruct jury to acquit defendant unless satisfied beyond a reasonable doubt that he was under the influence of liquor at the time he drove the automobile from a specified place to a place where he was arrested *held* proper, since he could be convicted of driving the automobile under the influence of liquor upon any other portion of the public highway.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

A. C. Dingle was convicted of driving an automobile while under the influence of intoxicating liquor, and he appeals. Affirmed.

A. E. Koepsel, of Santa Ana, for appellant.
U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant was charged with a violation of that provision of section 17 of the Motor Vehicle Act whereby it is declared that—

> "No person who is under the influence of intoxicating liquor * * * shall operate or drive a motor * * * vehicle on any public highway within this state." Stats. 1919, p. 214.

He was tried before a jury, was found guilty as charged, and was sentenced to imprisonment in the county jail for the term of six months. On this appeal from the judgment he contends that the evidence is insufficient to justify the conviction, in that it fails to show that he was intoxicated; that, in cross-examining one of defendant's witnesses relative to a certain bottle and its contents, the district attorney was guilty of misconduct; and that the court erred (a) in permitting the district attorney to pursue such line of cross-examination, (b) in giving a certain instruction, and (c) in refusing to give an instruction in the form requested by defendant.

[1] The evidence was clearly sufficient to justify the verdict. It is conceded that at the time laid in the information defendant was operating and driving an automobile on a public highway in the city of Anaheim. The whole case revolved around the question as to whether defendant was "under the influence of intoxicating liquor," within the meaning of that phrase as used in the Motor Vehicle Act. Witnesses for the prosecution testified that defendant's automobile, while being driven by him "zigzagged" down the street from one side to the other; that he drove his car so that it crossed directly in front of that of another automobilist who was traveling in the same direction, forcing the latter to the curb and compelling him to stop; that when defendant was taken from his machine by the arresting officer he staggered and walked very unsteadily; that at times his talk was thick; that he said to the officer who arrested him, "I guess I am too full to drive it"; that he talked as loud as he could, and applied profane and opprobrious epithets to a witness who was keeper of an auto park simply because the latter would not guarantee that defendant's car would not be stolen if he parked it on the witness' premises. The last-mentioned witness likewise testified that defendant's breath smelt "like sour wine—beer smell."

We entertain no doubt as to the sufficiency of this evidence to show that defendant was "under the influence of intoxicating liquor," within the meaning of the statute. The act contains no definition of those words. It doubtless is true that not any and every "influence" produced by intoxicants will subject one to the penalties prescribed by the statute for this offense. As was said by the Wisconsin Supreme Court in Bakalars v. Continental Casualty Co., 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123: "The 'influence of intoxicants' is a very elastic term." There the court was considering the meaning of the phrase "under the influence of any intoxicant," as used in an accident insurance policy. Upon the question of the discernible effects of intoxicating liquor, the Wisconsin court further said:

> "We are told by physicians and experimenters that the most trifling quantity of alcohol has some effect, and that its effect persists for days, if not permanently, so that one is literally under the influence from a single ordinary portion. We know as a matter of common knowledge that one of the first influences may be to stimulate those very faculties of observation and alertness which would improve the capacity of the subject to shield himself from danger, or escape, and that some such degree of influence of an intoxicant would not in any respect increase the peril of injury."

If, as stated by the learned author of the opinion in this Wisconsin case, the most trifling quantity of alcohol produces an influence that will persist for days, if not permanently, it is a natural and almost necessary assumption that the words "under the influence of intoxicating liquor" were not inserted in the Motor Vehicle Act for the purpose of fastening guilt in the case of every and any "influence" due to the use of intoxicating liquors, however slight. The field, therefore, is open for construction to ascertain just what degree or kind of "influence" is within the purview of the statute.

[2] We shall not assume to give any complete or all-inclusive definition of these words of the statute. We shall not undertake to express with precision the exact constituent ingredients of the word "influence," as employed in this act. However, with respect to the meaning of the phrase "under the influence of intoxicating liquor," as used in this statute, we think we are well within the bounds of accuracy in saying that if intoxicating liquor has so far affected the nervous system, brain or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate

or drive a similar vehicle under like conditions, then such driver is "under the influence of intoxicating liquor" within the meaning of the statute.

If defendant's condition and conduct be tested by the foregoing definition, it must be held that the evidence against him was sufficient to justify a finding that he operated and drove his automobile while "under the influence of intoxicating liquor." His staggering walk, his thick tongue, his loud and boisterous language, his admission that he was too "full" to drive his car, and, as one witness testified, the smell of sour wine or beer upon his breath, were sufficient to show that he had indulged in an alcoholic beverage of some kind. And the fact that his automobile "zigzagged" down the street and crowded another automobilist to the curb shows that he was so far under the influence of the intoxicant that, to an appreciable degree, he had lost the ability to drive his car in the manner that an ordinarily prudent and cautious person, in the full possession of his faculties and using due care, would have driven it under like conditions.

Defendant put upon the witness stand one Max Selscheider, the proprietor of a resort known as the Liberty Grill, who testified that he talked with defendant while the latter was in the witness' establishment; that this was shortly before defendant's arrest; and that while defendant was in the witness' resort he drank nothing but near-beer, and walked and talked all right. Defendant was arrested almost immediately after driving his car from in front of the Liberty Grill. On his cross-examination of Selscheider, the district attorney exhibited to him a bottle on which was a label stating that the alcoholic content of the bottle was 25 per cent. The witness testified that the bottle was similar to other bottles kept on hand in his resort and sold by him to customers, and that a bottle of that description contains a "tonic," the alcoholic content of which is, as stated on the label, 25 per cent. The witness denied, however, that he had sold any such bottle of "tonic" to defendant on the evening in question, or that he had seen any employé sell such a bottle to defendant. All of this evidence went in over the vigorous objection of defendant's counsel. It was admitted upon the district attorney's assurance that he would "connect it up with the case later on." Later, on rebuttal, the prosecution sought to show by the arresting officer that the latter had found a bottle in defendant's car. We infer from the record that it was the district attorney's intention to prove by the officer that he had found in defendant's car a bottle similar to the one which the prosecutor had exhibited to the witness Selscheider on his cross-examination of that witness. To the district attorney's question asking the arresting officer if he had found any bottles in defendant's car, the defendant objected and the objection was sustained. Thereupon, after an unsuccessful attempt by the prosecuting officer to file the bottle as an exhibit in the case, defendant's counsel moved that all the testimony of the witnesses in reference to any bottle be stricken out and the jury instructed to disregard such testimony and likewise to disregard the bottle which had been exhibited to the witness Selscheider. The court granted the motion to strike, and admonished the jury as follows:

> "I instruct you, all of the evidence pertaining to the bottle which was testified to by the witnesses as containing liquor of 25 per cent. alcohol is not for your consideration. All the balance of the evidence in the case is for your consideration."

[3, 4] It is claimed that in offering the bottle in evidence and in cross-examining defendant's witness with respect thereto, the prosecutor was guilty of misconduct. It is not at all apparent that the prosecuting officer acted in bad faith, or that he asked the questions or exhibited the bottle to the witness for the wanton purpose of raising a prejudice against the defendant. Indeed, from the questions asked of the arresting officer on rebuttal it would seem that the district attorney had some reason to believe that a bottle such as that shown to the witness Selscheider had been found in defendant's car. If such were the case, and if it also appeared that the contents of the bottle in defendant's car, if any bottle was found there, had been wholly or partially consumed, there would be ground for the inference that some one in Selscheider's resort had sold the bottle to defendant and that the latter had drank therefrom, thus not only tending to discredit Selscheider's testimony that defendant had drank nothing but near-beer while in the resort, but also tending to show that the defendant had, indeed, drank some alcoholic liquor on the evening in question, prior to his arrest. So that it is not clearly apparent that the district attorney's position as to the admissibility of the evidence was wrong in law. But conceding that it was, a judgment of conviction cannot be reversed for a mistaken view as to the admissibility of evidence which the prosecutor is honestly seeking to lay before the jury, unless, from an examination of the record, we may be of the opinion that a miscarriage of justice has been caused. In view of the order granting defendant's motion to strike out all of the testimony relative to the bottle and the court's admonition to the jury to disregard all that evidence—an admonition which it will be presumed was heeded—it cannot be said that the defendant's cause suffered by reason of the questions propounded by the prosecutor and the exhibition of the bottle to the witness Sel-

scheider. So, also, any error which may have been committed by the court in overruling defendant's objections to the questions which were put to the witness on his cross-examination by the district attorney was cured by the order granting defendant's motion to strike, coupled with the court's admonition to the jury. People v. Terramorse, 30 Cal. App. 267, 157 Pac. 1134.

Complaint is made of the following instruction:

> "The information in this case is filed by the district attorney under section 17 of the Motor Vehicle Law of 1919, which reads in part as follows: 'No person who is under the influence of intoxicating liquor * * * shall operate or drive a motor * * * vehicle on any public highway within this state.' The court instructs you that under this section it is not necessary that the person should be so-called 'dead-drunk' or hopelessly intoxicated, but if you shall be convinced, beyond a reasonable doubt, from the evidence in the case, that the defendant was in such condition from the use of intoxicating liquors that it so affected his acts or conduct, or movements, that the public or persons coming in contact with him could readily see and know that it was affecting him in this respect, and was reflected in his walk, acts, and conversation, and, if you shall find from the evidence in the case, beyond a reasonable doubt, that these conditions resulted from the use of intoxicating liquors and that the defendant was operating a motor vehicle upon a public highway in the county of Orange, when in such condition, then the defendant was under the influence of intoxicating liquor within the meaning of the statute and you should find him guilty as charged."

Appellant's criticism of this instruction is based upon the claim that it does not properly define "intoxication." The statute does not say that no person shall operate or drive a motor vehicle on the public highway while "intoxicated," but that no person shall operate or drive such a vehicle on the public highway while "under the influence of intoxicating liquor." The instruction, therefore, very properly does not undertake to define "intoxication," but does state what acts and what condition will justify a finding that the accused is "under the influence of intoxicating liquor," within the meaning of the statute. It is probably true, however, that the phrase "under the influence of intoxicating liquor" is, substantially and to all practical intents and purposes, synonymous with such words as "intoxication" and "drunkenness." But even so, the instruction gives a good definition of "intoxication." In St. Louis, etc., Ry. Co. v. Waters, 105 Ark. 619, 152 S. W. 137, the Arkansas Supreme Court defined "intoxication," or "drunkenness," substantially in accord with the definition given in this instruction. In that case the court said:

> "A man may be said to be drunk whenever he is under the influence of intoxicating liquors to the extent that they affect his acts or conduct, so that persons coming in contact with him could readily see and know that the intoxicating liquors were affecting him in that respect."

[5] Moreover, the instruction was, if anything, too favorable to defendant. A person may be so far under the influence of intoxicating liquor that, to an appreciable degree, there is an impairment of his ability to operate his automobile in the manner that an ordinarily prudent and cautious person, in the full possession of his faculties, would operate a similar vehicle under like conditions; and yet the person whose ability to operate his car is thus impaired might not be so drunk that the public, or persons coming in contact with him, could "readily" see and know that intoxicating liquor was affecting his acts or conduct and was being reflected in his walk and conversation. The drink may have impaired his ability to drive his car properly by imparting to him a dash of dangerous recklessness, without in any wise manifesting itself in his speech, or in his walk, or be noticeable in his intellectual processes. We find no prejudicial error in this instruction.

[6] Finally, it is contended that the court erred in giving in a modified form an instruction requested by defendant. The instruction as requested reads:

> "I instruct you that before you can find the defendant guilty of the crime charged in the information, the prosecution must establish beyond a reasonable doubt that the defendant operated a motor vehicle, to wit, an automobile upon North Los Angeles street in the city of Anaheim, Cal., and that he was under the influence of intoxicating liquor at the time that he operated said automobile; *and if there is a reasonable doubt in your mind as to whether or not he was under the influence of intoxicating liquor at the time he operated the automobile from in front of the grill to the place where he was arrested, you should give him the benefit of that doubt and acquit him.*"

The portion of the proposed instruction which we have italicised was stricken out by the court. Appellant has not made his position very clear. If we correctly understand him, his point is this: Because, forsooth, the arresting officer saw the defendant drive his car only from the spot where it had been left in front of the Liberty Grill to the place where the arrest was made, which is but a very short distance, defendant should not be convicted unless it were proven, beyond a reasonable doubt, that he was under the influence of liquor while driving his car along that short stretch of North Los Angeles street. The information charges defendant with having driven his automobile "upon a public highway in the county of Orange, to wit, North Los Angeles street, in the city of Anaheim," while under the influence of intoxicating liquor. The witness who testified that his car was crowded to the curb by defendant's automobile testified that on the evening in question the defendant, when the witness saw him, was driving northerly on North Los Angeles street. Clearly, the part of the instruction that was stricken out by the court was an unwarranted attempt to place an undue limitation upon the right of the prosecution to demand a conviction as charged in the information.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

56 Cal. App. 440

PEOPLE v. RUBALCADO. (Cr. 835.)

(District Court of Appeal, Second District, Division 2, California. Feb. 14, 1922.)

1. Witnesses 🔑379(9), 397—Testimony on preliminary examination admissible to impeach veracity, but not to prove offense charged.

In a prosecution for statutory rape, where prosecutrix testified that defendant had not been intimate with her, her contrary testimony at the preliminary examination was admissible to impeach her veracity, but not to prove the offense charged.

2. Criminal law 🔑783(1), 824(8)—Instruction limiting effect of testimony must be requested, but if given without request must not be confusing or misleading.

A party who desires to restrict evidence to the purpose for which it is admissible must request an appropriate instruction; but, if the court without such request gives an instruction respecting the admissibility of such evidence, such instruction must not be confusing or misleading.

3. Criminal law 🔑863(2), 922(6)—Instruction after submission of case held misleading and ground for new trial, though correct as abstract proposition.

Where the court, in a rape prosecution instructed the jury to convict if they believed from all the evidence beyond a reasonable doubt that the crime had been committed, an instruction, when the jury requested further information as to whether they might consider testimony taken at the preliminary examination, some of which was admissible only to impeach prosecutrix, that they might consider all the testimony introduced on the trial, including that at the preliminary examination, was confusing and misleading, and, even if correct as an abstract proposition, entitled defendant to a new trial.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Leopoldo Rubalcado was convicted of statutory rape, and he appeals. Reversed.

Walter E. Barry, of Ventura, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was charged with the crime of rape upon the person of a female child under the age of 16 years. He was found guilty and sentenced to state's prison. He appeals from the judgment of conviction.

Besides contending that the evidence is insufficient to support the verdict, appellant assigns as error the giving of an instruction which, it is claimed, was misleading, in that the jurors may have concluded therefrom that they could consider, as direct evidence of defendant's guilt, certain testimony that was given by the girl upon defendant's preliminary examination, and which, if admissible, could be received solely for the purpose of impeachment. As we are of the opinion that appellant's criticism of the instruction is well taken, it will not be necessary to consider whether there was sufficient evidence to justify the verdict of guilty. It will, however, be necessary to give a brief statement of the facts in order to show the prejudicial effect of the instruction.

Defendant was a boarder in the home of the parents of his alleged victim, an 11 year old school girl. On June 10, 1921, a friend drove the pair to the house of a neighbor, one Francisco Villegas, who lived on a nearby ranch. They stayed there three days. The neighbor's house has but two rooms, only one of which is a bedroom. During their stay at Villegas' home, defendant and the girl slept on the same bed; but, according to the uncontradicted testimony of the witnesses for both the prosecution and the defense, the two used separate coverings and slept fully dressed. Francisco Villegas slept on the floor in the same room.

On the trial of the case in the superior court the girl was called as a witness for the prosecution. In response to questions propounded to her by the district attorney she testified that she had not had sexual intercourse with the defendant at any time during their three-day stay at Villegas' house. She strenuously insisted that defendant's conduct had been entirely proper. Thereupon she was asked by the district attorney, by whom she had been called as a witness, if, at the preliminary examination before the committing magistrate, she had not testified that she did in fact have intercourse with the defendant during their stay at Villegas' home. She admitted that she had so testified, but emphatically declared that her testimony before the committing magistrate, so far as it related to her alleged sexual intercourse with defendant, was not true.

A physician who examined the girl about a month after the alleged offense testified that his examination disclosed that the hymen had not been ruptured, although in the majority of cases that membrane, the witness said, is punctured by sexual intercourse. The doctor added, however, that he found the girl's external genital organs rather well developed for a girl of her age; that her hymen is of the soft type—a type that does not tear easily; that he found the vagina lax and the vaginal inlet dilated so as readily to admit his two fingers; and, further, that he was of the opinion that something had been introduced into the vagina to dilate it.

[1] It has been necessary to set forth somewhat at length the testimony given by the witnesses for the prosecution in order to show the importance to defendant of the instruction of which complaint is made—an instruction which advised the jurors that they might consider the testimony given by the little girl at defendant's preliminary examination, without telling them that it should be considered only for the purpose of impeachment. As we have shown, in giving her testimony at the trial of defendant before the jury in the superior court, the girl positively denied that defendant had been intimate with her. The contrary testimony previously given by her before the committing magistrate, and which was brought out by the prosecution during defendant's trial in the superior court, could be considered by the jury as impeaching the girl's veracity and as discrediting her denials. But the testimony previously given by her at defendant's preliminary examination was not admissible against defendant on his trial in the superior court as evidence that he and the girl in fact did have intercourse. There was therefore no direct evidence of the alleged crime, but only certain circumstances from which, possibly, defendant's guilt may be inferred. But these circumstances, of themselves, were by no means conclusive evidence of guilt, nor were they of an assuredly convincing character. If, therefore, the instruction complained of be considered in the light of the evidence as we have outlined it, its prejudicial effect will at once be apparent.

Coming now to the language of the instruction: Shortly after the jurors had retired to deliberate upon their verdict they returned, and upon being asked by the court if they had arrived at a verdict, their foreman replied:

> "Your honor, we have not. We came back to get a little information; we are not clear, that is, clear whether we are entitled to consider the testimony taken at the preliminary examination."

Thereupon the court instructed the jury as follows:

> "You are permitted to consider any testimony that was introduced before you on the trial of this case, and it was shown before—testimony was introduced before you as to the testimony at the preliminary examination, that is certain phases of it, and you are entitled to consider all the testimony that was introduced here including the testimony at the preliminary examination, if that testimony was also introduced here."

[2, 3] At no time prior to the submission of the case did the defendant request the court to charge the jury that the testimony given by the girl at defendant's preliminary examination could be considered for the purpose of impeachment only. Therefore, if the court had not, sua sponte, specifically advised the jurors that they might consider the testimony which she had given before the committing magistrate, appellant would not now be in a position to complain of a failure to give an instruction with respect to the purpose for which the evidence might be considered. The rule is that where a party desires to restrict evidence to the purpose for which it is admissible, he must request the court to give the appropriate instruction. Nevertheless, if, in the absence of any such request, the court undertakes to give an instruction respecting the jury's right to consider certain evidence, the instruction as given must not be confusing or misleading. That, in this case, the jurors were likely to make an erroneous application of the instruction is, we think, quite obvious. In giving its charge to the jury previous to the submission of the case, the court, in effect, had instructed them that they might consider all of the testimony that was given by the girl. For example, the court gave this instruction:

> "It is sufficient if you believe from her evidence and all the other testimony and circumstances in proof in the case, beyond a reasonable doubt that the crime charged has been committed."

It was not necessary, therefore, again to instruct the jury that they might consider all the evidence which had been adduced at the trial. In view of this situation, the only legitimate inference that can reasonably be drawn from all the attendant circumstances is that when the jurors, through their foreman, asked whether they were entitled to "consider" the testimony given by the girl at the preliminary examination, they had in mind a consideration of that testimony for *all* purposes. That is, they were inquiring whether they might consider, as direct evidence of defendant's guilt, and not merely as impeaching evidence, those portions of the girl's testimony at the preliminary examination which were brought out by the district attorney in the course of his examination of her as a witness in the superior court. This being the manifest situation, the jurors must have understood from the instruction that they were permitted to consider this testimony for any and every purpose—to consider it, not solely for the purpose of discrediting the testimony given by the girl on the trial of defendant in the superior court, but also for the purpose of proving that she and defendant did in fact have sexual intercourse at Villegas' house, notwithstanding her denials thereof. The instruction was therefore confusing and misleading, and the defendant, for that reason, is entitled to a new trial. "The test of an instruction is not whether the instruction was erroneous, but whether it was misleading." Hayne on New Trial and Appeal, § 122. See, also, People v. Maughs, 149 Cal. 253, 86 Pac. 187. "If instructions, correct as abstract propositions, may have misled the jury, a new trial may be granted." Briggs v. Hall, 20 Cal. App. 372, 129 Pac. 288.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

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56 Cal. App. 416

PEOPLE v. CONDLEY. (Cr. 842.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1922.)

1. Criminal law ⟹1144(14)—Instruction that jury's judgment should not be directed by sympathy or revenge held proper.

The court's statement "Arguments have been made tending to arouse your sympathy" will be assumed true on appeal, so that it was not error to advise the jury that its judgment should not be directed by sympathy "nor by revenge."

2. Homicide ⟹250—Evidence held to justify conviction of manslaughter.

In a prosecution for murder, *held* that there was abundant proof justifying a conviction of manslaughter.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

T. T. Condley was convicted of manslaughter, and he appeals. Affirmed.

Gallaher & Simpson, of Fresno, and Farnsworth, McClure & Burke, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged with the crime of murder. The jury returned a verdict finding him guilty of manslaughter. He appeals from the judgment of imprisonment and from an order made denying his motion for a new trial.

The information of the district attorney charged that defendant, on or about the 6th day of March, 1921, in the county of Tulare, with malice aforethought, killed Joseph Silva.

A brief summary of the evidence, gathered from the quite voluminous record presented, is all that will be necessary to be made in order to properly present the contentions of appellant. The deceased's wife was the mother of the wife of appellant. Silva was her second husband, she having been divorced from the father of Mrs. Condley. The Condleys had been married about 12 years and had four children, the eldest of whom was, at the time of the trial, of the age of 10 years. Appellant had not lived happily with his wife during the year or so preceding the tragedy, and blamed his mother-in-law, Mrs. Silva, for, as he insisted, having tried to influence his wife against him. The Silvas and appellant lived near the town of Lindsay on ranches located in close proximity to each other. On the 5th day of March, 1921, appellant's wife took the four children and went with her mother and Silva to the city of Hanford, where there resided Mrs. Jones, who was a sister of Mrs. Condley and daughter of Mrs. Silva. Appellant remonstrated with his wife about going away that day and also, as he testified, expressed his objection to his mother-in-law. Nevertheless, Mrs. Condley refused to remain in appellant's house and departed with her mother and Silva. On the way to Hanford they stopped at a lawyer's office, where some consultation was had regarding the marital difficulties of appellant and his wife. After leaving Mrs. Condley and the children at the house of Mrs. Jones at Hanford, the Silvas, in the afternoon of the same day, returned to their home.

On the same afternoon appellant drove to Hanford, and discovered the whereabouts of his wife and children. He went to the Jones house. Mrs. Jones refused to admit him, telling him he could talk to his wife through the screen door, which he did. Mrs. Jones testified that in the conversation which ensued between appellant and his wife the latter refused to return to her home, and announced that she would not live with appellant again; that she was going to get a divorce. Upon the arrival of the husband of Mrs. Jones, appellant was admitted into the house, where he sat and talked for a time. He stated in his testimony that his wife advised him that she was going to stay there with Mrs. Jones for two or three days; that he had told her that he was going to see a police officer and find out whether he could not take the children home, but that he finally left and went to the home of Mrs. Dodds, an aunt of his wife's who resided near the town of Hanford. Mrs. Dodds was the sister of Mrs. Condley's father, and her father was at that time living with her at her house. Besides Mrs. Dodds, her husband and brother, there were three young daughters in the Dodds household. Appellant presented to the members of the Dodds family a perturbed appearance, and talked a great deal about his domestic difficulties. At least four members of the family testified that he said, referring to Mr. and Mrs. Silva, that if they bothered him he was going to get them both. He was advised, according to the testimony, by Mrs. Dodds' brother, that he shouldn't feel that way, that it would "only get him in bad," to which he replied, "I don't only feel that way, but I will do it." In a further talk with the Dodds family, when he was advised that if he could not get along with his wife he had better stay away from her, appellant asserted that he might go East. Upon leaving the house the following morning he said, in response to an invitation to come back before he went away, that he might come back or he might not come back at all.

By his own admission appellant knew that the Silvas had started for their home on the afternoon of the 5th of March; he knew that they were not at the Jones house during the time that he was there, and his wife had declared to him that she intended to stay at the Jones' for two or three days. The evidence discloses, however, that after leaving the Dodds house on March 6th he returned to his ranch. He testified that upon arriving there he did some chores, such as feeding the chickens. The Silvas were engaged in operating a small slaughterhouse which was located not far from their home. They were at work there on the 6th of March, having secured a pig from a neighboring place, which it was evident they intended to kill. The slaughterhouse was not a large building, but on the outside of it was kept a cauldron, used for the purpose of heating water. Defendant testified that, after performing the small duties about his place, as indicated, he went over to the house of a Japanese neighbor to borrow some cartridges to use in a shotgun for the purpose of killing a small female dog, which, he said, was running about. He testified that he procured two cartridges from the "Jap," returned and secured his gun; that he had one brass cartridge loaded besides these two that he borrowed; that he put the gun in the back of his automobile truck and drove around, looking for the dogs, which had by that time gone away. He testified that he drove over to the Silva house, and found no one there, and that he then drove to the slaughterhouse where Mr. and Mrs. Silva were. He testified that his purpose in going there was to ascertain whether his wife had not come home with the Silvas (this notwithstanding that he had seen his wife at the Jones place in Hanford, and that she had declared to him her intention to stay with Mrs. Jones for several days; and that he knew also that the Silvas had returned to their home on the afternoon of the 5th). His testimony further was that he stopped his machine near the slaughterhouse; that Mrs. Silva was at work at about the place where the cauldron was, outside of the building; that he alighted from his auto truck without taking the gun, and asked Mrs. Silva whether his wife was there, to which she replied, "No," and that he had said to her that he thought she might have his wife hidden somewhere about the premises, and that he was going to see; that Mrs. Silva advanced upon him with a cleaver and addressed him with a threat and told him to get out; that her husband appeared in view at or near the door of the slaughterhouse; that he too threatened the appellant, and started to move in a direction as though to secure a weapon; that he (appellant) retreated to his auto truck upon the advance of Mrs. Silva with the cleaver and picked up his gun, discharged it at her body, and immediately fired a second shot at Silva; that Silva "staggered or dropped down" behind the boarding, and that Mrs. Silva fell to the ground; that, fearing that Silva was procuring a weapon which appellant believed he had on the premises, appellant returned to his automobile, got the third cartridge, and inserted it in his gun and moved around toward the building within which Silva was, sheltering himself in part by a tree that was there; that he approached to where he could discern Silva, who, he said, was "kind of hunkered down"; that he immediately fired the third shot, which shot entered the body of Silva, after receiving which the latter fell. An eyewitness, a young man who observed the shooting from a point not far away, testified that appellant did not return to his automobile for the gun after meeting Mrs. Silva, but that he had the gun with him at the time he left the vehicle. In the slaughterhouse, on the opposite side from where the body of Silva was found, was a rusty 22-caliber rifle. About six feet away from the body of Silva, wrapped in a cloth of some sort and lying on the floor, was a revolver of large caliber, the chambers of which were loaded. There was testimony tending to show that Mrs. Silva, after seeing appellant that morning, had brought the parcel containing the larger gun from her home. The inference which the prosecution evidently sought to draw from this circumstance was that, having observed the presence of appellant, and fearing that he might make an attack upon her or her husband, she had carried the gun to the place where the two were at work, and, under the testimony introduced by the people, that inference was both plausible and reasonable.

Appellant, after completing the killing of the two Silvas, drove to the sheriff's office and gave himself up. His defense rested solely upon the claim that the shooting of the two persons was done by him as acts of necessary self-defense. There was testimony to the effect that certain threats made by Mrs. Silva and her husband, wherein they declared that they would kill appellant, were communicated to appellant prior to March 6th. There was testimony of an occurrence when some dispute arose between Mrs. Silva and appellant, the former had seized a small butcher knife and had started toward appellant, when her husband interfered and took her home. The threats reported to have been made by Mrs. Silva against the life of the defendant, were coupled with a condition, to-wit, that if he struck her daughter Addie (his wife) she would execute the reported design. That the evidence was sufficient to sustain the verdict we find no question made in the brief of counsel for appellant, and we are constrained to say that, had the verdict in this case been that of first degree murder, it would have been fully sustained by the proof.

The contentions urged upon this appeal are referable solely to instructions given by the court and to others which were offered by the defendant and refused. We find upon an examination of the charge as the court delivered it to the jury that there was expressed by the trial judge a very full and correct exposition of the law of self-defense. The jury was carefully advised as to the right of a person who is attacked or threatened with great bodily injury at the hands of another, to defend himself and use a deadly weapon in the prosecution of that defense; it was advised fully as to the right of such a person, using reasonable judgment, to act upon appearances and to be justified in the use of a deadly weapon, even though it might appear that the danger was not in fact real; the instructions were full to the point as to the right of the person attacked or threatened to not only kill his assailant, but to pursue him, where it appears that the danger to him might be increased by retreat; they correctly advised the jury as to the right of the defendant, in judging of the danger in which he was placed, to take into consideration threats made by the deceased. All of these features of the law touching the right of persons in the situation of the defendant were presented with ample elaboration, and we find no point necessary for the guidance of the jury which was not fairly included within the instructions as given. People v. Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403. Holding this view, we think it unnecessary to enter upon a discussion of particular phases of the instructions given, or of the applicability of those which were offered by the defendant and refused by the court.

[1] Appellant particularly complains because the court prefaced one instruction with this statement: "Arguments have been made tending to arouse your sympathy." The instruction proceeded to advise the jury that its judgment should not be directed by sympathy "nor by revenge." Counsel does not question the correctness of the statements of the court as contained in the body of the instruction, but argues that the preliminary sentence which we have quoted expressed the view of the court on a question of fact. We cannot deduce any such conclusion from that language. The court was evidently referring to the argument of some counsel, whether on one or both sides of the case we are not told. No part of the argument is presented. If, during the course of the arguments, an appeal had been made to the sympathies of the jury by either counsel, the trial judge would have been well within the line of his duty had he interrupted the argument and instructed the jury to disregard any such appeal. He had the same right to repeat in the final charge a caution to the jury to decide the case upon the law and the facts, and not be influenced by the bias of sympathy or prejudice. If the clause of the instruction quoted indicates the intention of the court to express to the jury his knowledge as to the fact that arguments tending to arouse sympathy had been made, we will assume the fact to be as stated by the court. There was no error in the giving of any part of the instruction referred to.

[2] A careful examination of the record has convinced us that there is no substantial merit in the appeal taken by the defendant. His conviction of the crime of manslaughter must be said to rest upon abundant proof. The case is one which makes pertinent the observation of the Supreme Court used in the case of People v. Cebulla, 137 Cal. 314, 70 Pac. 181, where it was said that the defendant should be considered fortunate that the jury reduced the crime to that of such small degree.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(56 Cal. App. 434)

IRWIN et al. v. KLIMPER. (Civ. 3521.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1922.)

1. Brokers 🔑43(2)—Precluded from recovering compensation in absence of written contract authorizing them to sell land.

Broker could not recover commission for sale of real estate where contract authorizing broker to sell the property was not in writing as required by Civ. Code, § 1624, subd. 6.

2. Brokers 🔑43(3)—Vendor's written escrow instructions to bank, referring to broker's commission, held not sufficient under statute requiring authority to sell to be in writing.

Written escrow instructions, addressed to bank by vendor, reciting conditions under which deed was to be delivered to purchaser, and stipulating that "I. & H. Realty Company, 5459 Hollywood Blvd., commission $342.50, hold your check for balance for me," *held* not a sufficient memorandum of broker's authority to sell land, under Civ. Code, § 1624, subd. 6; the instructions constituting at most merely an acknowledgment of the obligation of the vendor to pay the stated commission out of the purchase price on completion of the transaction.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by E. G. Irwin and S. L. Henry, doing business under the firm name of the Irwin & Henry Realty Company, against Lenora Marston Klimper. Judgment for plaintiffs and defendant appeals. Reversed.

Smith & Breslin, of Los Angeles, for appellant.

G. R. Dexter and Howard B. Henshey, both of Los Angeles, for respondents.

CONREY, P. J. Pursuant to the unwritten request of the defendant, the plaintiffs procured for the defendant a purchaser ready, willing, and able to buy and pay for certain real property at a stated price. Thereupon the defendant signed and delivered to the Hollywood National Bank escrow instructions dated April 10, 1920, which were addressed to the bank, and were in part as follows:

> "I will hand you a deed executed by ——— to Elinor J. Middleton, covering the following described property: (Stating description of the property, amount and conditions of payment to be made by the purchaser.)
>
> "Pay your escrow charges, also the charges for Cont. certificate of title and recording above.
>
> "Pay all incumbrances of record necessary to show title as above.
>
> "Property subject to all 1920–1921 taxes.
>
> "Insurance to be assigned free.
>
> "Interest to be adjusted as of date of closing.
>
> "Irwin & Henry Realty Company, 5459 Hollywood Blvd., commission $342.50, hold your check for balance for me. * * *"

Mrs. Middleton deposited with the bank the required sum, and complied with the conditions required of her by the terms of the escrow. At the time of the trial of this action the money remained with the bank, and the purchaser was willing to "go on with the deal." Nevertheless, for reasons which do not appear, the property has not been conveyed to the purchaser. We are not informed whether the failure to complete the sale is caused by willful refusal of the vendor, or by her inability to furnish a satisfactory title.

The plaintiffs have prosecuted this action to recover an alleged indebtedness of the defendant to them in the sum of $342.50 for their services in procuring the purchaser for the described real property. It was alleged in the complaint that for said services the defendant promised and agreed in writing to pay. The writing hereinabove described is the only document proved to have been signed by the defendant relating to said transaction. Judgment having been rendered in favor of the plaintiffs, the defendant appeals therefrom.

[1, 2] It is provided in section 1624 of the Civil Code as follows:

> "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: * * * 6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

If the writing to which we have referred is sufficient to comply with the quoted section of the statute, and thereby constitute a valid contract, then, and then only, the plaintiffs are entitled to recover. We think that the memorandum does not constitute an agreement authorizing or employing the plaintiffs to sell the property or a promise to pay the commission. It is an order which, at most, might be construed to be an acknowledgment of obligation on the part of the defendant to pay the stated commission out of the purchase price on completion of the transaction; that is to say, upon transfer of the property and payment of the consideration. Looking at it most favorably to the plaintiffs, they are not entitled to recover upon the facts shown in the record, because it has not been proved that the condition has been performed upon which alone the money would be payable.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

56 Cal. App. 454

PEOPLE v. PROSSER. (Cr. 582.)

(District Court of Appeal, Third District, California. Feb. 15, 1922.)

1. Criminal law 🔑1169(2)—Introduction of document in evidence held not prejudicial where facts set forth therein otherwise shown without objection.

Introduction in evidence of a certificate of discharge as not insane was not prejudicial to accused who set up defense of insanity, where superintendent of the asylum, who made the certificate, testified without objection that he had discharged the accused as sane, especially where there was no substantial grounds for a rational inference that accused was irresponsible at the time he committed the offense.

2. Criminal law 🔑48—When insanity available as defense to crime.

In order that insanity may be available as a defense to a crime, it must appear that the accused when the act was committed was so deranged and diseased mentally that he was unconscious of the wrongful nature of the act committed.

3. Criminal law 🔑570(3)—Commitment to asylum not conclusive evidence of insanity.

Commitment to an insane asylum is not conclusive evidence of insanity, but is only evidence to be weighed by the jury, in a criminal prosecution.

4. Criminal law 🔑1173(2)—Refusal to instruct as to effect of discharge from insane hospital held not prejudicial.

Accused was not prejudiced by refusal to instruct that certificate of discharge from hospital for insane was void, where, in view of the whole testimony, the jury must have regarded it simply as superintendent's opinion of mental condition of the accused.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Raymond Prosser, alias Newell Grant, was convicted of passing fictitious checks, and appeals. Affirmed.

Stanley M. Arndt, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of "making, drawing, uttering and delivering a check for the payment of money on a bank, without having sufficient funds in or credit thereat with intent to defraud," and he has appealed from the judgment. The only defense was insanity, and it is not disputed that the evidence upon that issue is abundantly sufficient to support the implied finding of the jury against appellant, but it is contended that the trial court committed prejudicial error in admitting in evidence a certain purported discharge from the hospital for the insane at Stockton and in refusing to give certain proposed instructions in reference to the invalidity of such discharge and the effect of defendant's commitment to the asylum. The defendant was adjudged insane upon two different occasions. The first time was in 1915, when he was committed by the superior court of Alameda county to Agnews, whence he escaped after six or seven months. On September 24, 1919, he was again examined and committed to Agnews by the superior court of San Francisco, and after escaping and being recaptured he was transferred to the Stockton asylum on March 16, 1920. On June 6, following, he was paroled and leave of absence granted, the parole providing that he "must be returned every thirty days for renewal." The parole was regularly extended to September 6, but before this date he broke his parole of which the police and asylum authorities were notified. On February 16, 1921, he was discharged from the hospital as "not insane." Defendant had not been there nor had he been seen by the physicians since June 6, 1920, and the last complete examination that they made of him was on March 20, 1920. On March 24, 1921, the check was passed, upon which the indictment was based.

[1] The court permitted said certificate of discharge to be introduced in evidence, and by appellant it is claimed that this was error under the authority of Aldrich v. Barton, 153 Cal. 488, 95 Pac. 900. Therein it is said:

> "There can be no doubt that the jurisdiction of the superintendent of an insane asylum to discharge a person as recovered from insanity exists, under section 2189 of the Political Code, only where such person is a patient in the asylum. The only authority given to the superintendent by the statute is to discharge a 'patient' and that by such 'patient' is meant one who has been committed to the asylum and has remained there (except in case of a temporary absence as on parole) for care and treatment, is clear from a reading of the entire chapter of the Political Code dealing with the commitment and care of insane persons."

In view of the facts already stated, it is the claim of appellant that he was not a patient in the asylum at the time of said discharge, and hence the superintendent was without jurisdiction to certify that Prosser was sane. But whether appellant was or was not at the time a "patient" as that term is used in said statute, the error, if any, was immaterial, since the superintendent before said certificate was received in evidence had without objection testified as follows:

> "Q. What did you do? Just tell the facts. A. Well, he was discharged on February 16, 1921, as not insane. Q. You signed a document to that effect? A. Yes, sir; the discharge. Q. Was that signed by you Dr. Clark? A. Yes. * * * Q. Now, that document, People's Exhibit 5, was signed by you, wasn't it? A. Yes, sir. Q. What date was it signed? A. Dated February 16, 1921. Q. What is the name of the document? identify it. A. This is a discharge from the hospital, Mr. Prosser's discharge from the Stockton State Hospital."

It is apparent that the formal introduction of the certificate of discharge could add nothing to the force of the preceding testimony. Moreover, the certificate was not received as conclusive evidence of the sanity of appellant, but as the opinion of Dr. Clark, the superintendent of the hospital, that Prosser was sane; the court stating that the weight of it was for the jury to determine. If it might be claimed that, in this aspect, it was incompetent, the answer is that it was entirely without prejudice, since Dr. Clark had testified:

> "On the recommendation of his doctor who had been in touch with him, and with his history taken, I thought the man was not insane, and his diagnosis, when he came before the medical staff for examination, there was no diagnosis of malcondition. He never showed any mental symptoms of insanity. He was at work, in the carpenter shop and around the place shortly after he came. He never showed any signs of insanity. Based on that and his attending physician's opinion, the discharge was made."

It may be added that Dr. McLeish, who carefully observed the patient all the time he was in the hospital and made a complete examination on March 20, testified that appellant was sane; that he never had any hallucinations or delusions; "I would not call him a normal individual but he is not insane; he is a man with criminal tendencies, but that does not mean he is insane."

[2] Indeed, an examination of the record is convincing that there is no substantial ground for a rational inference that appellant was irresponsible at the time he committed the offense; in other words, that he did not understand the nature of the act and appreciate the fact that he was doing wrong. It is well settled, as stated in People v. Willard, 150 Cal. 543, 89 Pac. 124:

> "That insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. * * * Although he may be laboring under partial insanity—as, for instance, suffering from some insane delusion or hallucination—still if he understands the nature and character of his action and its consequences * * * such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts."

Herein, there was some evidence that the defendant was a "constitutional inferior," that he had certain delusions, that he was indeed a proper subject to be committed to a hospital for the insane, as evidenced by said adjudications, but only one conclusion can be drawn from the whole record, and that is that he should be held answerable to the penalty of the law for his conduct. The truth is that he had committed many similar offenses, and from the record we must conclude that these acts were the result of his uncontrolled criminal tendencies, and not the irresistible product of a disordered brain. In view of this conclusion, we should be required to hold that, if any error was committed by the court in such ruling, it ought to be disregarded in the interests of justice.

[3] The court committed no error in refusing to give the following instruction:

> "You are instructed that if you find that defendant was committed to a state hospital in California as insane by the superior court of any county of California that the law presumes that defendant continues insane until such time as he was lawfully discharged from the state hospital or was legally adjudicated sane."

This instruction proceeds upon the mistaken assumption that such adjudication is conclusive evidence that the party was insane; whereas, it was only evidence to be weighed by the jury, and the effect of which was to be determined by them, but they were not in any wise concluded by the opinion of the medical examiners or by the judgment which declared appellant insane. People v. Willard, supra. In the Willard Case the defendant, just a few minutes after he had been examined and found insane and ordered committed to the asylum, killed the sheriff of Mendocino county, before he had left the judge's chambers where the examination was held; but his conviction for murder of the first degree was sustained by the Supreme Court, said commitment being regarded as merely evidence of insanity to be overcome by other evidence that he was sane.

[4] Another proposed instruction herein was:

> "You are instructed that a discharge or certificate of discharge given by the superintendent of a state asylum or hospital is of no effect, is illegal and void, if at the time it was given the person whom it purports to discharge had been paroled and while on parole had escaped and at the time of the purported discharge was not present at the hospital, nor had been there for some months previous, and was purported to be discharged without examination or observation at the time of the purported discharge and for a considerable period of time previous thereto."

We think the instruction properly characterized said discharge and the instruction might well have been given. But for reasons already stated the action of the court was not prejudicial. The purported discharge was not received as conclusive evidence that the defendant was sane, and in view of the whole of the testimony of Dr. Clark the jury must have regarded it simply as his opinion of the mental condition of appellant based upon his knowledge of the prior history of the case. Besides, if the instruction had been given, we think the verdict would and should have been the same.

The only other rejected instruction worthy of notice was based upon the theory that if the defendant had been committed as insane to the hospital at Agnews and was afterward transferred to the one at Stockton and then paroled and afterward escaped, and that the only evidence of his discharge was one purporting to have been made after such escape and while he was not in the custody "of the said state hospital or any state hospital for some time previous, and if there is no evidence of any adjudication by a superior court of the state of California that defendant is sane, then you must find at the time that defendant was alleged to have defrauded George Buthenuth, as alleged in the indictment herein, that he was insane." But it is manifest that this instruction is also based upon the erroneous theory that the commitment to the hospital was conclusive evidence that appellant was insane at the time and that his insanity continued until he was regularly discharged by the hospital or adjudicated to be sane. The fact is, as already seen, that it was evidence of insanity that could be rebutted by counter evidence, and, even if the jury believed that he was then insane, the prosecution was not precluded from showing by other evidence than such discharge or adjudication that he was sane at the time he committed the offense charged against him. The instruction was likely also to be construed by the jury as implying that sanity or insanity was the ultimate question to be determined instead of the capacity of the defendant to understand the legal and moral quality of his act in passing said check.

Appellant's counsel deserves commendation for the zeal and ability with which, without compensation, he has represented his client; but we are satisfied that justice has been done in the case and that no prejudicial error has been shown.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

56 Cal. App. 556

ROBERTS v. MILLS. (Civ. 2425.)

(District Court of Appeal, Third District, California. Feb. 18, 1922.)

1. Fixtures 🔑15—Intention of parties important factor in determining whether building a "fixture."

The intention of the lessor and lessee of a vacant lot was an important factor in determining whether a building placed thereon by the lessee was a trade "fixture" or became a part of the realty under Civ. Code § 660, such intention to be inferred from the nature of the building, the situation of the party making the annexation, the mode of annexation, and the purpose for which annexed (citing Words and Phrases, First Series, Fixture).

2. Fixtures 🔑15—May include building.

While the term "fixtures" is usually applied to tools, implements, and other contrivances more readily movable than a building, yet it also includes structures erected by a tenant on demised premises for purposes of trade, and he may exercise his right of removal at his will at any time before the end of the term, under Civ. Code, § 660.

3. Fixtures 🔑35(2)—Court warranted in finding building was trade fixture.

In an action for damages for removing building from lot, evidence *held* to justify a finding that the building was a trade fixture and that defendant had the right to remove it under Civ. Code, § 1019.

4. Fixtures 🔑15 — Statutes concerning removal construed.

To make Civ. Code, § 1013, applicable to an action for damages for removal of a building as a trade fixture, it would be necessary to show an agreement to that effect between the original parties to the lease; whereas, a "trade fixture" under the conditions specified in section 1019 may be removed without such agreement.

5. Fixtures 🔑27(2)—Building as trade fixture removable under oral agreement creating new tenancy.

Where lessee of portion of lot under lease not referring to removal of building, constructed a building for trade purposes, removal of building was made within the lessee's term, where, before the expiration of the lease, it was superseded by an executed oral agreement creating a new tenancy at an advanced rent, with a special agreement for the removal of the building, though if there had been no such agreement the tenant would be precluded from removing the building, under Civ. Code, §§ 1013, 1019.

6. Evidence 🔑276—Landlord and tenant 🔑33—Competent for parties to substitute executed oral agreement for written lease; decedent's declaration against interest admissible.

It was competent for lessor and lessee to substitute an executed parol agreement for written lease under Civ. Code, § 1698, and it was proper to receive in evidence conversations between the parties in reference to the new lease to establish the novation, under Code Civ. Proc. § 1870, subd. 4, making admissible declarations against interest by a decedent.

7. Tenancy in common 🔑49—Owner held to have ratified lease executed by co-owner.

One of two equal owners of lots ratified a lease by her co-owner to a third party, where she accepted the rent for many years without question, including an agreement that tenant could remove a building constructed by him.

8. Tenancy in common 🔑55(6)—Conclusion that co-owner acted within scope of authority in executing lease sustained.

In an action by one of two equal owners of lots against a third party for damages for removal of a building, evidence *held* to warrant a conclusion that co-owner was acting within the scope of his authority when he agreed that the tenant could remove a building constructed thereon by him.

Appeal from Superior Court, Kings County; J. C. Needham, Judge.

Action by Maggie L. Roberts against Richard Mills. Judgment for defendant, and plaintiff appeals. Affirmed.

J. G. Crichton and W. D. Crichton, both of Fresno, for appellant.

A. M. Drew, of Fresno, for respondent.

BURNETT, J. The action was for damages for the removal of a certain building from the lands of plaintiff situated in the town of Coalinga in the county of Fresno, and defendant had judgment for his costs, from which judgment the appeal has been taken.

Of the undisputed facts we may recite the following: On May 31, 1905, plaintiff and one M. S. Gibson were the equal owners of lots 17 and 18, block 29, of said town, said Gibson being in the sole possession and control of said lots, occupying a part of the same with a building, in which he was conducting a saloon, the rear end of the lots being vacant, the plaintiff residing elsewhere. On said date said Gibson made and executed a lease for the rear 25 feet of said lots to one I. Salhinger, for a term of five years, at a monthly rental of $15, payable on the 1st day of each month. This lease was signed by Gibson in person and as an attorney in fact for M. L. Williams, who is now Maggie L. Roberts, the plaintiff herein. Said lease was properly acknowledged and thereafter recorded in the county recorder's office. The building in question was subsequently constructed on said rear portion of said lots. There was no removal clause in said lease. On the 17th day of October, 1905, said Salhinger, by a written instrument duly executed and acknowledged, granted, sold, and conveyed to Richard Mills, the defendant herein, "and to his executors, administrators and assigns, that certain one-story frame building located on the fraction of the rear end of lots numbers 17 and 18, block number 29, town site of Coalinga. * * * Together with all the right, title and interest of the party of the first part in and to a certain five-year lease of said above-described fractional lots executed by M. S. Gibson and M. L. Williams on the 31st day of May, 1905." And the said Mills thereafter entered into the possession and use of said building.

As to the character of this structure, the court found that within the terms of said written lease "the said Salhinger erected and constructed a frame building upon said lots, placing the said building on said lots on mud sills on the surface of said ground and the same was built and constructed as a trade fixture to be removed upon the termination of said lease or any continuation thereof. That thereafter and during the term of said lease the said Salhinger sold, assigned, and conveyed all of his right, title, and interest in and to said lease and sold and assigned and conveyed the building situate on said leased premises to the defendant herein, Richard Mills, and the said Richard Mills continued in the possession thereof and as tenant of the said M. S. Gibson and the plaintiff herein until the removal of the building from the said premises.

> "That during the running of the said lease made and executed by M. S. Gibson and the plaintiff to Salhinger, and subsequent to the purchase of the said lease and the said building by the said defendant, Richard Mills, the said M. S. Gibson, for and on behalf of himself personally and for and on behalf of the said Maggie L. Williams, entered into a verbal agreement with the said defendant, Richard Mills, wherein the said Richard Mills agreed to pay to the said M. S. Gibson personally and as agent, the one-half of all of the net proceeds received as rent for the use and occupation of said building, and the said M. S. Gibson personally and as agent for the said plaintiff agreed to accept said net rent in full payment of the rent for the ground on which the said building or any additional building erected by the said defendant, Richard Mills, stood. That it was also agreed between the said M. S. Gibson personally and as agent for Maggie L. Williams and the said Richard Mills, defendant herein, that the said Richard Mills should have the right to remove said building at any time he desired to do so and that the said M. S. Gibson personally and as agent should have the right to order the said building removed on reasonable notice at any time that he should desire to erect another building on said ground or to use for any other purpose the said portion of said lots 17 and 18 in said block 29 occupied by said building or buildings. That the said verbal agreement became an executed oral agreement of monthly tenancy for the said portion of said lots 17 and 18 occupied by the said buildings and was continued as a monthly tenancy from month to month until the removal of the buildings thereon by the said defendant, Richard Mills, and the said plaintiff accepted and received her portion of the said rent in full settlement for the use and occupation of the said portion of lots 17 and 18 of the buildings by the said defendant and the same became a settled and executed agreement of monthly tenancy by and on behalf of said plaintiff, with the right on the part of the defendant to remove the buildings at any time."

[1, 2] One point relates to the question whether the building became a "trade fixture" as found by the court, or became a part of the realty as provided in section 660 of the Civil Code. However, as to this, we think there can be no doubt that the evidence supports the finding. That this building was to be erected for purposes of trade appears in the written lease, and the evidence shows that it was so used by the tenants. In this connection the intention of the parties is, of course, an important factor in the determination of the character of the building. The question of "intention is given pre-eminence by modern authorities. This intention is inferred from the nature of the thing annexed, the situation of the party making the annexation, the mode of annexation, and the purpose for which it was annexed." 3 Words and Phrases, First Series, p. 2832, and cases cited. While the term is usually applied to tools, implements, and other contrivances more readily movable than a building, yet it also includes structures erected by the tenant on the demised premises for purposes of trade, and he may exercise his right of removal at his will at any time before the end of the term. Deane v. Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292; Carr v. Georgia Railroad, 74 Ga. 73; Evans v. McLucas, 15 S. C. 67; Earle v. Kelly, 21 Cal. App. 480, 132 Pac. 262.

The manner in which the building was erected would also indicate that it was not intended to become a part of the realty, but that it was understood that it might be moved off by the tenant. Defendant testified that—

> The "wooden uprights were resting on little boards, and around the bottom of the boards on the sides and ends of the building was a four by four scantling. * * * It was on top of the soil when it was built, but the soil was piled up on the outside afterward."

J. M. McIntyre testified that—

> It was "just a board and battin building; twelve-inch boards for the sides; no studding or anything; made of twelve-inch boards and four-inch battin on the outside; and it was built—well, like most of the houses over there at that time; with a board laid down; or a two-inch plank and then posts up and four by four on that and then the boards nailed to that."

It may be added that the agreement made by Mr. Gibson and the defendant as to the removal of the building furnishes a contemporaneous construction of the undertaking as to the character of the building. It is true that there is no direct evidence of any such agreement with Mr. Salhinger, the original lessee, but it is worthy of note that the latter only a short time after he put up the building sold it to defendant. It is not to be supposed that he would undertake to transfer property which he had no reason to believe that he owned. Indeed, the most rational explanation of his conduct is based upon the theory that the original understanding was that the building might be removed as a "trade fixture."

Moreover, from the fact that said building was erected by the tenant for his own purposes the presumption is in favor of his right to remove it.

> "With respect to buildings erected by a tenant the rules are more favorable to the tenant than to persons in other relations. * * * The building is deemed to be personal property during the life of the lease, and becomes real estate upon the expiration or surrender thereof without removal." 11 R. C. L. p. 1082.

[3] The trial court was therefore justified in finding that the building was a trade fixture, and since it further appears that "the removal could be effected without injury to the premises," and it had not become "an integral part of the premises," the tenant had the right to remove it during the continuance of the term. Section 1019, Civ. Code; Alden v. Mayfield, 33 Cal. App. 684, 166 Pac. 377. This would follow independent of the express agreement for its removal made by Gibson and defendant.

[4] It is to be observed that the finding of the trial court brings the case within said section 1019 rather than section 1013 of the Civil Code. To make the latter applicable it would be necessary to show an agreement to that effect between the original parties to warrant the removal, whereas a "trade fixture" under the conditions specified in said section 1019 may be removed without such agreement.

[5] The question then arises whether the removal was made within the term. Herein it becomes material to state that before the expiration of the written lease it was superseded by an executed oral agreement creating a new tenancy at an advanced rent with a special agreement for the removal of the property. The removal was made while this substituted lease was in force, and, since the parties had stipulated to that effect, the tenant could remove the building. Wadman v. Burke, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192, 3 Ann. Cas. 330. If there had been no such agreement, the tenant would be precluded from disturbing the landlord's possession. Watriss v. First Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694; Earle v. Kelly, supra.

[6] Of course, it cannot be disputed that it was competent for the parties to substitute the executed parol agreement for the written lease. Section 1698, Civ. Code; Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979. To establish the novation it was necessary and proper to receive in evidence the conversations between Gibson and defendant in reference to the new lease and the admissions of the former as to his agreement for the removal of the building. Tench v. McMeekan, 17 Cal. App. 14, 118 Pac. 476; subdivision 4, § 1870, Code Civ. Proc.; Robinson v. Rispin, supra.

[7, 8] Some objection is made to the sufficiency of the evidence that Gibson was authorized to represent appellant in the execution of the lease. As to this, however, it hardly becomes her to take this position, in view of the fact that she accepted the rent for many years without question and acquiesced in the possession and use of the building by respondent during the entire period. She must have known also of the terms of the lease. It was a matter of record, and, besides, it is almost inconceivable that she did not inquire of Gibson concerning it. Her conduct, indeed, amounts to a ratification of his authority. Moreover, the court was justified in the conclusion that he was her agent for the purpose of renting the property. She testified that Gibson was a man of integrity:

> "Well, I would take his word that little I had to do with it; he collected the rents and sent them to me; that's all I had to say." Furthermore, that she didn't go over there and make any terms with the tenants. "I didn't go, but he wouldn't make any terms without speaking to me."

But there is no doubt that he did make terms by the execution of said lease, and therefore, according to the admission of appellant, it is a fair inference that he had her consent. But if we consider her equivocal statements as a denial that she authorized Gibson to lease the property, more importance should be attached to the circumstance that this man of integrity did represent himself as her agent, and did actually execute this instrument as her attorney in fact and she never repudiated nor questioned his right to do so. Such situation would warrant the conclusion that he was acting within the scope of his authority.

After a careful reading of the entire record, we are satisfied that the conclusion of the lower court is just and should be upheld.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

(56 Cal. App. 463)

REVEAL et al. v. STELL. (Civ. 3675.)

(District Court of Appeal, Second District, Division 1, California. Feb. 15, 1922.)

1. Appeal and error 🔑1071(6)—Failure to make finding which must have been adverse not prejudicial.

A party cannot complain that court did not make a finding on a certain issue, which finding, if made, could only be adverse to him.

2. Witnesses 🔑159(1)—Testimony as to transaction with deceased incompetent as against distributees of estate.

In action upon a note by distributees of payee's estate, testimony of defendant as to transactions with deceased, introduced in support of a counterclaim, was incompetent under Code Civ. Proc. § 1880.

3. Descent and distribution 🔑140—Executors and administrators 🔑431(2)—Claim, not presented to personal representative in proper time, not subject of action against estate or distributees.

A claim against a decedent that was not presented within the time required by Code Civ. Proc. § 1493, could not be the subject of an action against the estate or the distributees thereof.

4. Executors and administrators 🔑434(5)—Cross-demand against estate not enforceable, in absence of presentation under statute.

While under Code Civ. Proc. § 440, the right to plead a cross-demand against the estate of a deceased person is not affected by his death, nevertheless such right is subject to compliance with section 1493, requiring presentation of claims to the personal representative.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by Ida Frasch Reveal and others against Henry Stell. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. V. Richardson, of San Diego, for appellant.

Philip Storer Thacher, of El Cajon, and George H. Stone, of San Diego, for respondents.

SHAW, J. Defendant appeals from a judgment rendered against him upon a promissory note made and delivered to Gotthard Grot, which, by its terms, was due and payable on September 26, 1914. Grot died on September 14, 1918, and within six months thereafter, to wit: On March 12, 1919, the administrator of his estate filed a complaint to recover the amount of the note. Thereafter, upon a final order of distribution of the estate, the chose in action was by the court distributed to Ida F. Reveal and Charles F. and Christopher R. Frasch, who, by order of court made upon stipulation of the parties, were substituted as parties plaintiff in the action.

In his answer defendant denied the making of the note, alleged that payment thereof had been made, that it was barred by the statute of limitations, and, as a set-off and counterclaim, alleged that deceased at the time of his death was indebted to him in the sum of $1,200 for work and labor performed, at his special instance and request, during the six years immediately preceding his death, a verified statement of which claim he alleged was filed with the administrator of the estate. Other than as to the bar of the statute of limitations, as to which no finding was made, the court upon sufficient evidence found adversely to defendant as to all of these alleged defenses.

[1] At the time of Grot's death the note was not barred, and the action, under the authority of section 353, Code of Civil Procedure, extending the time for the institution of suits in such cases, was instituted by his representative within six months after his death; hence, since a finding upon such question, if made, must have been adverse to defendant, he was not prejudiced by reason of the court's failure to find thereon. Nor did the mere substitution as parties plaintiff of the heirs of deceased, to whom the note was distributed, constitute a new cause of action, as claimed by appellant.

[2-4] Appellant's chief contention is that the court erred in excluding evidence offered in support of his alleged counterclaim based upon services performed for Grot, at his special instance and request, during the six years immediately preceding his death. As to this it not only conclusively appears that no demand based upon such claim was presented to the administrator until long after the time specified therefor, by reason of which fact it was barred (section 1493, Code Civ. Proc.), but that the only testimony whereby it was sought to establish the fact, and which the court ruled out as incompetent, was that of defendant as to the occurrences of the transaction had between himself and Grot, the deceased. Such testimony was clearly incompetent. Section 1880, Code Civ. Proc. Moreover, since it is made to appear that the claim was not presented as required by law, it could not be the subject of an action against the estate, nor the distributees thereof. Conceding the demand was the proper subject of a counterclaim against Grot, had he survived, and its operation as such unaffected by his death (section 440, Code Civ. Proc.), nevertheless defendant, in the absence of a presentation of the claim as required by law, and which was not made, could neither sue thereon nor invoke its payment by pleading it as a counterclaim. In support of his contention that presentation was not necessary, appel-

lant cites Ainsworth v. Bank of California, 119 Cal. 470, 51 Pac. 952, 39 L. R. A. 686, 63 Am. St. Rep. 135. Not only does an examination of that case show that the demand upon which the claim was based was duly presented to and rejected by the administrator, but the court says:

> "Under our Code provisions as to claims against estates of deceased persons, it is compulsory upon a claimant to present his claim under oath stating all offsets and credits. Without doing this he cannot maintain an action or be paid his claim."

While under section 440, Code of Civil Procedure, the right to plead a cross-demand against the estate of a deceased person is not affected by his death, nevertheless such right, we think, under our Code, is subject to a compliance with the law requiring the presentation of such claim to the executor or administrator of the estate of the deceased against which the cross-demand existed. There was no error in excluding the evidence.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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56 Cal. App. 437

PEOPLE v. ALEXANDER. (Cr. 837.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1922. Hearing Denied by Supreme Court April 14, 1922.)

1. Mayhem 🔑5—Evidence held to sustain verdict finding attack by accused was not in self-defense.

Testimony by the injured man and by his friend that he was attempting to leave defendant's house when defendant attacked him with a knife, though contradicted by testimony of defendant and her friend that he was attacking defendant with a chair, could be accepted by the jury as true, and was sufficient to show that defendant was guilty of mayhem in destroying one of prosecuting witness' eyes and was not acting in self-defense.

2. Criminal law 🔑829(1)—Refusal of requested instructions covered by instructions given is not error.

It was not error to refuse a number of instructions requested by accused, where, in so far as they were applicable, every theory of the defense was covered by the instructions given.

3. Homicide 🔑118(3)—Person attacked in own home need not attempt to escape.

Where one is violently attacked in her own home it is not necessary that she withdraw or seek to escape therefrom, but she may resist the attack even to the extent of committing a homicide.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Lena Alexander was convicted of mayhem, and she appeals. Affirmed.

E. C. Jennings, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

SHAW, J. Defendant was convicted of the crime of mayhem in that she maliciously and unlawfully destroyed the eye of one Moran Watson. She has appealed from the judgment pronounced and an order denying her motion for a new trial.

The first contention of appellant is that the verdict is contrary to the evidence and shows that, in inflicting the injury upon Watson, she acted in self-defense. There is ample testimony, if believed by the jury, to establish the following facts, namely: That for nearly a year Watson had been on terms of intimate acquaintance with defendant; that on the morning of March 22, 1921, she phoned him that she would be at the house of a friend in the afternoon. Watson, accompanied by a friend called Smitty, went to this house, where they found defendant and her friend, Mrs. Pinkie Pride. The four left for defendant's house, some two or three blocks distant. On the way defendant gave the key to the house to Mrs. Pride, and left the party to perform some errand. Upon arriving at the house Mrs. Pride unlocked the door, and the three entered. Soon thereafter defendant arrived at the house and, seeing a bottle of whisky on the table, proceeded through the kitchen and threw it away. Then, getting the knife, she went to the front room, where Mrs. Pride and Watson were dancing or engaged in a playful scuffle, which she ordered discontinued, saying that the neighbors would think she was running a rough house. Thereafter she and Watson engaged in a scuffle which ended by her ordering both Watson and Smitty to leave the house. The latter left through the front door, and Watson, having been told by defendant upon other visits to always leave by way of the back door, started out through the kitchen door. He had reached the door, in front of which stood a chair, which he kicked out of place, and while in the act of unlatching the door, defendant struck him twice with the knife, the second stroke reaching his eye and cutting it, as a result of which it was removed. It further appears that Mrs. Pride had told defendant of Watson's flirtations with some other woman, as a result of which she was greatly displeased and at the time, by her manner, indicated her displeasure towards Watson, who, due to her slapping and striking at him, engaged in the scuffle with her.

[1] While there is a sharp conflict in the testimony given by Watson and his friend on

the one hand and that given by defendant and her friend, Mrs. Pride, on the other hand, it is apparent from the testimony of the former, which the jury were entitled to believe (People v. Glover, 141 Cal. 246, 74 Pac. 745; Dallman v. Frank, 1 Cal. App. 541, 82 Pac. 564; People v Logan, 123 Cal. 414, 56 Pac. 56), that Watson's visit was at defendant's invitation, and her act of striking him with the knife while he was leaving the house, was wholly unjustifiable in that she was not warranted, under the circumstances, as a reasonable person, in believing that he would attack her in a violent manner or contemplated any violence to her person. While a party attacked in his own house may stand at bay and turn upon and attack his assailant, if apparently necessary to save his own life or protect himself from violence (People v. Lewis, 117 Cal. 186, 48 Pac. 1088, 59 Am. St. Rep. 167), nevertheless, upon the testimony offered, the jury might well conclude, as it apparently did, that appellant's story to the effect that when Watson was leaving the house in accordance with her order, he grabbed a chair and, advancing toward her, said he would knock her brains out, that she was in a position from which she could not retreat and escape the fatal blow which she feared, all of which was denied by Watson, was unfounded. There is ample evidence to justify the verdict.

[2, 3] Defendant requested a number of instructions which were refused by the court, and error is predicated upon such rulings. An examination of the instructions requested and those given shows that, in so far as they were applicable, every theory of the defense was covered by the instructions given. The argument of her counsel is based upon the contention that, since she was in her own house, defendant's rights were other than they would have been elsewhere, and he cites a number of cases to the effect that, where one is violently attacked in his own house, it is not necessary that he withdraw or seek to escape therefrom, but may resist the attack, even to the extent of committing a homicide, in the protection of himself and household. That this is a correct statement of the law admits of no question, and the effect of the instructions given was to so state to the jury.

Under the testimony, however, of both Watson and his friend Smitty, the jury, if they believed it, were justified in concluding, not alone that the defendant had not been violently assailed by Watson, but also that he was in the act of peaceably leaving the house at the time when defendant, angered on account of her friend's attentions to another woman, struck him with the knife. We find no prejudicial error in the record.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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56 Cal. App. 587

PEOPLE v. BOARDMAN. (Cr. 849.)

(District Court of Appeal, Second District, Division 1, California. Feb. 23, 1922.)

1. Criminal law 🔑696(3)—Prosecutrix's testimony as to the act held so unsatisfactory that it was error not to strike her entire testimony.

Where the 14 year old prosecutrix, who was in the habit of sleeping with her father, the defendant, answered that defendant had had sexual intercourse with her and that she knew what that was, but failed to answer a long series of questions calling for similar facts and details and finally answered that she did not know if it was true, refusal to strike her entire testimony *held* error; there being otherwise insufficient evidence to make out the state's case.

2. Rape 🔑52(2)—Evidence held insufficient to make out a case.

Witnesses' testimony as to movements of bedclothes where prosecutrix, aged 14, was in bed with her father, the defendant, *held* insufficient to make out a case of rape for the state; there being no showing of any penetration.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

G. S. Boardman was convicted of rape, and he appeals from the judgment of imprisonment and from an order denying a new trial. Judgment and order reversed.

Moody & Rosenthal, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of rape. The appeal is from the judgment of imprisonment and from an order made denying a motion for a new trial.

It was charged in the indictment that the act complained of was accomplished with defendant's daughter, who was, at the time, of the age of 14 years. To sustain a conviction the people relied upon the testimony of John Boardman, a brother of the defendant, and Hazel Boardman, the daughter referred to. The evidence shows that the defendant was the father of three children, all girls, the youngest being Hazel, the one named in the indictment; that for about ten years prior to the commission of the alleged offense the wife of the defendant and mother of these girls had been confined in an insane asylum; that the custody and care of the children had devolved upon the father, who worked at common labor in the support of the family. At the time in question he was living in the county of Kern near the town of Wasco. The quarters available at that place for sleeping purposes were meager, being of shed-like construction, and the father and three girls slept in the same room, which was in part an open-air affair. In this room there were two beds, one of which was occupied by the two elder girls, while the defendant and his youngest daughter occupied the second.

[1, 2] It appears that since this daughter was a very small child she had been in the habit of sleeping in the same bed with her father. On the date charged in the indictment a brother of the defendant was stopping at the same place, and at night he used a third bed which was about 18 feet away from the bed of the defendant. Between the two beds there was some screen or obstruction which it was necessary to look over in order to obtain a view of the space wherein the girls and father slept. This brother testified that on the night in question, after the defendant and Hazel had retired, he, with the intent to observe what transpired, got up and looked across the intervening obstruction at the bed which his brother and niece occupied. This witness testified that both of the elder daughters were away that evening; that he saw his brother awaken Hazel, heard a mumbled conversation and saw certain movements of the bedclothes which he described. Hazel Boardman, when called as a witness, answered first the direct question as to whether at the time specified her father had had sexual intercourse with her, and that answer was in the affirmative. She stated also that defendant had had such intercourse with her upon a prior occasion. She answered the general question as to whether she knew what sexual intercourse was by the words, "Yes, sir." On cross-examination she was asked to describe in her own words the acts which were done. She failed to answer that question and failed to answer a long series of questions calling for similar facts. The combined efforts of counsel on both sides and the court were fruitless in the attempt to secure a narration of any details of the occurrence as to which she had made reference in her direct testimony. To each interrogatory, designed to elicit these important matters, most pertinent to a proper cross-examination, there was interposed nothing but silence on the part of the witness. The court several times inquired as to whether she could answer the questions, and the witness answered, "No." The district attorney suggested that the court ascertain from the witness if she was not "feeling well," or whether there was some reason why she would not testify, whereupon the court asked the question and received the following answer:

> "Q. Can you give any reason why you can't at this time tell? A. I don't know if it is true or not, and I don't want to say it."

The counsel for the defendant, in view of this persistent refusal of the witness to answer proper questions on cross-examination, moved that her entire testimony be stricken out, which motion the court denied. In this ruling we think that the court erred. A case was not made out by the testimony of the brother, for there was nothing in that testimony from which the jury would have been entitled to infer that any act of penetration, which is essential to the establishment of the charge of rape, had been accomplished. The young girl's testimony to the effect that the act of sexual intercourse had been committed fell short of establishing the necessary fact and stands in the record as a mere conclusion of the witness, in view of her refusal, without any reason, to describe the acts which went to establish the offense. Plainly it appears from the record that the witness was competent and intelligent; she answered readily enough and in a clear manner many questions. Her final answer as to her reason for not detailing the facts called for was that she did not know whether it was true or not. This very state of mind made it highly important to the defendant that the jury should have presented to it a description of the things done by the accused in order that it might determine whether the criminal characterization first assigned to those acts by the young girl was justified. The trial judge should have granted the motion to strike out the testimony. The other evidence being insufficient to support the verdict, a miscarriage of justice has resulted, and the defendant is entitled to a new trial.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

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56 Cal. App. 570

PRESTON v. STEVENS. (Civ. 3520.)

(District Court of Appeal, Second District, Division 2, California. Feb. 21, 1922. Rehearing Denied March 23, 1922.)

Waters and water courses ⚿203(6)—Ruling of Railroad Commission held not to affect contract concerning charge for water connections.

A ruling of the Railroad Commission that, except in the case of extension in unincorporated territory, a water company could not require an applicant to sign a contract for service, did not affect a prior contract with an owner of an addition in unincorporated territory, and did not prevent the collection of a charge for water connections from purchasers of lots and application thereof on a note given a water company under an agreement that payments by purchasers of lots for connections were to be credited thereon.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by F. A. Preston against W. O. Stevens. Judgment for plaintiff, and defendant appeals. Affirmed.

W. P. Boland and J. H. Kann, both of Los Angeles, for appellant.

Humphrey Marshall, of Los Angeles, for respondent.

CRAIG, J. This action is one to recover a balance of $528 remaining due on a promissory note which was originally executed by appellant in favor of Janss Company. The payee assigned the note to respondent. At the time the note was executed Janss Company gave Stevens the following receipt:

> "It is understood and agreed that Mr. W. O. Stevens will receive for this 42 connections. He will include in his contract of sale on tract No. 2399, a provision that lot purchasers must pay $16.00 for each connection to Janss Co., which will credit note."

It appears that the execution of the note and the giving of the receipt were the culmination of negotiations which had occurred between the parties looking toward extension of the water service owned by Janss Company to a tract of land being subdivided by Stevens. The defendant received the 42 connections mentioned in the receipt. However, he only included the provision for the purchasers making payment of $16 for each connection in 12 of the contracts. Nine of the connections were paid for and credited on the note. After the note and receipt were executed and some of the connections made the Railroad Commission adopted a ruling which the defendant construed as preventing his collecting any charge for water connections from the purchasers of lots.

The sole question necessary to be determined upon this appeal is whether or not the defendant, because of this ruling of the Railroad Commission, was prevented from the further carrying out of the contract by which it was understood that he should reimburse himself for the payment of the note by collecting from lot purchasers for the water connections. This ruling reads as follows:

> "D. Contracts.
>
> "Rule 12.
>
> "*Except in the case of extension in unincorporated territory,* which matter is left open for consideration in subsequent proceedings, and of extension in incorporated territory in cases in which the commission may hereafter authorize the signing of contracts for serving a water, gas, electric or telephone utility may not require that an applicant sign a contract for service as a condition precedent to service; provided that such utility may require that reasonable written application for service be made." (Italics ours.)

The lots sold by Stevens are not situated in any incorporated territory. Therefore the ruling by its own terms does not apply and cannot be said to have prevented the carrying out of the original plan for the reimbursement of Stevens for his payment of the note.

The judgment appealed from is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

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56 Cal. App. 566

UVADA CONSOL. MINES CO. v. WESTERN GAS ENGINE CORPORATION et al.

(Civ. 4138.)

(District Court of Appeal, First District, Division 1, California. Feb. 20, 1922. Hearing Denied by Supreme Court April 20, 1922.)

Sales 🔑417—Evidence held to prove abandonment of contract by both parties.

In buyer's action for breach of contract to sell engine, evidence *held* to prove abandonment of the contract by both parties.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Uvada Consolidated Mines Company, a corporation, against the Western Gas Engine Corporation and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Chas. R. McCarty and Wm. C. Jensen, both of Los Angeles, for appellant.

F. D. R. Moote and Harold I. Cruzan, both of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of defendants in an action for damages for the breach of a contract for the sale of personal property.

In the month of November, 1916, the plaintiff, through its then president, C. H. Putnam, entered into a contract with the defendants for the purchase of a certain four-cylinder engine, with equipment, for the sum of $4,000, one-third of which was paid upon the execution of the contract, the balance to become due upon presentation of shipping documents. Under the terms of the contract the plaintiff was to furnish the defendants with information as to the size of the pulleys required for the proper operation of the engine, and the size of the crank shaft necessary to properly operate the pulley. The purchaser was also, quoting the language of the instrument—

> "to furnish cement and you are to build foundations at place and in position designated by you, according to plans furnished by us. You are to furnish sand, gravel, rock, water and all other foundation material; you are to do all teaming and haul all supplies to site of installation. You are to furnish all necessary help; you are to pay all freight and transportation charges from factory."

At the time of the execution of this agreement C. H. Putnam produced a telegraphic money order for $1,600, made out to his order, and which had been wired to him by the plaintiff. He delivered this order to the defendants, out of which they took the sum of $1,333.33, the amount of said initial payment, and gave to Putnam a check for $266.67.

In the month of December, 1916, W. D. Lea, the sales manager of the defendants, requested Putnam to furnish the details required by the contract so that the crank shaft and pulley might be ordered and the engine prepared for shipment, pointing out to Putnam that the contract provided a specific date of shipment. In reply Putnam informed Lea that his company was not prepared to proceed with the financial requirements of the contract, and that he would release the defendants from the delivery date in the contract. Accordingly, upon request he wrote a letter to the defendants, part of which was as follows:

> "Owing to the necessity of rearranging our plans of installation you will kindly hold the matter in abeyance pending the time we can give you further instructions."

Thereafter Putnam repeatedly spoke to Lea in regard to a return of the deposit, saying that the company "needed the money." On January 19, 1917, the plaintiff sent a telegram to the defendants, signed by three of its officers, requesting a withdrawal of $1,000 of the first payment for temporary use because "funds are low at present and we need the money." To these requests the defendants refused to accede, but later Putnam called upon them, and as the result of a personal interview secured from Lea a check for $1,200. At that time, it seems, there was some trouble among the stockholders and directors of the plaintiff; in any event Putnam represented that he was unable to procure a properly authorized note at that time, but would do so later if the defendants would take his personal note in the meantime. Thereupon the defendants wrote and delivered to Putnam a letter to the effect that the payment of $1,200 was a refund of the first payment on said engine, less approximately 10 per cent.; and, after stating that, if the maker at the due date of the note should not desire to pay the same the note will be renewed, sets forth that the arrangement between the parties is for the purpose of allowing the maker of the note and contract to "straighten out certain financial matters." The sum thus returned was kept by Putnam, and not turned over to the plaintiff. Nothing further was done in relation to the matter until March 1st following, when H. T. Johnson—who in the meantime had become the manager of the plaintiff corporation—called with an attorney and stockholder to inquire about the status of the contract. Lea told them what had been done in regard to it, and they stated to him that the plaintiff stood upon the contract and expected the defendants to perform their part of it, provided the former were able to obtain control of the plaintiff and could raise the money to go ahead with the work, and Johnson also criticized Putnam for having purchased the engine, the plaintiff having no use for it as far as Johnson could see. There were, it appears, two other conversations between Johnson for the plaintiff, and a representative of the defendants, with reference to the contract for the engine, one in June and the other in September of the year 1918, but no offer of performance was made by Johnson nor did he demand delivery of the engine. It appears further that in the last-mentioned month Charles R. McCarty, an attorney representing plaintiff, called on the defendants, and was told by one of their officers that he knew nothing about the transaction, but, upon looking over the papers and correspondence in reference to the matter and making inquiries about it, found that the contract had been marked "Canceled" in June, 1917, and refused to proceed with it. In the meantime, as a result of the World War, the price of engines of the sort in question had nearly doubled.

The court, among other facts, found that the defendants still retain the sum of $133.33 paid by plaintiff on account of the purchase price of the engine; that plaintiff at no time informed defendants, as required by the terms of the contract, of the size of said crank shaft; that the plaintiff never gave to defendants instructions for the delivery of the engine; that prior to March, 1918, the contract was abandoned by both parties; that the market value of the engine at the time of the trial was $7,000. As a conclusion of law the court found that the plaintiff was entitled to recover from the defendants the sum of $133.33, and rendered judgment accordingly.

It is conceded that plaintiff made no offer of performance of the conditions of the contract by it to be performed, taking the position that no such offer was necessary for the reason that the defendants had refused to perform their part of the contract.

If it appeared here that the plaintiff in good faith intended or desired to accept the engine and was in a position financially to do so, then the conduct of the defendants might be regarded as a sufficient ground for the refusal of the plaintiff to perform its part of the contract; but here Putnam, its president, had been criticized by those who later assumed the conduct of the transaction for having contracted to purchase the engine; Johnson asserting that the plaintiff had no use for it. An attorney for the plaintiff called upon the defendant, not to demand delivery of the engine, but to learn, as he said, the status of the contract and what the defendants were going to do about it. It is also a fair inference from the record that the plaintiff was not in a position to pay for the engine. It doubtless appeared to the court that, the price of engines of this sort having advanced, the plaintiff desired to profit by this circumstance without carrying out its part of the contract; and that its claim that the defendants had repudiated the contract was an afterthought, availed of to enable the plaintiff to maintain this action without offering to perform. The finding of the court on this subject is amply sustained by the evidence. It is also manifest from the facts and circumstances of the case that the contract had been, as found by the court, abandoned by both parties.

Judgment affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

56 Cal. App. 423

PEOPLE v. WIGNALL. (Cr. 832.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1922. Hearing Denied by Supreme Court April 14, 1922.)

1. Conspiracy 🔑47—Evidence held to sustain conviction for conspiracy to defraud a bank.

Evidence *held* sufficient to sustain a verdict convicting defendant of criminal conspiracy, with three other men, to defraud a bank by cashing at the bank a check drawn upon another bank in which defendants had no funds.

2. Criminal law 🔑995(2)—Judgment shown by minute entry held sufficient.

A minute entry reciting that defendant appeared in person and by counsel and stated he had no legal reason why judgment should not be pronounced, and that it was the judgment of the court that he be confined in the state's prison for a term of not less than one nor more than ten years, which was the proper term of sentence for criminal conspiracy under Pen. Code, § 182, as amended by St. 1919, p. 170, sufficiently identified the case and, while the recitals were not as complete as they should be under Pen. Code, § 1207, was not so defective as to be void.

3. Criminal law 🔑1088(19)—Commitment has no place in record and cannot be considered.

The commitment has no place in the record and cannot be considered for any purpose on appeal, though it was not in the form of a certified copy of the entry, as provided by Pen. Code, § 1213.

4. Criminal law 🔑999(1)—Defective commitment can be amended.

If the commitment is defective in form, a new and corrected commitment might have been issued to conform with the judgment.

5. Criminal law 🔑304(16)—Appellate court cannot take notice of judgment and commitment made after notice of appeal.

The appellate court cannot take notice of what purports to be an amended judgment and commitment made after the entry of the judgment from which appeal was taken, and after notice of appeal had been given.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

W. Wignall was convicted of criminal conspiracy, and he appeals from the judgment and from an order denying his motion for new trial. Affirmed.

Charles P. Huey, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

JAMES, J. Defendant was informed against for the crime of criminal conspiracy under the provisions of section 182, Penal Code, as amended by St. 1919, p. 170, and especially subdivision 4 thereof. It was charged that he conspired with three other persons named in the information to defraud the First National Bank of Yorba Linda of the sum of $827.30. The information, in its statement of facts constituting the offense, further alleged that the conspirators deposited two certain checks, drawn upon a San Francisco bank for the aggregate sum of $2,250, with the former bank, and that they represented that the checks were good, and upon such representations obtained from said bank $300 in cash and a cashier's draft or check for the sum of $527.30. It was charged that the checks first mentioned were worthless, which the conspirators at the time well knew. Of the four men concerned in the transaction it appears that the defendant alone was apprehended, tried, and convicted. His appeal purports to be from the judgment and from an order denying his motion for a new trial.

[1] As to the sufficiency of the evidence to sustain the judgment, no question can well be made. It was shown that four men, the defendant being one of them, appeared at Yorba Linda, and, pretending to be interested in oil lands, expressed their desire to purchase an option for a lease on certain lands then controlled by the president of the bank mentioned. This defendant was represented as a geologist, and another of the four men as an attorney who was passing upon the regularity of the transaction. One of the remaining men took the part of the chauffeur. The land in question was viewed, and this defendant reported to his confreres that it looked "all right." The price to be paid for the option was $500. One of the men, called "Franklin," produced the two

checks, drawn upon San Francisco banks, representing that he had the money there. He went with the president of the Yorba Linda bank to the latter institution, deposited the two checks, and in turn drew a check for $500 which was used in an escrow made in connection with the option transaction. He also was allowed to draw the sum of $300 in cash against the purported deposit, and also asked for and received a draft or cashier's check for the sum of $527.30, which at his request was issued payable to one De Witt. Without loss of time the defendant here, who had been known to the banker at Yorba Linda as "Sharky," appeared in a Los Angeles bank seeking to cash the cashier's check, representing himself to be De Witt. The bank refused to honor the draft without evidence of identification, and for that reason defendant was unable to get the money. He was next heard from in the city of Long Beach. A jeweler of that city testified that a man whom he had known by the name of "Fields"—evidently the "Franklin" referred to herein—appeared at his store and stated that he had lost a watch which he had purchased of the jeweler at a time prior thereto, and desired to buy a new one. He selected a watch and presented in payment therefor the cashier's check for $527.30, and requested that the price be deducted therefrom, and that he receive the remainder in cash, which would have amounted to something over $400. The cashier's check at that time bore on the back the name of "De Witt," and "Fields" (or "Franklin") stated to the jeweler that he knew De Witt and knew that the signature was all right. The jeweler stated that he had not the amount of money in the store, but would go to the bank and get it. His real intent was to ascertain as to whether the cashier's check was good. He went to a bank in Long Beach, which in turn communicated by telephone with the Yorba Linda bank and received from that institution advice to hold the check and arrest the man. The jeweler returned to his store and found that "Fields" had gone, the latter having indicated to a clerk that he was going out to get something to eat. Shortly thereafter a messenger boy arrived at the store with a note directing the delivery of the watch and money to the bearer. A police officer had been secured in the meantime, and he gave direction to the messenger boy to take the package to the person who had sent him there, while the officer followed a short distance behind. The messenger boy testified that when he received the note from the man he had been told by him not to disclose his whereabouts. When the boy arrived at the place where the man had told him to report, that individual, observing the proximity of the officer, motioned to the boy to follow him and then proceeded in the direction of the beach. As the boy got close to him he told the boy not to give him the package, that some one was following him. This being the situation, the officer took the parcel from the boy and proceeded to arrest the man, who was fully identified as being this defendant. As to whether he was the same person who appeared in the jeweler's store is not made certain by the record, but that is not material. Defendant's connection with the entire fraudulent scheme was fully established, and, from the circumstances shown, no reasonable mind could be left in any doubt at all as to the conspiracy having existed as charged in the information. The evidence introduced was competent to establish the essential facts.

[2] Appellant complains that the judgment, as pronounced by the court, was not only defective, but void, in that it did not sufficiently specify the crime for which defendant had been convicted. Attention is called to the fact that, under the provisions of section 182, the punishment authorized to be adjudged upon conviction may be different, dependent upon the subdivision under which the charge is framed. If the defendant here had been charged with the crime of defrauding the bank, rather than a conspiracy so to defraud, he would have been punishable by imprisonment of from one to ten years. Section 182, in its concluding provisions, declares that, where the conspiracy is to commit any felony, the person convicted is punishable in the same manner and to the same extent "as in this Code provided for the punishment of the commission of the said felony or act." Under date of July 27, 1921, a record of the minutes of the court shows that the defendant was in court with his counsel and that a motion for a new trial was denied, also an application for release on probation. The following recitals then appear:

> "The defendant was asked if he had any legal reason why judgment should not be pronounced at this time. He stated 'He had none.' It is the judgment of this court that you be confined in the state's prison at San Quentin for a term of not less than one nor more than ten years. Defendant makes motion for an appeal in open court. The sheriff was directed to carry out the court's order."

The minutes of the court sufficiently identified the case, and, while the recitals were perhaps not as complete as section 1207, Penal Code, directs that they shall be, at the same time the judgment was explicit in that it indicated the maximum term for which the imprisonment of the defendant should be enforced, and that maximum was in accord with the extent of the punishment authorized for the crime charged. Penal Code, §§ 532, 489. People v. Kelly, 120 Cal. 271, 52 Pac. 587.

[3-5] Section 1213, Penal Code, provides that authority for the execution of a judgment in a criminal case is shown by a certified copy of the entry made upon the minutes. We find no requirement in the Code that the form of the commitment issued shall appear upon the minutes or docket of the court. In this record there is exhibited what purports to be a commitment issued upon the judgment, and which commitment, instead of following the minute order, directs that the defendant be imprisoned "for the term provided by law." We think that the commitment, as it purports to be set forth, has no place in the record and cannot be looked to for any purpose here. If in fact a commitment defective in form had been made, a new and corrected one might have been issued to conform with the judgment, and the presence of such an amended or new commitment in the hands of the custodian officer would be an answer to an application for discharge upon habeas corpus. At any rate, matters of defect in the form or substance of commitment process cannot be reviewed on appeal. For like reason we are not permitted to take notice of what purports to be an amended judgment and commitment made after the entry of the judgment herein referred to, and after notice of appeal had been given. Upon the record, as presented, we find no error entitling appellant to a new trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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56 Cal. App. 469

GARY SOUTH COAST AGENCY v. PACIFIC ELECTRIC RY. CO. (Civ. 3669.)

(District Court of Appeal, Second District, Division 1, California. Feb. 16, 1922. Hearing Denied by Supreme Court April 17, 1922.)

1. Street railroads 🔑114(14)—Finding of contributory negligence sustained.

In an action for damages to a motor truck struck by a street car at a street intersection, evidence *held* sufficient to sustain a finding of contributory negligence in not looking toward the car and heeding the warning of its approach.

2. Street railroads 🔑117(29)—Contributory negligence of driver failing to look question of fact.

As a matter of law it cannot be said that the driver of a motor vehicle crossing street car tracks can do so without looking in either direction to observe the approach of a car and be free from the charge of contributory negligence in the event damage results from his act.

3. Appeal and error 🔑1071(1)—Court's misstatement of speed limit in city held not prejudicial.

In an action for damages to a motor truck by a collision with a street car, where there was evidence that the truck driver failed to look before crossing the track and the court found that defendant was negligent only in operating the car at a speed in violation of an ordinance, the court's error in stating that the ordinance prohibited a greater speed than 20 miles an hour, whereas the speed limit was 12 miles per hour, was not prejudicial, though court found for defendant.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Gary South Coast Agency, a corporation, against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

C. E. Spencer, of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the defendant denying the prayer of the plaintiff for damages. The complaint alleged that, while a motor truck belonging to the plaintiff was traveling across the tracks of the defendant at a street intersection in the city of Los Angeles, a car of the defendant collided with the truck causing damage in an amount stated. It was alleged that the collision was caused by the negligence and carelessness of defendant in operating the street car. The answer denied the charge of negligence and affirmatively alleged that the damage, if any, which plaintiff claimed, was proximately caused by the negligence of plaintiff's employees in the operation of the truck. It was stipulated in the course of the trial that an ordinance of the city of Los Angeles prohibited the running of street cars at a greater speed than 12 miles per hour. The trial court found that the defendant was not negligent "except that it did operate the same (meaning the car) at a speed of about 25 miles per hour, in violation of the ordinance of said city of Los Angeles prohibiting a greater speed than 20 miles per hour." The finding further was that the defendant gave ample warning of the approach of the car by sounding a gong thereon and that the car was plainly visible to the servants of the plaintiff "driving said truck, upon entering said intersection and before reaching said tracks of defendant." Upon the defense of contributory negligence the finding was made that the servants of the plaintiff were negligent and careless in operating the truck in not looking toward the car of the defendant or "heeding the approach thereof, or heeding the warning of its approach given by the ringing of its gong, and thereby directly and proximately contributed by their negligence to the collision which thereupon ensued."

[1-3] It will be noted that the court found that the ordinance of the city of Los Angeles prohibited a greater speed than 20 miles per

hour, while the fact had already been stipulated that such ordinance prohibited a speed in excess of 12 miles per hour. The error was unintentional no doubt; but it affords the appellant ground for insisting that the conclusion of the court as to negligence of the plaintiff might have been different had the true terms of the ordinance been expressed in the findings. The second contention is that the evidence does not sustain the finding of contributory negligence. The evidence was conflicting as to the speed at which the street car was being operated, and as to the actions of the driver of the truck. Considering, as we must, that evidence which tends to support the findings of the court, it appears in the record by the testimony of certain passengers who were riding on the street car, and who observed the truck, that the driver thereof did not look in the direction of the car at all as it approached the street intersection, but drove directly forward intent upon crossing the street upon which the street car tracks were, until he had advanced directly in the pathway of the car. There was testimony that the motorman had been ringing the gong on the car for some distance before he reached the street intersection. The evidence was sufficient to support the findings made by the trial court and to establish the charge of contributory negligence. The question as to whether, in the circumstances, either the motorman or the driver of the truck acted with ordinary caution, was one for the trial judge to decide. As a matter of law, it cannot be said that the driver of a vehicle, crossing a street upon which the cars of a railway are being operated, can do so without looking in either direction to observe the approach of a car and be free from the charge of contributory negligence in the event damage results from his act. The cases cited by appellant relate to a different situation and, in our opinion, are not applicable to the facts as they are here disclosed. Nor do we think that the mistake of the court in misstating the terms of the city ordinance can be said to amount to prejudicial error. The court did find that the car was traveling at 5 miles per hour in excess of the speed as limited under the finding, and plainly intended to determine that the defendant was in that respect negligent. However, whether the speed limited by the ordinance was exceeded 5 or 15 miles per hour would not have excused the truck driver from the duty to at least look in the direction from which cars might be expected to approach or to heed the warning given by the sound of the gong which the court found was being rung at the time.

No error is presented justifying an order of reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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56 Cal. App. 579

PEOPLE v. BIANCHI et al. (Cr. 1007.)

(District Court of Appeal, First District, Division 1, California. Feb. 21, 1922. As Modified March 23, 1922. Hearing Denied by Supreme Court April 20, 1922.)

1. False pretenses ⚷7(5)—Statement retirement of partner would make no change in business is not future promise.

Where two partners jointly indebted to a bank requested the cancellation of their joint note because of the sale by one partner of his interest to the other, their statement to the bank that the change in the firm would make no difference in the affairs of the firm merely expressed the existing condition of the firm, and was not a promise concerning future action.

2. Criminal law ⚷564(4)—Proof held to establish venue of conspiracy.

In a prosecution for conspiracy to defraud, proof that the false statements were made in a bank located on a designated street in San Francisco, and that the entire transaction occurred in San Francisco, is sufficient proof of venue.

3. Criminal law ⚷1168(1)—Failure to prove corporate character of bank defrauded does not require reversal.

In a prosecution for conspiracy to defraud by false pretenses, where there was no controversy as to the identity of the bank defrauded, the failure to prove the corporate character of the bank does not affect defendant's substantial rights.

4. Criminal law ⚷829(3)—Refusal of requested instruction as to false pretenses already sufficiently covered is not error.

It was not error to refuse an instruction, requested by accused, defining false pretenses and one distinguishing false pretenses from expressions of opinion, where the jury was fully and properly instructed upon that subject.

Appeal from Superior Court, City and County of San Francisco; Louis R. Ward, Judge.

Rinaldo Bianchi and another were convicted of conspiracy to defraud by false pretenses, and they appeal. Affirmed.

John L. McVey, of Oakland, and James A. Devoto, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen. (Henry Ach, of San Francisco, of counsel), for the People.

TYLER, P. J. Defendants were charged with conspiring and confederating together unlawfully for the purpose of cheating and defrauding by false pretenses. The indictment was in two counts. The jury rendered a verdict of guilty as to both counts and against both defendants. This is an appeal from the judgment and the order denying their motion for a new trial.

The first count charges the defendants with having conspired together to cheat and defraud the Bank of Italy, a corporation, of a certain promissory note in the principal sum of $6,000, signed by Bianchi Shoe Company, a corporation. The second count charges the same defendants with having conspired to cheat and defraud said bank out of property owned by it, consisting of a certain claim and debt against defendant Del Prete.

It appears from the evidence that in the early part of the year 1918 defendant Bianchi was conducting a small shoe store on Eighteenth street, San Francisco. About this time he entered into a partnership with defendant Del Prete, who was his brother-in-law, for the purpose of conducting the business of wholesaling boots, shoes, and leather findings, under the partnership name of R. Bianchi & Co. Their place of business was in the Montgomery block, San Francisco. Their capital amounted to a sum less than $10,000. In addition thereto, each defendant owned a small parcel of mortgaged land. Through the years 1918 and 1919 their business was conducted on a conservative scale, each partner withdrawing therefrom about $30 per week. During this time they had become indebted to the Bank of Italy in the sum of $6,000, and in connection therewith had presented to the bank on December 19, 1919, a statement of their assets and liabilities. This statement showed their total liquid assets to be $61,145.61, the net assets $54,191.61, and current liabilities $6,850. Beginning with the year 1920, and at the time it is claimed defendants agreed upon a plan to loot their business and defraud their creditors, their conduct in relation to the conservative management of the business underwent a change. Commencing with January, up to the 13th day of February, each partner withdrew $3,000 from the business. They then caused to be filed a notice of sale of defendant Del Prete's interest therein to Bianchi, and such sale was noticed to take place on February 14, 1920. On this date the two defendants went to the Bank of Italy, and there interviewed its vice president and credit manager for the purpose of securing a release of their joint note in favor of the bank in the sum stated, and substituting in place thereof a new note of Bianchi alone. They were asked for a statement of their affairs, and in response thereto presented a written statement dated December 19, 1919, which statement purported to be a continuing one. They represented that they had entered into the dissolution agreement of partnership above referred to, and when asked by the credit manager if this business arrangement would make any material change in the assets of the business, they replied that it would not, and that the business affairs were practically the same as shown by the statement. They further represented that defendant Del Prete would not become a creditor of the business, as the consideration he was receiving was derived from real estate holdings of Bianchi. These representations were made by each of the defendants, and the bank, through its manager, believing and relying thereon, released the obligation as requested. The evidence shows that the statement presented by defendants was false, and did not contain the true financial condition of the affairs of the partnership. In addition to the liability stated therein, the firm owed Del Prete's brother $1,990, being the balance due on a loan of $2,500. This sum had been paid by the firm's check on January 5, 1920. Contrary to the representations, the statement also made no mention of the fact that the partners had drawn over $6,000 from the firm's assets since the date of the statement, or that an automobile listed among the assets as being worth $1,400, had been transferred to defendant Del Prete. It also appears that contrary to the representations that the dissolution of partnership would make no change in the business, that Del Prete had received $6,500 in cash from Bianchi, and a note for the sum of $3,500 secured by a mortgage. It further appeared that after the pretended dissolution defendant Del Prete moved into Bianchi's old store on Eighteenth street, where he proceeded to carry on a retail business and that in May, 1920, when the Bianchi Shoe Company went into bankruptcy, he had in his possession over $20,000 worth of stock obtained from the Bianchi Shoe Company, which he claimed to have paid cash for. Other evidence indicates a deliberate plan on the part of defendants to misrepresent the condition of their business and its assets. It appears therefrom that they secured credit from certain shoe manufacturers on financial statements corresponding with the one presented to the credit manager of the Bank of Italy. The Bianchi Shoe Company went into bankruptcy in May, 1920, and the Bianchi note which was substituted for the joint note of the two defendants was never paid, and this prosecution followed.

[1] As ground for reversal, it is first claimed that the allegations of the indictment and the proofs upon the trial do not correspond. In this connection appellants claim that the alleged false representations as proved are not representations of past or existing facts, but rather of future promises, and, being such, that they cannot form the basis of a prosecution for fraudulent misrepresentations. This contention is based upon the form of expression used by the manager of the bank in ascertaining whether the dissolution of the partnership would make any change in the business. Defendants were asked if such change *would* make any difference in the affairs of the firm, and in response thereto the manager of the bank was

told by defendants that there "*would be*" no change. The use of these words in no manner indicates futurity. It was but a mode of expressing the then present condition of the affairs of their business. The expression used was the most common one that could be employed for that purpose. It was for the jury to determine what impression the words used by defendants were intended to convey. 19 Cyc. 446.

[2] It is next claimed that no venue was established. While no formal proof was presented upon this subject it fully appears throughout the evidence that the entire transaction was had in San Francisco, California. The head teller in the note department testified that the Bank of Italy was on Montgomery street, San Francisco. There is therefore no force in this objection.

[3] Complaint is also made that no proof was had of the corporate character of the bank. This was a mere incidental matter. There was no dispute upon the question of the identity of the person defrauded, and failure to establish this fact by direct proof did not affect the substantial rights of either of the defendants.

[4] Further complaint is made that the trial court erred in refusing a proposed instruction defining false pretenses and one distinguishing false pretenses from mere expressions of opinion. The jury was fully and properly instructed upon this subject. No further questions are raised. There is no merit in the appeal.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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56 Cal. App. 604

SECURITY BANK & TRUST CO. v. WILBUR. (Civ. 4117.)

(District Court of Appeal, First District, Division 2, California. Feb. 23, 1922.)

1. Appeal and error ⚷662(2)—Recital of judgment roll held conclusive that service of papers in trial court was regular.

In the absence of a bill of exceptions, a recital in a judgment and decree that plaintiff "duly served and filed its answer and cross-complaint" is conclusive, as showing regular service of the papers in the trial court.

2. Appeal and error ⚷909(1)—Application of attorney to set aside nonsuit held to require assumption that he was substituted as attorney.

Where defendant, acting as her own attorney, was in default, which had been duly entered, and A. applied to plaintiff's attorneys and had the default set aside, in absence of anything in the record to the contrary, on appeal, the assumption arises that A. was substituted as attorney for defendant.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Suit by the Security Bank & Trust Company (formerly Security Savings Bank) against Edith M. Wilbur. From judgment for plaintiff and an order overruling defendant's motion to vacate the judgment, defendant appeals. Affirmed.

Edith M. Wilbur, in pro. per.

McCutchen, Willard, Mannon & Greene, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff sued the defendant in an action to quiet title; the plaintiff had judgment; the defendant moved the lower court to vacate the judgment, and the lower court denied the motion. The defendant appealed from the judgment in chief and from the order refusing to vacate.

[1] The appellant has filed a transcript which contains a copy of the judgment roll, and has inserted in the judgment roll some papers which the statute does not authorize to be included therein; and has printed in the transcript some other papers not authorized to be printed therein; but she has not brought up a bill of exceptions. The appellant makes but one point, and that is that the trial court did not have jurisdiction of the defendant and cross-complainant at the time it ordered judgment in favor of plaintiff. In support of this point she calls to our attention the fact that the defendant's answer, and also the cross-complaint, are signed Edith M. Wilbur in propria persona. At this point it should be stated that there is nothing in the judgment roll showing that the answer to the cross-complaint was not served on Edith M. Wilbur in propria persona. On the other hand, the judgment and decree recite that the plaintiff "duly served and filed its answer to the cross-complaint." In the absence of a bill of exceptions, the foregoing recital contained in the judgment roll is conclusive as showing that the service of the papers in the trial court was regular.

[2] Assuming that this court has any right to examine the rest of the papers contained in the transcript, it appears that the defendant was in default, and that her default had been duly entered. Thereupon H. M. Anthony, Esq., applied to the attorneys for the plaintiff, and obtained the consent of such attorneys that the default be, and thereafter the same was, set aside. In the absence of anything in the record to the contrary, we must assume that Mr. Anthony had been substituted as attorney in the place of Edith M. Wilbur in propria persona, otherwise he would have had no right to act for her. There is no showing made that after Mr. Anthony had been made an attorney of rec-

ord that he was supplanted by any other person duly substituted in his stead.

Still assuming that we have any right to examine papers not a part of the judgment roll, it appears that on the 2d day of March, 1921, the answer to the cross-complaint was duly served on Mr. Anthony, and that on March 10, 1921, a notice of the date of trial was duly served on Mr. Anthony; that thereafter on March 11th Mr. Anthony sent to Edith M. Wilbur all of the papers, thus giving her five days' notice of the date of the trial. In fairness to all concerned, it may be stated that Edith M. Wilbur was not at her place of residence, and therefore did not receive the above-mentioned papers until the 23d day of March, 1921. In short, there is nothing in the record showing that the appellant ever complied with the provisions of sections 284 and 285 of the Code of Civil Procedure. She failed to follow the methods, provided by statute, by which each party, in legal effect, serves notice on his adversary, who is the attorney duly authorized to receive and accept service. Errors and omissions, if any, were the errors and omissions of the appellant, and not of the respondent.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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56 Cal. App. 583

ZERBE v. UNITED RAILROADS OF SAN FRANCISCO et al. (Civ. 4118.)

(District Court of Appeal, First District, Division 2, California. Feb. 21, 1922. Hearing Denied by Supreme Court April 20, 1922.)

1. Trial 🔑296(7)—Instruction on presumption of negligence too broad held not erroneous in view of another instruction.

Though the first paragraph of an instruction that the burden was on the common carrier to prove that an injury to a passenger was occasioned by inevitable casualty or some other cause which human care could not prevent was too broad because not requiring proof that the injury was caused by the operation of an instrumentality under the carrier's control, it was not erroneous where the second paragraph of the same instruction correctly stated the rule, and there was no controversy that passenger was injured by the overturning of a street car.

2. Trial 🔑194(18)—Instruction on presumption of negligence from injury to street car passenger does not invade the province of the jury.

The giving of an instruction that an injury to a street car passenger resulting from the operation of an instrumentality under the carrier's control raises the presumption of the carrier's negligence is not erroneous as a charge on the weight of the evidence.

3. Trial 🔑260(1)—Requested instruction on point already covered need not be given.

It was not error to refuse an instruction requested by defendants where the question of law involved therein was fully covered by other instruction given by the court.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charles F. Zerbe against the United Railroads of San Francisco and another to recover damages for personal injuries. Judgment for the plaintiff, and defendants appeal. Affirmed.

Wm. M. Abbott and K. W. Cannon, both of San Francisco, for appellants.

Reisner & Honey, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them for $7,500, damages for personal injuries received by the plaintiff while he was a passenger upon a street car owned and operated by the United Railroads of San Francisco and in charge of the other defendant, who was the motorman upon said car.

The accident out of which the action grew occurred on July 13, 1918, at Walridge and Schwerin streets in San Francisco, in a region known as the Visitacion valley. At the time of the accident, the street car on which plaintiff was riding was crowded with employees of the Schaw-Batcher Iron Works, on their way to their work. After descending a steep grade, the car overturned on a curve and injured many of the occupants.

Plaintiff contended that the motorman negligently and carelessly operated said car at an excessive rate of speed which caused it to be derailed and overturned when it struck the curve in the track. The theory of the defendants was that some unknown passenger on the car, maliciously and willfully, had tampered with the air-breaking equipment, rendering it useless and resulting in the accident.

It is unnecessary for us to discuss the facts in further detail, because a consideration of the points urged by appellant do not require it. Appellants make but two points upon this appeal: First, that the trial court erred in giving certain instructions to the jury; and, second, that the trial court erred in refusing an instruction requested by the defendants.

The instructions given of which complaint is made are as follows:

"Contributory negligence on the part of a passenger cannot be presumed from the mere fact of an injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car or vehicle of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care or foresight could not prevent, or by the contributory negligence of the passenger. You are not to understand this instruction to mean that the burden of proof is shifted to the defendant under circumstances such as are here referred to. The rule of law applicable to such a case has been stated as follows: 'When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care.' The effect of this rule in a case to which it applies is to cast upon the defendant the burden of meeting a prima facie case."

"The proof of injury to a passenger on a street car of a common carrier caused by the operation thereof by the carrier casts upon the carrier the burden of proving that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not reasonably prevent, or by the contributory negligence of the passenger."

[1] While the statement of the rule in the first paragraph of the above-quoted instruction is a little broader than warranted by the law, in that it does not state that the injury must be shown to have been caused by the operation by the common carrier of the instrumentality under its exclusive control, that defect is remedied beyond any question of doubt in the second paragraph of the instruction, where the true rule is stated in the form in which it has been approved frequently in this state. Furthermore, the facts of the case show, without contradiction, that the plaintiff was injured through the operation of an instrumentality under the exclusive control of the defendant United Railroads of San Francisco.

[2] Appellants' objection to the foregoing instructions is that they are charges upon the weight of the evidence, and, as such, are invasive of the province of the jury.

Since substantially the same instructions have been carefully considered and discussed in numerous cases which are authorities in this state, it would seem a useless proceeding for us to restate the reasons given in those cases upon which the instructions were held to be proper. The following cases and others have settled, in this state, the propriety of the instructions of which complaint is made: Campbell v. Bradbury, 179 Cal. 364, 373, 176 Pac. 685; Worden v. Central Firepoof Co., 172 Cal. 94, 96, 155 Pac. 839; Steele v. Pac. Electrical Co., 168 Cal. 375, 378, 143 Pac. 718; Wyatt v. Pac. Electrical Co., 156 Cal. 170, 174, 175, 103 Pac. 892; Renfro v. Fresno City Ry., 2 Cal. App. 317, 84 Pac. 357; Boone v. Oakland Transit Co., 139 Cal. 490, 494, 73 Pac. 243; Bosqui v. Sutro R. Co., 131 Cal. 390, 400, 63 Pac. 682; Bush v. Barnett, 96 Cal. 202, 31 Pac. 2; Boyce v. Cal. Stage Co., 25 Cal. 460, 468; Cody v. Market St. Ry., 148 Cal. 90, 82 Pac. 666.

Appellant meets these cases by stating that the attack made upon the instructions in the present case was not made in the cases cited. Much reliance is placed upon the case of Davis v. Hearst, 160 Cal. 143, 116 Pac. 530, and the distinction therein pointed out between a presumption and an inference. But, whether or not the present objection was urged in the above-cited cases, it is certain that that objection was ably presented by the same counsel in the recent case of Jones v. United Railroads (Cal. App.) 202 Pac. 919, and this matter formed a part of the structure of the dissenting opinion filed in said case. The same matters were then forcefully advanced before the Supreme Court in a petition for a hearing by that court after decision by the District Court of Appeal, and the Supreme Court, in denying that petition impliedly declared that an instruction similar to the one we are here considering was impervious to this attack.

The matter is therefore not open for further argument, and this court is bound by the authorities above cited.

[3] As to the further point urged by appellants, that the court erred in refusing an instruction offered by defendants, it is only necessary to say that the question of law involved in this instruction was fully covered by another instruction given by the court, and that the defendants' theory of the case was given to the jury in several instructions contained in the record.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(56 Cal. App. 502)

KELLS et al. v. PEARSON. (Civ. 3659.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1922.)

1. Time 🔑10(10)—Escrow instructions held to extend time for paying balance of purchase price.

Even if the original agreement for the sale of land required the balance of the purchase price to be paid 15 days after March 5th, the time was extended one day by escrow instructions signed by the vendor requiring the payment to be made within 15 days after March 6th, and, where the time so extended expired on Sunday, the purchaser could make the payment on the following Monday under Civ. Code, §§ 9, 10, 11.

2. Escrows 🔑9—Acceptance by escrow holder of purchaser's check subsequently honored is binding on vendor.

The escrow holder is made the agent of the vendor to receive the purchaser's payment for the property, and, where it accepted the purchaser's check as such payment and the check was subsequently honored, the tender of the check within the time fixed for payment was sufficient compliance with the contract, since, under Code Civ. Proc. § 2076, if the agent objected to payment by check, it should have so stated at the time.

3. Brokers ⚷60—Commission for negotiating sale is earned by procuring binding contract with able buyer, though afterwards released therefrom.

Where an owner agreed to pay a brokers' commission for negotiating the sale of the property, the brokers became entitled to the commission when they secured an enforceable contract for the purchase of the property from one ready, able, and willing to purchase it upon the terms exacted by defendant, and with whom he entered into the contract, even though thereafter the owner for reasons of his own released the purchasers from their contract.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by H. R. Kells and C. W. Grant, copartners doing business under the firm name and style of Kells & Grant, against W. J. Pearson, to recover commission on the sale of real estate. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Leonard B. Slosson and J. Marion Wright, both of Los Angeles, for respondents.

SHAW, J. Action to recover money as commission for negotiating a sale of real estate. Judgment went for plaintiffs, from which defendant has appealed.

It appears that on March 5, 1920, plaintiffs, acting as agents for defendant, received from George C. Albert, the proposed purchaser of the property, the sum of $500, which they acknowledged to be a deposit in part payment of the purchase thereof agreed by him to be made at the price of $15,000, to be paid upon the conveyance of the property, with a certificate of title to be furnished by defendant showing the same to be vested by such conveyance in the purchaser free and clear of incumbrances. Time was made the essence of the agreement, which further provided that the sale upon the terms and conditions set forth should be agreed to and accepted by the owner within 2 days from the date thereof, or the deposit returned upon demand. By the agreement the purchaser was given 15 days after notice from the owner of his ability and readiness to convey the property within which to complete the purchase, and upon his failure to do so within such time, provided the seller complied with the terms of the agreement, he was to forfeit the deposit as liquidated damages. Upon this document, signed by plaintiffs as agents, was indorsed the following:

> "I hereby agree to purchase the real property above mentioned and described upon the terms and conditions above set forth.
> "George C. Albert, Purchaser."

And attached thereto, duly signed by defendant, was the following:

> "I hereby agree to sell the real property above mentioned and described at the price and upon the terms set forth in the foregoing instrument and agree to execute and deliver a good and sufficient deed conveying said property to said purchaser in accordance with the provisions thereof; and I further agree to pay Kells & Grant $750.00 as commission for negotiating such sale. Said commission or any part thereof, may be retained by the broker from the first money received on account of the purchase price, or forfeit money paid by the purchaser."

On the day following, to wit, March 6th, the defendant deposited with the Title Guarantee & Trust Company a deed conveying the property to Albert, the purchaser, together with instructions to the escrow holder to deliver the same to the grantee upon payment to it, within fifteen days from March 6th, for his account, the sum of $15,000; and further instructed that if at the expiration of the time provided therein the condition of payment was not complied with, the escrow holder should, upon written demand of Pearson, return to him the instrument so deposited. Corresponding instructions were given to the Title Guarantee & Trust Company by Albert as to the payment, wherein he stated that he would hand to the escrow holder his check for $14,500, to be used by it subject to the conditions therein expressed and which were the same as embodied in the agreement hereinbefore referred to made with defendant's agents. On March 19th the purchaser delivered to the Title Guarantee & Trust Company as escrow holder his check for $14,500 which, together with the sum of $500 theretofore deposited by him with the agents and by the latter delivered to the Title Guarantee & Trust Company, made the sum of $15,000. On March 22d defendant, claiming that the time within which payment was to have been made had expired, demanded from the escrow holder a return of the deed, which request was complied with, and thereupon he sold the property to another for $17,000. It further conclusively appears that the purchaser had on deposit with the Hollywood Branch of the Security Trust & Savings Bank of Los Angeles, upon which the check was drawn, a sufficient amount of money to cover the check and which would have been, and in fact was, paid upon presentation thereof.

The court found that George C. Albert was ready, able, and willing to complete the purchase, and that he did, within the time provided therefor, fully comply with all the conditions of the agreement imposed upon him, notwithstanding which facts defendant repudiated his part of the contract and before the expiration of the time within which the purchase was to be completed, withdrew the deed. In our opinion, these findings are amply supported by the facts established.

[1] Conceding that under the agreement the money was payable 15 days from March 5th, which expired on Saturday, March 20th, nevertheless such time was extended by defendant when he deposited his deed in escrow with instructions to deliver the same upon payment within 15 days from March 6th. This time expired on March 21st, which was Sunday, by reason of which fact the time within which the purchaser might make payment included the following day (sections 9, 10 and 11, Civ. Code), prior to the expiration of which time defendant withdrew the deed, on which day, for aught that appears to the contrary, the money called for by the check had been paid to the escrow holder or its collecting agent.

[2] Furthermore, we are of the opinion that the checks for $15,000 delivered to the Title Guarantee & Trust Company on March 19th, in the usual and customary course of business, constituted a compliance with the agreement as to payment on the part of the purchaser. The escrow holder, under defendant's instructions, was his agent to accept payment of the purchase price and, without objection, it, in the ordinary course of business, accepted the checks. This was prior to the expiration of the time fixed for payment as specified in the agreement. If payment so tendered by check to defendant's agent, except in case of dishonor, was not acceptable to defendant's agent, it should have so stated (section 2076, Code Civ. Proc.; Smiley v. Read, 163 Cal. 644, 126 Pac. 486), in which case the purchaser could, and doubtless would, have withdrawn the money from the bank and paid it in cash.

[3] Moreover, under the contract in writing made by defendant, he agreed to pay plaintiffs' commission for negotiating a sale of the property, and this was accomplished when they secured a valid, binding, and enforceable contract to purchase the property from one ready, able, and willing to purchase it upon the terms exacted by defendant, and with whom he was willing to and did enter into the contract. In Jauman v. McCusick, 166 Cal. 517, 137 Pac. 254, it is said:

> "If the brokers had been employed by a writing in the ordinary form, agreeing to pay them a commission for negotiating a sale * * * of defendant's property upon certain terms, their obligation would have been fully performed by procuring 'a valid contract to purchase, which could be enforced by the vendor if his title were perfect.'"

Such contract was procured here, and under its terms the payment of the commission was not made contingent upon a consummation of the sale. In United States Farm Land Co. v. Darter, 42 Cal. App. 292, 183 Pac. 696, it is said:

> "The rule is that 'the services of a real estate broker are fully performed, his commission fully earned, when he has procured a purchaser ready and willing to enter into a valid contract of sale upon the terms fixed by the owner'"—citing Root v. Greadwohl, 20 Cal. App. 139, 128 Pac. 418.

To the same effect are Stewart v. Bowie (Cal. App.) 185 Pac. 868, and Gunn v. Bank of California, 99 Cal. 352, 33 Pac. 1105.

The agreement in the instant case was, "and I further agree to pay Kells & Grant $750 as commission for negotiating such sale." As conclusively appears from the record, they procured a solvent purchaser having sufficient money with which to pay for the property and whose readiness and willingness to buy the same is evidenced by the fact he in writing obligated himself so to do; and plaintiffs as brokers, having done all that they were required to do under the contract, should not be deprived of their right to payment of the commission because the seller deemed it to his interest to waive the enforcement of the contract in accordance with its terms. However viewed, there is no merit in the appeal.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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56 Cal. App. 498

HARGRAVE et al. v. MOODY et ux.

(Civ. 3678.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1922.)

1. Brokers ⚷86(1)—Evidence held not to show wife ratified changes agreed to by husband in written authority given brokers.

In an action for a commission, where the written authorization of plaintiffs was signed by the defendant wife and stated the terms on which a sale was to be made, evidence *held* not to show that the wife had agreed to the modification of such terms agreed to by her husband and incorporated in an escrow agreement signed by the husband alone, so that the brokers were not entitled to recover their commission from the wife.

2. Brokers ⚷43(3) — Provision in escrow agreement that brokers were to be paid from proceeds of escrow when completed held not to bind vendor husband to pay, notwithstanding he had not given written authorization as required by statute.

A written provision in an escrow agreement that plaintiffs were to be paid their commission from the escrow when it was completed, which was signed only by the vendor husband, was not an agreement binding him to pay the commission, notwithstanding he has not given a written authorization as required by Civ. Code, § 1624, and does not entitle the brokers to recover the commission from the husband after the wife refused to join in the conveyance because the terms varied from those stated by her in her written authorization to the brokers.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by P. B. Hargrave and another, copartners doing business under the firm name and style of Hargrave & Whiteley, against C. J. Moody and wife, to recover brokers' commission on sale of real property. Judgment for defendants, and plaintiffs appeal. Affirmed.

Chris Wilson, of Long Beach, for appellants.

G. F. Peck, of Long Beach, for respondents.

JAMES, J. Plaintiffs sued to recover the sum of $500 alleged in the complaint to be owing to them as a broker's commission earned upon the sale of certain real property. The appeal is from the judgment which was entered in favor of the defendants.

It is contended that the evidence presented at the trial court does not sustain the findings upon which the judgment is based. No testimony was offered on behalf of the defendants; hence the question of a conflict of the evidence does not arise. It is shown in the record that one of the plaintiffs, learning that defendants wanted to sell their flat building in the city of Long Beach, communicated with defendant Mrs. Moody and ascertained that the property was for sale. The agent requested an exclusive agency on the property for three days, which was allowed by Mrs. Moody; the authorization to the agents being expressed on a card over the signature of Mrs. Moody. The terms of sale there expressed were a total consideration of $18,000, one-half in cash and one-half secured by mortgage. The commission agreed upon and in like manner expressed was 5 per cent. on the first $10,000 and 2½ per cent. on the balance of the sale price. Upon the following day the agents presented a proposed purchaser at the Moody house, when both defendants (husband and wife) were present. The proposed purchaser declined to pay $18,000, but offered to pay $17,500, which price, we gather from the testimony, was agreed to by C. J. Moody. The agent then conducted the proposed purchaser to a bank, where a deposit of $100 was made on account of the purchase price and an escrow agreement prepared and signed by the latter. This fact was communicated to defendant C. J. Moody, who then suggested a reduction of the amount of the commission, and the agents agreed to accept $500. At the request of the agents, defendant C. J. Moody called at the bank, where the proposed purchaser's agreement and instructions had been deposited, and signed the escrow instructions. These instructions provided for entirely different terms as to payment of the purchase price than were expressed in the original authorization given by defendant Mrs. Moody to the agents. This agreement of the purchaser, instead of providing for a $9,000 cash payment, provided for only $2,500 to be paid in cash; the remainder was to be secured by various mortgages. The escrow instructions directed the holder thereof to draw the instruments required, and contained the following clauses:

> "Buyer is to have possession on or before 30 days from date. $500.00 commission to be paid to Hargrave & Whiteley from proceeds of escrow when completed."

As far as the record shows, the escrow never was completed by either of the parties. The Moodys refused to execute a deed, and the proposed purchaser apparently made no deposit of money in addition to the $100 which she left at the time she signed the instructions. The evidence does not show that defendant Mrs. Moody consented to the changed terms of sale as they were stated in the escrow instructions different from those expressed in her authorization to the agents. She did not sign the escrow instructions and could only become bound upon the theory that her husband was authorized as her agent to change those terms. There is no evidence that she did in any way either originally authorize, or afterward ratify, the act of the husband. Section 2310, Civil Code, provides, referring to the authority of an agent:

> "Ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified. * * *"

[1] While it may be gathered from the testimony that there was some conversation had in Mrs. Moody's presence respecting the reduction in the price from $18,000 to $17,500, there is nothing at all that we can find which tends to show that the particular terms of payment were presented to the wife before the signing of the escrow agreement, or were in any manner agreed to by her. The plaintiffs did not testify that the changed terms were agreed to by Mrs. Moody; neither did the proposed purchaser. The latter, referring to the acts performed by her in attempting to close the transaction, said:

> "I did not see Mr. Moody again that day, but I went to the escrow department and made my offer."

The same witness testified that Mrs. Moody objected to carrying out the deal, for the reason that not enough cash was provided to be paid. We think that it was clearly her legal right so to do.

[2] It is insisted nevertheless that defendant C. J. Moody should be held bound to pay the commission, notwithstanding that he had not given a written authorization to the agents as required to create a valid agency under the provisions of section 1624, Civil Code. It is argued that, having dealt with the agents with a knowledge of their employment by his wife and the terms of that employment, and having accepted their services and signed the escrow instructions authorizing the payment to be made to them of $500, he became bound as fully as though he had engaged them under the formality of the written authorization required by the Code. As we have seen, in order to make a ratification of oral authorization sufficient where a writing is originally required, the manner of authorization must be equivalent to that which would have been necessary to confer the original authority. Section 2310, Civ. Code; Lambert v. Gerner, 142 Cal. 399.[1] And appellants argue that the expression in the escrow instructions furnished sufficient confirmatory evidence to establish an enforceable contract. Among other cases we are cited to In re Balfour & Garrette, 14 Cal. App. 261, 111 Pac. 615. In that case, after services of the agent had been performed, the vendors wrote a letter to the agents which contained the expression:

> "We have agreed to pay you a commission of 2½ per cent. on same, due and payable when the terms and conditions of the various contracts have been complied with."

That expression was taken to import a present agreement to pay a commission upon a consideration rendered. The material expression contained in the escrow instructions here exhibited constitutes a direction to the escrow holder to pay $500 "commission" to these plaintiffs "from proceeds of escrow when completed." This instruction was quite different from an unconditional acknowledgment of the alleged debt; it rested upon a condition, to wit, that it should be paid out of money which the proposed vendee should deposit when the escrow transaction was completed. The conditions authorizing this payment to be made never were satisfied. Mrs. Moody refused to make a deed; consequently the proposed vendee performed no act further in the completion of her part of the escrow transaction. The case is closely parallel as to the question involved and the facts respecting the commission agreement to one which was recently decided by this court and to which we now refer. Irwin et al v. Klimper (Civil No. 3521) 205 Pac. 714, filed February 14, 1922.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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[1] 76 Pac. 53.

(188 Cal. 474)

PARKER v. SWETT et al.

SAME v. CARLSTON et al.

(S. F. 9559, 9748.)

(Supreme Court of California. March 24, 1922, as Amended March 31, 1922. Rehearing Denied April 20, 1922.)

1. Trial 🔑66—Reopening discretionary.

Matter of permitting a party to reopen the case to introduce evidence is discretionary.

2. Easements 🔑30(2)—Right to construct pipe line not lost by disuse.

The right of a grantee under a reservation in a deed to construct a pipe line over other land of the grantor, was not lost by disuse.

3. Waters and water courses 🔑48—Riparian rights not lost by disuse.

Riparian rights are not lost by disuse.

4. Appeal and error 🔑1170(7)—Introduction in evidence of judgment held not prejudicial "miscarriage of justice."

Admission in evidence of judgment roll in another case in which an appeal was pending was not a miscarriage of justice, within Const. art. 6, § 4½, where the judgment was subsequently affirmed.

5. Partition 🔑12(1)—Riparian rights may be divided.

Where a tract of land on a stream was partitioned by the parties, riparian rights could also be divided and be preserved as to both parcels by reservations in the deeds.

6. Judgment 🔑743(2)—Adjudication as to extent of riparian rights conclusive on parties in another action.

An adjudication as to riparian rights in a stream was res adjudicata in a subsequent action between the parties.

7. Waters and water courses 🔑40—Rights of riparian owners mutual and reciprocal.

The rights of riparian proprietors on the same stream with respect to each other are mutual and reciprocal, and neither has right to the whole stream as against the rights of others, and each is entitled to his reasonable share thereof considering the rights and needs of others, and such rights must be exercised and the use must be made only on the parcel to which the rights attach.

8. Waters and water courses 🔑44—Riparian owner could not take water on tract and use it on another.

Where a tract of land was partitioned and the right to water in a stream was divided, and thereafter owner of one of the parcels acquired another tract of land having riparian rights, the latter could not take water on the last-acquired tract for use on the parcel acquired under the partition deeds, so as to deprive the other parcel of its share of water.

In Bank.

Appeals from Superior Court, Napa County; Henry C. Gesford, Judge.

Actions by Homer C. Parker against E. C. Swett and others, and by the same plaintiff against J. F. Carlston and others. Judgments for plaintiff, and defendants appeal. Judgment in the first case affirmed and that in the second case modified and affirmed, with directions.

R. P. Henshall, of San Francisco, for appellants.

Samuel C. Wiel, of San Francisco (Clarence N. Riggins, of Napa, and William E. Colby, of San Francisco, of counsel), for respondent.

SHAW, C. J. The above-entitled cases were tried separately and at different times. Separate judgments were given, and separate appeals were taken. They both concern the same property and rights, and the points involved are so closely connected that it will simplify matters to decide them in one opinion. We will treat each case separately in the order of their respective numbers.

Case S. F. No. 9559:

This is an action to quiet the alleged title of the plaintiff to certain easements, against the claims of the defendants. This is the second appeal in the cause. The decision on the first appeal was made by the District Court of Appeal on February 26, 1919, reversing, in part, the judgment of nonsuit previously rendered by the trial court. 40 Cal. App. 68, 180 Pac. 351. Thereafter a new trial was had in the court below, and judgment was given for the plaintiff. The defendants Swett and Grange appeal.

The defendant Grange, by his answer, disclaimed all interest in the matter set up in the complaint. We are at a loss to understand why he joined in the appeal. But it is obvious that, as to him, the judgment must be affirmed. The matters involved in the present appeal concern only the plaintiff Parker and the defendant Swett.

On or about May 7, 1890, Thompson and Chase, predecessors in interest of both parties, were the owners as tenants in common of the 722 acres of land to which the rights and easements here involved pertain. A small stream, known as Chase creek, rising in the hills northeasterly of said tract, enters the land near the northeast corner and runs westerly for a considerable distance and then southerly through the tract to the southern boundary thereof. On May 7, 1890, a partition was effected between said parties by which the southern portion, containing 298 acres, was given to Thompson, and the northern portion, containing 424 acres, to Chase. The boundary line between them was a line running through the central part of the tract from a point on the western line, north 68½ degrees east, to the eastern boundary thereof. The northerly line of the tract was indented by another tract not then owned by the parties. The division line ran along the south line of this other tract and as a result the land partitioned to Chase was cut into tracts, the westerly parcel containing 370 acres, designated herein as "tract 1," and the easterly parcel 54 acres, designated herein as "tract 2." There was a space twenty chains wide between them. The partition was made by deeds whereby each party conveyed to the other his interest in the tract thereby set apart to the other. The easements now in question were set forth in the deed of Thompson to Chase and they were reserved by Thompson as burdens or servitudes upon the northern parcel, tract 1, and as easements appurtenant to the southern parcel. They were five in number, but the only easements now involved are those numbered 3 and 4, which are as follows:

> 3. "A right to take, use, appropriate, divert, lead, and carry away, in pipes or otherwise, one-half of the waters flowing or that may flow, in the stream on said premises, to be taken at or near the point where the waters of said stream are now partially diverted in pipes leading to the dwelling on said premises."
>
> 4. "The right of way for a line of pipe for water from the point where said waters may be diverted over, across, in, and through said premises to the said adjoining tract on the south, such pipe to be laid so as not to interfere with the proper cultivation of said premises, and also the right at all times to enter in and upon said premises for the purpose of viewing, changing, repairing, or preserving said pipe that may be so laid, and making and maintaining a proper division of said water."

The point of diversion of the water mentioned in No. 3 is situated near the northeast corner of the tract 1, now owned by Swett. The third reservation, it may be noted, reserved to Thompson, as an appurtenance to the tract conveyed by Chase to him, the right to take and use "one-half of the water flowing or that may flow" in Chase creek at said point of diversion on tract 1, designated in the record as the "1890 point."

The judgment declares that the plaintiff, as against the defendants, is the owner of the right to have Chase creek flow naturally and undiminished to said point of diversion and to take out at that point one-half of the water thereof there flowing and carry it away in pipes or otherwise and use the same, and that said right is appurtenant to "and part and parcel of" plaintiff's said land; that plaintiff is also the owner of a right of way for a pipe line, to be laid in and along the bed of Chase creek from said point of diversion to plaintiff's tract of land, and of the right to enter on the Swett land to view, examine, change, repair, or preserve the pipe so laid, and to make and maintain a proper division of said water, which rights are also declared to be appurtenant to the plaintiff's land.

The appellants claim that these provisions of the judgment assume that the partition deeds granted to the plaintiff an interest in the stream, and that this is contrary to the decision of the district court of appeal on the previous appeal which has now become the law of the case. We do not so understand the previous opinion. That opinion shows that, after this partition, Chase acquired the tract designated in the record as "tract 3," being the land lying between tracts 1 and 2 set off to him by the partition, and it declares that the deeds show no intention to convey anything but a right to the use of the water which could be obtained on the northern half of the original tract of land at the place called the point of diversion, the northern one-half referred to being the aforesaid tract 1. This right would constitute an interest in the stream flowing at that point, and in the water to be obtained there. But this is not inconsistent with the fact that the right so secured to Thompson was a riparian right and a part of the riparian right in the stream which was part and parcel of the entire original undivided tract before the partition. Thompson was a half owner in these rights, as well as of the land of which they were part. The intention of the partition being to divide the land between them and set off to each in severalty his due proportion thereof, such intent would include the riparian rights in the stream. The obvious purpose and effect of the easements reserved to Thompson was to provide a means whereby he could obtain his share of the water and carry it to the land set off to him for use thereon in the exercise of his riparian right. It therefore accomplished a division of the riparian rights by assigning one-half the water to each party, and also a reservation in favor of the Thompson land of easements in the Chase land to enable Thompson to obtain and use the water by taking it out of the stream on the Chase land. Without the reservations he would have had no rights of access at that point. It was not necessary to also expressly reserve the riparian right to one-half of the water, for that would go with the land set off to Thompson, which also abutted on the stream. The insertion of the reservations was an implied recognition of that fact. The opinion also declares that the partition deeds did not transfer or convey any right or interest in the water rights pertaining to tract 3, through which also the stream runs. This must have been so, since neither of them at that time had any interest in tract 3. Afterwards, in the year 1895, Chase acquired tract 3, and Swett is now the owner thereof. But his ownership of that land, of itself confers on him, as against other riparian land on the stream, no right in the stream, except to take a reasonable part of the water for any beneficial use on that land, and not elsewhere. We think the present decree is not objectionable in its declaration that the plaintiff's right to take the water at the "1890 point" is "part and parcel of" his land, that is to say, riparian in character.

The judgment proceeds to declare the quantity of water which constitutes the natural flow at the point stated and declares that the plaintiff is entitled to one-half thereof and the defendant to the other half. No complaint is made of this portion of the judgment.

[1] After the trial had closed and the cause had been submitted to the court for decision, it was reopened at the request of the appellants for the sole purpose of introducing additional testimony to identify the location of the roads and the quarry mentioned in the reservations not here involved. The court did not err in refusing to allow the defendant to reopen the case upon other subjects. The matter was discretionary, and there is not even an attempt to show an abuse of discretion.

[2, 3] The appellants insist that the injunction against interference by defendants with the rights adjudged to the plaintiff should have been contingent upon the construction by the plaintiff of a pipe line from the point of diversion to plaintiff's land. It seems that no such pipe line has ever been constructed. Inasmuch as these are all vested rights, we can perceive no reason why the court did not have the right to declare that the defendants should be enjoined from interfering therewith. Even if we assume that the right of plaintiff to take water from the stream does not come to him as a partition of the riparian right attaching to the land, but only by virtue of the reservations in the deeds, it would not be lost by disuse. Where rights or easements are acquired by grant, or by a reservation having the effect of an implied grant (Wood v. Boyd, 145 Mass. 179, 13 N. E. 476), the owner does not lose them by mere disuse. Parker v. Swett, 40 Cal. App. 74, 180 Pac. 351; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Currier v. Howes, 103 Cal. 437, 37 Pac. 521; Petitpierre v. Maguire, 155 Cal. 250, 100 Pac. 690; People v. S. P. Co., 172 Cal. 701, 158 Pac. 177; Copeland v. Fairview L. & W. Co., 165 Cal. 166, 131 Pac. 119. The decree, however, declares that plaintiff's water right is not only appurtenant to his land, but is "part and parcel" thereof, which means that it is a riparian right and consequently, that it is, as such, not lost by disuse.

It appears from the findings that Swett has acquired the parcel of land known as tract 3, situated between the two parcels conveyed to Chase by Thompson in 1890, and that the stream in question passes through this tract. The appellant insists that the court should have decreed that the easements created by the deed from Thompson to Chase did not affect the water rights pertaining to tract 3. A sufficient answer to this point is that the decree does contain such a provision. Consequently, notwithstanding the other provisions of the decree, the defendant may make a reasonable use of the water on said intervening land, as riparian owner thereof, subject to the correlative and reciprocal rights of other riparian owners of land on the stream.

The judgment in case S. F. No. 9559 is affirmed, respondent to recover costs of appeal.

Case S. F. No. 9748:

In this action the complaint alleged plaintiff's ownership of the land claimed by him in case S. F. No. 9559, aforesaid, that the defendants were in possession of the tract designated as tract 3, being the land situated between the two tracts of land belonging to Swett, designated as tracts 1 and 2, respectively, as aforesaid, and that Chase creek flowed across defendant's tract 3 in a westerly direction to the point of diversion, hereinbefore mentioned, on said tract 1. In the record before us this point is called the "1890 point," and for convenience we will use that designation hereafter. It is alleged that the plaintiff owns the right to have said creek flow naturally and undiminished to said 1890 point, and there to take one-half of said natural flow and carry the same to the plaintiff's said land for use thereon; that the defendants have diverted all the natural flow of the creek above said 1890 point, so as to prevent any water from coming down to said point and deprive the plaintiff of all use of said water, that they claim the right to do so by reason of their possession of said tract 3, and that said claim is without right.

The defendants answered, averring that defendant Swett is the owner of tract 3, admitting that she is in possession of same, and alleging that the possession of the other defendants is subordinate to her possession and that their rights depend upon her rights. It also avers that the natural flow of Chase creek does not reach the 1890 point and denies that plaintiff has any right to the water thereof at that point.

The findings are to the effect that plaintiff is the owner of the land as alleged in his complaint; that the defendant Swett is the owner of said tract 3; that Chase creek is a natural stream of running water arising easterly of tract 3 and flowing across the same into the defendants' tract 1 to the 1890 point aforesaid; that said tract 1 and tract 2 and the plaintiff's said land was, in 1890, a single undivided tract owned by Thompson and Chase as tenants in common, that all of said undivided tract was riparian to Chase creek, that the same was partitioned between Chase and Thompson, as previously stated, that by said partition deed there was set off to plaintiff's predecessor, and preserved to plaintiff's said land, the riparian right which said land had as a part of the original undivided tract, and that by said partition deeds the predecessor of Swett granted to the predecessor of plaintiff, "as a means of enjoying the riparian rights of the Thompson ranch, the right to exercise said riparian rights at said 1890 point" and to take the water at that point, together with the right of way for a pipe line to carry water from that point to plaintiff's said land; that said tract 3 and tract 1, belonging to defendant Swett, and said Thompson ranch belonging to plaintiff, are each and all riparian to said Chase creek; that as part and parcel of tract 3, defendant has, as against the plaintiff, the right as a riparian owner of tract 3 to take a reasonable share of the waters of the creek, but no more, for reasonable use upon tract 3, and not elsewhere, and for no other purpose, and that the defendants have no other claim or right in the waters of said creek by virtue of or because of their ownership or possession of tract 3. It was further declared that tract 3 is mountainous land not capable of agricultural use, except to pasture stock thereon, and that the only use of said water that can be made on said tract is for furnishing drinking water for stock pastured thereon; also that the defendants, against plaintiff's protest, have diverted the water from said creek and deprived the plaintiff thereof at said 1890 point, and that they have not used the same in any manner on said tract 3.

The material portions of the judgment are that plaintiff is the owner of the land aforesaid together with the water right in said Chase creek as aforesaid; that defendant Swett is the owner of tract 3; that tract 3 and tract 1 aforesaid, and also the land of the plaintiff, are riparian to said creek; that defendant Swett is entitled to take of the water of Chase creek a reasonable share and no more for use upon said tract 3, and not elsewhere or for any other purpose; that the only use of which it is available there is to supply water for stock pastured thereon during the period between January 1st and June 30th of each year; and that, except as to said rights of the defendant, the plaintiff is entitled, as part and parcel of his land, to have said creek flow naturally and undiminished to said 1890 point and there to take for use on his said ranch "the natural flow of said Chase creek"; and that the plaintiff's title thereto be quieted and the defendants be enjoined from claiming adversely thereto.

We learn from the briefs, although it does not appear in the record, that the diversion by the defendant on tract 3 complained of by the plaintiff, was the collection of all the water of the stream at some point on that tract and carrying it down in a pipe to a concrete reservoir constructed by defendant on h tract 1 on which the 1890 point is situated and there storing it for his own use on said tract 1 to the exclusion of any use thereof by the plaintiff. The record contains remarks and circumstances indicating that this is true, and it is not disputed by the defendant.

We also infer from the briefs that, after the decision by the district court on the former appeal in February, 1919, affirming the judgment of nonsuit as to tract 3, the plaintiff began the present action to quiet plaintiff's title to the water of Chase creek against claims of the defendant based on their possession of tract 3. The judgment appealed from in case S. F. No. 9559 was rendered several months before the trial of the present action. At the opening of the trial of this action the plaintiff offered in evidence the judgment roll in the action previously tried as aforesaid, claiming the right to do so and to have the same admitted and considered as a final adjudication between the parties, under a stipulation made in the other action on May 3, 1920, as a part of a stipulation therein extending the time to file a transcript on appeal. The portion of the stipulation referred to is as follows:

> "In consideration for the foregoing extension of time, said defendants waive pendency of said appeal as an objection to use by plaintiff hereafter, whether in this action or in any other, of the judgment roll in the case above entitled."

At the time of the trial of the present action, October 8, 1920, the appeal referred to was still undetermined. No objection was made to the introduction of the judgment roll, and the same was received in evidence. At the close of the trial, however, the defendant moved to strike out the judgment roll on the ground that it was not admissible as a final judgment, or as proof of the facts adjudicated thereby, because it had not yet become final, the appeal therein not yet having been decided. This motion was denied. In the course of the trial the defendant offered evidence to show the amount of water flowing in Chase creek on the lands in controversy. The plaintiffs objected on the ground that the judgment introduced in evidence adjudicated that matter, and that the defendant could offer no evidence to contradict the declaration in said judgment. That judgment purported to state the amount of water flowing in the creek at the 1890 point. The objection was sustained, and the defendant was not allowed to introduce any evidence on that subject. These rulings are assigned as error.

[4-8] Under section 4½ of article 6 of the Constitution, the appellate courts cannot set aside a judgment rendered in the superior court for any error in the admission or rejection of evidence or in procedure, unless the court, upon examining the record, shall be of the opinion that the particular error complained of has resulted in a miscarriage of justice. The facts which we have recited, with respect to the location and description of the land in controversy, are not disputed. The defendant offered no evidence to indicate that the other facts stated in the findings in the other case and declared in the judgment were not true. His complaint, except as to the quantity of water flowing in the creek, is altogether with respect to the conclusions of law found therein and embodied in the judgment. While it is true that the judgment in question had not become final at the time it was admitted in evidence, it will be final when our decision herein affirming it becomes final. At that time it will be an adjudication and will constitute an estoppel. Under all these circumstances, we are unable to see how the ruling can result in a miscarriage of justice as to the defendant. She disputes the conclusion that the lands of the plaintiff are riparian to the stream but she does not dispute that the stream runs through all the tracts in controversy, or that for a considerable period each year it carries water throughout its course, and the conclusion follows as matter of law. We have already shown that, under the facts found in case S. F. No. 9559, all the lands were, as matter of law, entitled to riparian rights in the stream at the time of the partition hereinbefore mentioned, and that the effect of that partition was to divide the riparian right and set off the one-half of that portion of the riparian rights which attached to said original tract to the tract now belonging to the plaintiff, as part and parcel thereof. It is clear, therefore, that when the judgment in case S. F. No. 9559 becomes final by our affirmance thereof, the defendant will be estopped to deny the existence or extent of plaintiff's riparian rights aforesaid. It is also clear that what she is endeavoring to do by the diversion of the water flowing on tract 3 is to collect the same for use on some other tract. The briefs show that she does this for use on her own tract 1, and this is not disputed. This she has no right to do as against the rights of the plaintiff. The rights of riparian proprietors on the same stream, with respect to each other, are mutual and reciprocal. Neither has a right to the whole stream as against the rights of the others. Each is entitled only to his reasonable share thereof, considering the rights and needs of the others, and such rights must be exercised and the use must be made only on the parcel to which the rights attach. Swett could not use her riparian rights on tract 3 to feed or increase her right on tract 1, or to collect it on tract 3 for the purpose of using it all on tract 1, without allowing to the plaintiff, for use on his land, his rightful share of the water so collected. We are of the opinion that the judgment should not be reversed because of the error, if it be such, in the admission and consideration of the judgment roll aforesaid as a determination of the riparian character of the water rights in question.

We think, however, that errors appear in the decree, perhaps made through inadvertence, which, if allowed to remain, would substantially impair the technical legal rights of the defendant, though not otherwise of substantial importance. It declares that the plaintiff is the owner of the right to have the creek flow naturally and undiminished to said 1890 point and there to take "the natural flow" of said creek. This means the entire flow. The complaint asserts a right to only one-half thereof. This part of the judgment was evidently a mistake. Whether the taking of the half be accomplished by a division of the flow at all times or by a division of the time of taking it all, is not material to our inquiry, and is not settled by the decree. Probably the latter is the only feasible method for so small a stream. The decree also declares, in effect, that the defendant cannot use the water of Chase creek, or any part thereof, on tract 3, except to supply water for drinking purposes to domestic animals pasturing thereon between January 1st and June 30th of each year. We do not think that it was within the province of the court thus to limit the riparian use of water. The future cannot be foreseen. The owner of tract 3 may use all the water at any place on that tract, provided it is not consumed and is all returned to the channel before it passes the boundary of the tract. There may be years when pasturage on the tract will be valuable at other times of the year than that allowed by the judgment. The use of the water for drinking should not be forbidden in that event. Any use made of the water on tract 3, which consumes it and prevents it from reaching the 1890 point, should be limited to such quantity as may be reasonable and just when taken in connection with the rights and needs of the other riparian tracts belonging to the defendant and plaintiff, respectively. Neither the pleadings nor the findings present this question for decision, and it must remain for future adjudication if necessity ever arises. The evidence indicates that the beneficial use that can be made of the water on said tract 3 is altogether too trifling to justify the expense of litigation, but it is not for the court, in its judgment, to attempt to forecast the future by a declaration to that effect.

From what we have said it necessarily follows that the judgment requires modification. The defendant has not seriously complained of the features which we have mentioned, and which we find to be erroneous. Obviously, the appeal was not taken to correct these particular errors, and we are of the opinion that our judgment directing the modification of the judgment below should not carry the costs of appeal. Indeed, it seems to us from the entire record in both cases that this litigation is the result of the persistent and unfounded claim of the defendant, Swett, that she has the right to take all of the water of the stream to the exclusion of the plaintiff, notwithstanding the effect of the partition of the land and the riparian rights attached thereto, whereby the title to one-half of the water flowing at the 1890 point remained attached to the plaintiff's land.

The judgment in case S. F. No. 9748 is vacated, with directions to the court below to enter a judgment on the pleadings and findings, in accordance with this opinion. Neither party shall recover costs on appeal, in case S. F. No. 9748.

We concur: RICHARDS, Justice pro tem.; SHURTLEFF, J.; WASTE, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

Amendment of Opinion.

PER CURIAM. It is ordered that the judgment of the Supreme Court set forth in the opinion filed March 24, 1922, be amended to read as follows:

It is ordered that the judgment of the superior court, entered in case S. F. No. 9748, be modified by striking therefrom the whole of paragraph numbered 6 thereof, and by amending paragraphs numbered 4 and 5 thereof, respectively, so as read as follows:

4. As part and parcel of said tract 3, defendant Swett is entitled, as against plaintiff, to take of the water of said Chase creek a reasonable share, but no more than a reasonable share, for use upon said tract 3 and not elsewhere, and for the reasonable use of said tract 3 but for no other purpose.

5. Except as in the preceding paragraph (numbered 4) stated, plaintiff is the owner of, and he and his heirs and assigns are entitled to the use of the right, as part and parcel of said Thompson ranch, to have said Chase creek flow naturally and undiminished to said 1890 point, where plaintiff, for use upon his said Thompson ranch, has the right to take one-half (½) of said flow.

As so modified, the judgment is affirmed. Neither party to recover costs on this appeal therefrom. The court below is directed, on the going down of the remittitur to reenter the judgment as thus modified.

SHAW, C. J., RICHARDS, Justice pro tem., and SHURTLEFF and LAWLOR, JJ., concur.

On Petition for Rehearing.

PER CURIAM. The appellant, defendant Swett, has applied for a rehearing in this case. She makes an entirely new objection to the judgment appealed from. We do not ordinarily notice a point made for the first time in a petition for rehearing. We depart from our rule solely because of a hope that an explanation of our view as to the effect of the judgment may prevent controversy between the parties.

The objection is to that part of the judgment which, in awarding to each party "one-half of the natural flow of Chase creek at said 1890 point," proceeds to state, in connection with the one-half allotted to plaintiff, the number of gallons, varying from 10,000 to 15,000 per 24 hours during specified months, as constituting one-half, and fixes a minimum of 9,000 gallons per 24 hours in the months not specified. The defendant suggests that nature may not produce water enough to make up these quantities, and claims that the judgment is so framed that, in the event of such shortage, the plaintiff is adjudged the number of gallons daily as stated in the judgment, notwithstanding the deficiency, and that, consequently, the defendant will get less than the one-half to which she is in justice entitled.

We do not so understand the judgment. It does not purport to control the forces of nature. In the event that the natural flow does not supply the quantity designated, each party will nevertheless be entitled to the one-half of the quantity which nature furnishes and actually flowing, even if this compels plaintiff to accept less than the quantity estimated in the judgment.

The petition for rehearing is denied.

SHAW, C. J., and LENNON, SLOANE, WILBUR, SHURTLEFF, and LAWLOR, JJ., and RICHARDS, Justice pro tem., concur.

188 Cal. 559

BRYAN v. REGENTS OF UNIVERSITY OF CALIFORNIA. (S. F. 10132.)

(Supreme Court of California. March 31, 1922.)

Colleges and universities 🔑2—Constitutional law 🔑205(2)—Requirement of tuition fee from citizens who have not resided in the state one year is reasonable classification.

Pol. Code, § 1394½, and the rules of the regents of the university thereunder, requiring students at the university to pay a tuition fee, if they have not been bona fide residents of the state for one year, is a reasonable classification of citizens, in view of the similar distinction made between citizens with reference to the right of suffrage by Const. art. 2, § 1, and Pol. Code, § 50, and the right to hold office by Pol. Code, § 58, so that it is not in violation of Const. art. 1, §§ 11, 21, prohibiting special immunities to any citizen or class of citizens, though one who has resided within the state less than a year is a citizen under Pol. Code, § 51.

In Bank.

Application for writ of mandate by Ernestine Bryan, against the Regents of the University of California, to require them to admit petitioner to the university without fee required of nonresidents. Writ denied.

John J. Goldberg, of San Francisco, for petitioner.

J. M. Mannon, Jr., of San Francisco, for respondent.

WILBUR, J. The petitioner seeks a writ of mandate to compel the respondent to admit her to the University of California. The respondent is willing to admit her as a student providing she will pay the fee fixed by the respondent for nonresidents, amounting to $75 a semester. This refusal of the respondent is in accordance with section 1394½ of the Political Code and rules of the state board of regents adopted in accordance therewith. This section, adopted in 1921, reads as follows:

> "An admission fee and rate of tuition fixed by the board of regents must be required of each nonresident student. The board of regents shall cause to be computed the actual cost to the university of maintaining one student in each of the respective courses of the several colleges for the period of one year. Each nonresident student shall be required to pay as the rate of tuition the sum provided for by the above computation for the particular course such student is following: Provided, that the maximum sum to be paid shall not exceed five hundred dollars: And provided, further, that such sum may be remitted in whole or in part in the case of graduate students in other than professional colleges and schools. A nonresident student as used in this section shall mean any person who has not for more than one year immediately preceding his entrance into the university been a bona fide resident of the state of California." Stats. 1921, p. 541.

It is contended that this legislation and the rule of the board of regents adopted in pursuance thereof violates article 1, sections 11 and 21 of the Constitution of the state of California. These sections prohibit the granting of privileges or immunities to any citizen or class of citizens "which upon the same terms shall not be granted to all citizens." It is pointed out that all persons residing within the state of California, except the children of transient aliens and of alien public ministers and consuls, are citizens (Pol. Code, § 51) and that, therefore, the petitioner is a citizen within the meaning of article 1, section 21, of the state Constitution. It is conceded that the Legislature has power to enact laws classifying citizens, where the classification is not unreasonable and arbitrary, and that legislation with reference to such classification is constitutional, but is is contended that there is no reasonable basis for extending the rights of the university to all other citizens and denying such privileges to citizens who have not resided within the state for one year. It must be conceded that it is permissible to classify citizens who have resided within the state one year for certain purposes, notably, that of voting. Section 50 of the Political Code provides:

> "The people, as a political body, consist: (1) Of citizens who are electors; (2) of citizens not electors."

The Constitution itself makes this classification. Article 2, § 1. Now, one reason for denying a citizen of the state the right to vote in the state until he has been a resident of the state one year is that his residence for one year within the state is evidence of his bona fide intent to remain in the state permanently, and for the same reason the requirement that the voter shall reside 90 days in the county and 30 days in the election precinct in which he seeks to vote, is also considered necessary. Only such persons are eligible to become public officers. Pol. Code, § 58.

There seems to be no good reason for holding that the Legislature may not make a similar classification in fixing the privilege for attendance upon the state university. It would be impossible for the state university to provide educational opportunities for all the citizens of the state. These facilities are necessarily limited. It is stated by the respondent that the number of scholars at the university have increased from 1,783 in 1900 to 10,599 in 1920. The expenditures for the next current biennial period are estimated at $9,000,000, almost equal to the entire annual expenditures of the United States government during the first years of its existence ($10,000,-

000). This expenditure is a heavy burden upon the taxpayers of the state. Taxes are payable annually and the requirement that a student shall maintain a residence in the state of California during one taxation period as an evidence of the bona fides of his intention to remain a permanent resident of the state and that he is not temporarily residing within the state for the mere purpose of securing the advantages of the university, cannot be held to be an unreasonable exercise of discretion by the Legislature or by the respondent. It follows that the exclusion of the petitioner does not violate her constitutional rights.

Petition denied.

We concur: SHAW, C. J.; SHURTLEFF, J.; LAWLOR, J.; LENNON, J.

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188 Cal. 505

GOULD v. GOULD. (S. F. 9925.)

(Supreme Court of California. March 28, 1922.)

1. Divorce ⚷62(2) — Residence in county where action commenced essential to jurisdiction.

Dismissal of an action for divorce for want of jurisdiction was proper where plaintiff stated she could not prove herself a resident, at the commencement thereof, of the county in which it was brought.

2. Divorce ⚷139—Stipulation by counsel held to authorize dismissal of entire action including cross-complaint.

Where the parties to an action for divorce, by attorneys of their own selection, orally stipulated for dismissal for want of jurisdiction on agreed statement of facts as to plaintiff's residence, without suggestion it might proceed on the cross-complaint, and no fraud was practiced on either party or the court, the judgment of dismissal was in accord with law and was not entered through defendant's mistake, inadvertence, or excusable neglect, so that it was an abuse of the trial court's discretion to set aside the dismissal.

3. Divorce ⚷294—Custody of child incidental.

On dismissal of an action for divorce no order providing for the custody of the minor child of the parties was required, the need of such provision being dependent on the granting of a divorce.

4. Divorce ⚷101—Not tried on cross-complaint where defendant denied plaintiff's charges in form only.

Where defendant categorically denied plaintiff's charges but alleged that the acts complained of were only apparently committed by him in carrying out a collusive agreement, and it appeared his denials were true only in form and not in effect, the action should not proceed at his instance, even if the judgment of dismissal for want of jurisdiction were not regularly made.

In Bank.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action for divorce by Vida Vick Gould against Augustus C. Gould. From an order vacating and setting aside a judgment of dismissal, plaintiff appeals. Reversed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, and Mannon & Mannon, of Ukiah, for appellant.

Augustus C. Gould, in pro. per.

WASTE, J. The plaintiff appeals from an order of the lower court vacating and setting aside a judgment of dismissal and restoring the case to the calendar to be set for trial.

The plaintiff brought an action against the respondent for a divorce, upon a number of grounds. The action was originally filed in the superior court of Los Angeles county, the plaintiff alleging herself to be a resident thereof, and was transferred to the county of Mendocino for the reason that the defendant was a resident of that county. The defendant filed an answer and a cross-complaint in which he sought the divorce. The matter came on in due time for trial, and on the day set therefor both plaintiff and defendant appeared in open court by their respective counsel. The attorneys for the plaintiff thereupon informed the court that the plaintiff was not at the time of the commencement of the action a resident of the county of Los Angeles, and, in support of that statement, laid before the court the facts, from which it conclusively appeared that the plaintiff was not a resident of the county of Los Angeles at the time she filed her complaint, and could not establish a jurisdictional fact, essential to making out a case for divorce. Flynn v. Flynn, 171 Cal. 746, 749, 154 Pac. 837; Dahne v. Superior Court, 31 Cal. App. 664, 161 Pac. 280. As bearing on the subsequent action of the defendant, what then occurred is important and is as follows:

"Mr. Mannon (counsel for plaintiff). Under these circumstances, your honor, I am prepared at this time to state that there is the matter of the custody of the child in this action; that Mr. Gould is entitled to have his day in court, therefore I agree at this time that the case may be set for trial and heard right away now. If counsel on the other side consent that my statement is the facts I am ready to submit the matter. I know what the law is, and I am satisfied that there is only one thing to do and that is a dismissal, and I consent that the action may be dismissed and that the decision of the court may be held over until Monday or some such time. This is not a matter of collusion but gives Mr. Gould his day in court.

"Mr. Witherspoon. Specially appearing for Mr. Gould in this matter I am ready to agree with Mr. Mannon: That Mr. Mannon and I have examined the law very carefully and I am ready to agree that there is only one thing to do. I am asking that the matter be submitted to the court at the present time and that the decision of the court may be reserved until, well say Monday and that will give us time in which to shape ourselves with regard to the custody of the child. We ask that the matter be submitted."

The court thereupon continued the matter, and in due time entered a judgment dismissing the action, without making any provision for the custody of the minor child of the parties. Shortly after the entry of the judgment the defendant, through other counsel, moved the court for an order vacating and setting aside, and relieving the defendant from the judgment, upon the ground that the same was entered without authority of law, and through defendant's mistake, inadvertence, and excusable neglect. In his affidavit accompanying the motion, the defendant asserted that he had instructed his former counsel, prior to the time of the submission of the cause, not to agree or stipulate to a dismissal of the action, for the reason that he had been informed by other counsel that the court had jurisdiction of the matter and might hear the testimony and decide the case on the cross-complaint of the defendant, irrespective of whether or not the complaint of the plaintiff was dismissed. The lower court granted the motion to vacate and set aside the judgment. It is from that order that this appeal is taken by the plaintiff.

[1, 2] We are of the opinion that the order vacating the judgment of dismissal was erroneously made and entered. When it appeared to the satisfaction of the trial court, through the stipulation of counsel for the respective parties at the time the case was called for trial, that, notwithstanding the allegation of the residence of the plaintiff contained in the complaint, plaintiff could not furnish the essential proof of residence, and the parties consenting, there was nothing for the court to do but to dismiss the case. The consent of both parties was for a complete dismissal of the action. There was no suggestion that the action might proceed on the cross-complaint of the defendant. The parties were represented in open court by their respective counsel, and, upon an agreed statement of facts, stipulated that the action be dismissed. No fraud was practiced upon either of the parties or upon the court. The defendant was represented by counsel of his own selection, who acted entirely within the scope of their duty as attorneys in the case. There is nothing in respondent's point, made on his motion to set aside the judgment, and renewed here, that the judgment was not entered in due accord with the law. Neither is there ground for the claim that the judgment of dismissal was entered through the defendant's mistake, inadvertence, and excusable neglect. It was, therefore, an abuse of discretion on the part of the trial court to set aside the judgment of dismissal.

[3, 4] Respondent's efforts to have the judgment set aside results, apparently, from a feeling of dissatisfaction arising from the failure of the lower court to make some provision for the custody of the minor child of the parties before dismissing the action. The question as to the proper custody of the child was an element of the case entirely incidental to the main relief sought, dependent alone upon the divorce proceedings. When a decree of divorce was denied either of the parties, and such was the result of the judgment of dismissal, the court was not required to make any order touching that subject. Brenot v. Brenot, 102 Cal. 294, 296, 36 Pac. 672. Aside from the fact that the judgment of dismissal was regularly made and entered, there is another reason why this action should not proceed at the instance of the respondent. While categorically denying the serious charges contained in the plaintiff's complaint, respondent, in his verified answer thereto, alleges the acts complained of were only apparently committed by him in carrying out an alleged collusive agreement with plaintiff. But we think it sufficiently appears that his denials were true only in form and not in effect.

The order appealed from is reversed.

We concur: SHAW, C. J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

188 Cal. 468

MORRIS v. STANDARD OIL CO.
(L. A. 6989.)

(Supreme Court of California. March 23, 1922. Rehearing Denied April 22, 1922.)

1. Appeal and error 🔑171(3)—Proceeding on theory that amendment was made prevents complaint.

Where, at commencement of trial, plaintiff asked for and was granted leave to amend his complaint, and counsel proceeded to trial on the theory that the change was made, defendant, who did not oppose the amendment, cannot complain that the amendment was not actually made.

2. Appeal and error 🔑1002—Findings based on conflicting evidence not disturbed on appeal.

In negligence cases arising out of collision between vehicles on city streets, where there was a conflict regarding the exact point or the precise manner of contact, it is not the province of the appellate court to review the conclusion reached by the jury on the testimony, if there is any rational basis for the verdict.

3. Negligence 🔑136(29)—Contributory of 13 year old child on bicycle held for jury.

Capacity of a 13 year old bicyclist to exercise care in avoiding a collision with a motor truck on a city street, was one of fact, falling within the province of the jury.

4. Municipal corporations 🔑705(10)—Looking down by a bicyclist at intersection not negligence.

The fact that a bicyclist looked down into a bag for a paper while crossing an intersection of city streets, did not constitute negligence, where he had been keeping a proper lookout and had no reason to believe that an approaching truck would attempt to make a turn at the intersection.

5. New trial 🔑76(4)—Duty of trial court not to permit jury to allow excessive damages.

Where juries, in assessing damages for personal injuries, indulge in reckless prodigality, it is the duty of the trial judge to correct the injustice.

6. Appeal and error 🔑1004(1)—Power of the appellate court over excessive damages exists only where passion, prejudice, or corruption appear.

The power of appellate courts over excessive damages exists only when the facts are such as to suggest passion, prejudice, or corruption on the part of the jury.

7. Damages 🔑131(2)—$25,000 excessive for injuries to legs.

A verdict for $25,000 for the tearing and lacerating of legs and ankles of a 13 year old boy was so excessive as to show passion and prejudice, where the injuries were not permanent.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Milton Morris, a minor, by J. M. Morris, his guardian ad litem, against the Standard Oil Company. Judgment for plaintiff, and defendant appeals. Reversed.

Lawler & Degnan and Geo. H. Moore, all of Los Angeles, and Dorsey Whitelaw, of El Centro, for appellant.

A. L. Hubbell, of Calexico, for respondent.

PER CURIAM. [1] The opinion of the District Court of Appeal herein, prepared by Presiding Justice Tyler, is adopted as the opinion of this court in all respects, except the last sentence thereof. Said opinion is as follows:

"Action for damages for personal injuries. Plaintiff, a minor, through his guardian, alleges in his complaint that, on September 17, 1920, he was riding a bicycle in a southerly direction on the west side of Imperial avenue, north of Seventh street, in the city of Calexico, Imperial county, in this state. At the same time an automobile truck belonging to defendant was being driven in a northerly direction on the east side of the same avenue. Plaintiff arrived at the point of the intersection of travel on the west side of the avenue and the north side of Seventh street before the truck of defendant, and attempted to cross the intersection in a southerly direction, when, it is alleged, the driver of the truck negligently and carelessly turned his vehicle to the west at said intersection without giving warning to plaintiff and without running to the right of the center and beyond such point of intersection. Plaintiff was knocked down and the rear wheels of defendant's truck caught and held him. His injuries, as alleged, consisted in the tearing and lacerating of both of his legs and ankles. The complaint alleged and prayed for damages in the sum of $15,000. At the commencement of the trial plaintiff asked for and was granted leave to amend the complaint by changing the allegation and prayer of damages to $25,000. The motion was not opposed, but the amendment was never made. Counsel, however, proceeded to trial upon the theory that the change had been made. Under these circumstances it cannot here complain. The case was tried before a jury and a verdict in favor of plaintiff in the sum of $25,000 was rendered, and judgment was entered accordingly. Thereafter defendant gave its notice of intention to move for a new trial on all statutory grounds. The motion was denied.

"Two principal points are here urged for a reversal of the judgment. It is claimed (1) that plaintiff was guilty of negligence as a matter of law, and (2) that the damages are so excessive as to shock the conscience.

"Upon the first contention it is argued that, under the law as applied to the uncontradicted evidence, the plaintiff was guilty of contributory negligence as a matter of law. The facts relied on as proving plaintiff's negligence are as follows:

[2] "Plaintiff testified that he was proceeding southerly along Imperial avenue, and before reaching Seventh street he was riding to the west of the paved avenue and approximately where the curb or gutter would be if the avenue were paved and curbed at that point; that as he was approaching Seventh street he saw two trucks coming toward him on Imperial avenue; that they were about a block away, the Standard Oil truck being ahead of a Dodge truck; that he was watching the trucks coming up the street and that they did not give any signal that they were going to turn off Imperial avenue onto Seventh street; that when he got about half way out and upon the intersection of the streets, he looked around or down into his sack for a paper—then he looked up and the truck was almost on him and he was struck by the right front wheel or fender or bumper; that the right front portion of the truck struck the front part of his bicycle, and knocked him off, and somehow he was injured by the rear wheel of the truck. Testimony of other witnesses is to the effect that plaintiff was looking down to take a paper from his bag at the time of the accident. From these facts it is contended that plaintiff was guilty of negli-

gence as a matter of law in riding out upon, as well as in proceeding and continuing on, the intersection of the streets without watching or observing the traffic. Plaintiff, however, also testified that he was watching the approach of the trucks and that they failed to give any signal that they were going to turn, and that he supposed they were going straight on, as they were traveling at a speed which, in his opinion, would not permit them to turn, and that he did not look down and reach for his paper until he was nearly half way across the north half of Seventh street. Appellant seeks to prove, from an analysis of the testimony, that it would be physically impossible for the truck to have arrived where the collision took place if plaintiff's statement were true. From this evidence it is claimed that the trial court erred in refusing defendant's instruction to find the issues in defendant's favor. In the character of cases here involved, where there is a conflict regarding the exact point or the precise manner of contact, it is not the province of the appellate court to review the conclusion reached by the judge or jury upon such testimony, if there be any rational basis for the verdict, and a finding regarding such negligence will not be disturbed on appeal. Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679; Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 Pac. 894.

[3] "Here plaintiff was a boy but 13 years of age, and his capacity to exercise care in avoiding a particular danger was one of fact falling within the province of the jury. Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 175 Pac. 690; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 Pac. 319.

[4] "If his testimony is to be believed there was nothing in the situation to warn him of impending danger, and his act of looking down for his paper, under such circumstances, did not constitute negligence. Simonsen v. Christopher Co. (Cal. Sup.) 200 Pac. 615.

"The second point urged by counsel for a reversal presents a more serious situation. The nature and extent of plaintiff's injuries were agreed upon. It was stipulated by the parties that if the physician who had treated plaintiff were present, he would testify to the following effect: That as a result of the accident the flesh on the leg and ankle of the plaintiff was torn, and that dirt and other foreign substances were ground into the flesh, substantially as alleged in the complaint; that the wounds were, at the operation, sterilized and treated and no infection from the original injury occurred; that there was a steady improvement of the general condition; that the stiffness which was present in the plaintiff's ankle and knee would by treatment be removed and full normal function restored in a period of from four months to one year; that a shortness of one-half to one inch of the leg as a result of the accident upon the muscles would also be removed within the time indicated, as would any atrophy of the muscular tissue from disuse; that no bones were broken.

"It further appeared in testimony that the plaintiff had suffered intense pain and had been nervous in consequence of the injury for several weeks, and that skin had been grafted upon the wounds; that at the time of the trial the left ankle had been entirely healed up and had been so healed for about a month; that the knee was not entirely healed at the time of the trial and was considerably stiffer than one of the ankles.

[5] "The injuries not being of a permanent nature, it is appellant's contention that there is no escape from the conviction that the verdict of $25,000 is grossly excessive and cannot be allowed to stand. It infrequently happens that juries indulge in reckless prodigality in dealing with property belonging to others. In such cases it is the duty of the trial judge to correct the injustice. In the instant case, the trial court, in passing upon the motion for a new trial, expressed the following opinion: 'I consider the verdict and judgment excessive, but the appellate court is better able from its wide experience to reduce it to the proper amount than I. The motion for a new trial is denied.'

[6] "It thus affirmatively appears that the trial judge passed the responsibility on. It was his plain duty to consider the testimony, and if he concluded, in his judgment, as he did, that the verdict was too large, to either provide for its reduction, or in default thereof, to grant a new trial. The question of excessive damages is one that is first addressed to the trial court. Practically, the trial court must bear the whole responsibility in every case. The power of appellate courts over excessive damages exists only when the facts are such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury. Bond v. United Railroads, 159 Cal. 270–286, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 Pac. 83; Bisinger v. Sacramento Lodge, etc. (Cal. Sup.) 203 Pac. 768.

"That the verdict herein rendered was exorbitant and did suggest to the trial judge that it had been improperly rendered is indicated by the expression of his opinion in the order denying the new trial. We are of the opinion that his conclusion upon the subject was correct, and that the case comes within the rule laid down in Bond v. United Railroads, supra, as indicating that it was rendered through passion or prejudice. Counsel, upon argument of the case have intimated to this court that, in the event of the judgment being deemed excessive, we fix the amount of the verdict. This duty we do not feel should be imposed upon us. This is not the province of appellate courts. The duty is one that is imposed on the trial court."

[7] There is no necessity for again trying any of the issues of the case except that of the amount of damages. All the other issues are sufficiently disposed of in the foregoing opinion, and the evidence does not indicate any necessity for further investigation thereof in the court below.

The judgment is reversed and the cause is remanded to the lower court for a new trial solely upon the issue of the amount of damages, with directions to that court, upon the settlement of that issue, to render judgment in favor of the plaintiff for the amount so found.

SHAW, C. J., and SLOANE, WILBUR, SHURTLEFF, and LAWLOR, JJ., and RICHARDS, Justice pro tem., concur.

188 Cal. 491

WESTINGHOUSE ELECTRIC & MFG. CO. v. LOS ANGELES COUNTY.

(L. A. 6725.)

(Supreme Court of California. March 24, 1922. Rehearing Denied April 22, 1922.)

1. Taxation 🔑98—Choses in action attach to domicile of owner.

For the purpose of taxation, choses in action follow and attach to the domicile of the owner, except where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicile so that its substantial use and value primarily attach to and become an asset of the outside business.

2. Taxation 🔑98—Credits of foreign corporation held not taxable as "property in the state."

Solvent credits of a foreign corporation, arising from sales on credit contracted through a sales agency within the state, *held* incident to the business of the foreign corporation at its domicile and not property in the state subject to taxation, under Const. art. 13, § 1.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

In Bank. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Westinghouse Electric & Manufacturing Company against the County of Los Angeles. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

A. J. Hill and Gordon Boller, both of Los Angeles, for appellant.

Bordwell & Mathews, of Los Angeles, for respondent.

SLOANE, J. The plaintiff is a foreign corporation engaged in the manufacture, distribution, and sale of electrical machinery and appliances, with its factories and principal place of business of East Pittsburgh, Pa. It maintains distributing and sales agencies for its products at various commercial centers throughout the United States and in foreign countries. One of these, serving the territory of southern California, Arizona, New Mexico, and part of Texas, is located at Los Angeles.

The question presented by this appeal is the right of the state of California to levy and collect taxes upon the solvent credits of the corporation arising from sales on credit contracted through this Los Angeles agency. Such a tax was levied for the year 1918-1919 in the aggregate sum of $1,585.66 and paid under protest. This appeal is by the county of Los Angeles from a judgment of the superior court awarding the plaintiff corporation a refund of the amount so paid.

The question presented is a very simple one in its statement, namely, Are these credits, owing to the Pennsylvania corporation, property in the state of California?

[1] Section 1 of article 13 of the Constitution of California directs that "all property in the state," with certain exceptions not applicable here, "shall be taxed in proportion to its value." The same section of the Constitution defines the word "property" as including "moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." The only element of uncertainty left is that of location. Where is the situs of these credits for the purpose of taxation? That proposition, too, so far as the general rule governing the location of intangible assets for the purpose for taxation is clearly settled under the decisions of this court. The rule that mere choses in action follow and attach to the domicile of the owner, as expressed in the Latin maxim, "Mobila sequuntur personam," has been repeatedly and consistently maintained. Estate of Fair, 128 Cal. 607, 61 Pac. 184; Pacific Coast Sav. Soc. v. San Francisco, 133 Cal. 14, 65 Pac. 16; Fenton v. Edwards, 126 Cal. 43, 58 Pac. 320, 46 L. R. A. 832, 77 Am. St. Rep. 141; Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382; People v. Park, 23 Cal. 139.

The latest expression of this court (Chambers v. Mumford, 201 Pac. 588), although arising in the matter of an inheritance tax upon the right of succession, directly recognizes the doctrine stated as the settled rule of California. It denies the right to tax within this state mere credits and rights of action belonging to nonresidents, though contracted and owing here and dependent upon the local courts for their enforcement. It is held that, in fixing the situs of intangible assets for purposes of taxation, no ground of distinction exists under the laws of California between levying a tax on the property and taxing the succession to property. The question is in either case the situs of the property in this state, and the conclusion reached is that the rule of "mobilia sequuntur personam" has been in force so long and has been so consistently followed that, if it is to be changed or modified, it should by legislation and not by the courts. Appellant's counsel cite, as the correct rule, a quotation from Board of Assessors v. Comptoir National, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. Ed. 232, as follows:

> "It may be taken as a general rule of the law of taxation of personal property that such property can only be taxed at the residence of the owner, or at such place as it has acquired a situs, which will subject it to the taxing power of the state where found."

The exception to the general rule contained in the italicized words of the quotation, while it cannot be gainsaid, sets at large the whole question and makes it necessary to determine under what conditions solvent credits owned by a nonresident may be said to have detached themselves from the domicile of the owner and to have become property in some other jurisdiction.

If we may venture to formulate a general statement of this modification of the rule, it would be that this can only result where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicile, so that its substantial use and value primarily attach to and become an asset of the outside business. In other words, while the nonresident may own the business, the business controls and utilizes in its own operation and maintenance the credits and income thereof.

The case of People v. Home Insurance Co., 29 Cal. 533, cited by appellant, does not go further than the principle stated. In the first place, the property of the nonresident there held subject to taxation in this state consisted of California state bonds. Municipal bonds and securities of that class, which are recognized as a commodity on the market and pass from hand to hand on delivery, are commonly treated as a species of tangible property in themselves, and on this ground, have been frequently held taxable as property wherever actually located. Furthermore, these particular bonds were permanently located in this state by the nonresident owner, an insurance company, under a statute requiring such deposit, and, as is pointed out in the opinion, "are separated from the owner and his domicile, and in the hands of an agent in this state, and in the character of property, by the express provisions of the act requiring the deposit, subjected to the jurisdicton of the state." McDougald v. Lilienthal, 174 Cal. 698, 164 Pac. 387, L. R. A. 1917F, 267; Murphy v. Crouse, 135 Cal. 19, 66 Pac. 971, 87 Am. St. Rep. 90; McDougald v. Lowe, 164 Cal. 107, 127 Pac. 1027.

In Lowry v. County of Los Angeles, 38 Cal. App. 158, 175 Pac. 702, certain shares of corporate stock owned by a resident of this state were held to have been removed from liability to taxation in California, where the legal title thereto had been transferred to nonresident trustees domiciled where the corporation was organized and where it had its principal place of business, and where the trustees were given full power to hold, manage, and control the stock, vote it and collect and disburse the dividends for certain specific purposes. Corporate stock is often given the status of tangible property in the state where the corporation is organized, on the theory that the shares represent the actual corporate assets.

The doctrine of a business situs, apart from the domicile of the owner as we have herein defined it, is substantially set out in the opinion of this court in Matter of the Estate of Fair, supra, where it is said:

> "There is an exception which has obtained extensive recognition—where the paper evidences of debt are in the possession and control of an agent of the owner in a state foreign to the domicile of the latter, and are held by the agent for management in the course of the permanent business of the owner, as for example, to collect the money to become due thereon and reinvest it, the securities are deemed to be taxable at the domicile of such agent."

In Mackay v. San Francisco, supra, a similar statement of the exception to the general rule is made.

> "The authorities generally agree that where the owner is not a resident of the state in which the credits are situated, and the credits are in the possession and control of a local agent, who holds them for the purpose of transacting a permanent business, and of investing and reinvesting the proceeds from the principal or interest in such manner that the property or credits come in competition with the capital of the citizens of the state in which the agent resides, that the credits have a situs for the purpose of taxation in the place of residence of the local agent."

The distinction we have pointed out is further emphasized in Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145, where the court, in commenting upon the foregoing citations from Estate of Fair and Estate of Mackay, supra, says:

> "But it will be observed that the exception to the general rule assumes that the securities 'are held by the agent for management in the permanent business of the owner,' at the place where they are held; and as was said in Mackay v. San Francisco, * * * the investment and reinvestment is 'in such a manner that the property or credits come in competition with the capital of the citizens of the state in which the agent resides.' In the instance of securities thus sent away as the basis for a permanent business in a foreign state, the accumulations to be there invested and reinvested, and the principal to remain as the source of income for the investments, the case is quite different from that of a temporary hypothecation as security for a loan. In the one case there is a transfer of capital from the owner's residence to the foreign state, there to be used in prosecuting a permanent business, and for the purposes of taxation for that reason is held to have a 'business situs'; in the other case, the transfer is for a specific and temporary purpose that may be accomplished in a brief space of time, and may be, and presumably is, to aid the business of the owner at his place and residence."

This seems to have been the precise situation as found by the trial court in the case before us. It was held that the solvent credits subjected to the disputed tax were incident to the business of the corporation in Pittsburgh, Pa., and were therefore not property in the state of California.

[2] We are of the opinion that the facts

of the case support the findings and conclusions of the court. The agency maintained by the plaintiff corporation in the city of Los Angeles was not an independent business, nor an independent branch of the principal business of the plaintiff. It was a sales agency, doing business, it is true, on a large scale, but doing business through and for and under the immediate control and management of the home office at Pittsburgh. The Los Angeles establishment maintained an expensive office, a warehouse carrying a large stock of the products of the home factories, employed a large force of agents and office assistants, but in the plan of its operation was not greatly different from that of some more modest foreign manufacturer who might be represented by a sales agent or two with a line of samples in the commercial rooms of a downtown hotel. Salaries, office, and warehouse rent, operating expenses with the exception of incidentals met by a local petty cash account, were paid from the home office. Orders were filled for the most part directly from the home factories, the warehouse stock being used only for smaller and emergency orders. All contracts were in the name of the Pittsburgh concern and payable to its order. If moneys were collected through the local agency, they were deposited to the credit of the home office, and were not held, paid out, or invested or reinvested by or for the local business. They became assets at once of the Pittsburgh concern and were as likely to be expended in Calcutta or London as in the Los Angeles district. The business done through this local agency undoubtedly was in competition with California business enterprises in similar lines, but only in the same way as that of any eastern establishment carrying on a mail order or sales agency business. In short, the plaintiff corporation was conducting this branch of its business through this local agency upon its general corporate capital, for the general benefit of its central factories, and the solvent credits here sought to be taxed were at all times part of the general corporate assets with no more relation to the Los Angeles agency than if they had been contracted in Canada or Cuba.

We find nothing within the scope of California authorities governing the situs of accounts or choses in action to authorize taking these credits out of the operation of the general rule. We have not attempted to review the authorities from other states, some of which have gone further than the announced policy of this court would justify, but most of which, in the facts presented, are clearly distinguishable from the case before us. In the absence of further legislation changing the status of intangible assets in this state for purposes of taxation, we see no reason for departure from the application of the rule consistently followed by this court, as herein stated.

We have not considered the item of interest included in the judgment, for the reason that the parties to the action have stipulated that such allowance of interest be eliminated.

The judgment will be modified by striking out the allowance of interest, and as so modified is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; LAWLOR, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

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188 Cal. 498

MEINDERSEE et ux. v. MEYERS.
(S. F. 9665.)

(Supreme Court of California. March 27, 1922. Rehearing Denied April 24, 1922.)

1. Appeal and error 🔑1041(3)—Owner of waterworks held not prejudiced by refusal of court to permit filing of amended answer.

In an action against an owner of waterworks system to recover for injuries to one falling into an excavation in the street, *held* that defendant was not harmed by action of court in refusing to permit him to file an amended answer setting up the fact that plaintiffs, in constructing their fence, had encroached upon the street, leaving less room to pass the excavation, in that there was no causal connection between the existence of the fence and the accident.

2. Waters and water courses 🔑195—Violation of ordinance requiring barriers for excavations in street negligence per se.

Owner of waterworks system was negligent in violating ordinance requiring every person making an excavation in the street to maintain barriers and place proper lights at night.

3. Municipal corporations 🔑821(20)—Whether wife or husband were guilty of contributory negligence held for jury, in action for injuries to wife falling into excavation.

In action by husband and wife for injuries to wife falling into an excavation in the street in front of their residence, of which they had knowledge, whether either of the plaintiffs was guilty of contributory negligence *held* for the jury.

4. Municipal corporations 🔑806(2)—Pedestrian had right to assume that excavation would not be left open at night.

Pedestrian who had knowledge of an excavation in a street had the right, in traversing the street at night, to assume that the excavation would not be left in an unguarded and dangerous condition.

5. Negligence 🔑69—Forgetfulness not negligence unless showing want of care.

Forgetfulness of a known danger will not prevent recovery unless it shows want of ordinary care.

6. Negligence ⚷117—Contributory negligence of husband of injured wife affirmative defense.

Contributory negligence of husband, in not warning his wife of dangers incident to an excavation in the street in front of the house, was a matter of affirmative defense and should have been pleaded in an action by husband and wife for injuries to the wife.

7. Appeal and error ⚷173(1)—Matter not urged below not considered on appeal.

Matters of affirmative defense, not pleaded or urged below, cannot be considered on appeal.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Alois Meindersee and wife against Fred Meyers. Judgment for plaintiffs, and defendant appeals. Affirmed.

Faulkner & Faulkner, of San Francisco, and Pierce & Carlson, of Richmond, for appellant.

T. H. Delap and Will S. Robenson, both of Richmond, for respondents.

WASTE, J. The plaintiffs, husband and wife, brought this action to recover damages from the defendant for injuries alleged to have been sustained by the wife, through falling into an excavation made in the street by employees of the defendant, and left in an unguarded condition. The action was tried with a jury, which awarded plaintiffs a verdict of $7,500. This amount was reduced by the trial court to $5,000, with the consent of the plaintiffs, as an alternative to granting a motion for a new trial. Judgment was entered for that amount, and the defendant has appealed.

The defendant is the owner of a waterworks system in the city of Richmond. On the afternoon of June 4, 1919, one of his employees began digging a trench in the street directly in front of the property of the plaintiffs, for the purpose of installing a water meter. The house is located in what appears to be a somewhat unimproved section of the city, and, owing to uncertainty as to the property line, the plaintiffs had constructed and maintained a fence around the supposed area of their lot, which also enclosed that portion of the street ordinarily used for sidewalk purposes. The front fence was, therefore, several feet nearer the water main in the street than it would have been had the fence been properly located. At the time of the accident a board walk, about 2½ feet in width, and 8 inches above the ground, extended from the front steps of the house, through a gate in the fence, into the street and over the location of the service pipe leading into the premises. In an effort to locate the stopcock and shut off the water, preparatory to installing the meter, the employee of defendant dug a trench, along and in the general direction of the service pipe, varying from 1 to 4 feet in width and about 20 inches in depth. Not having located the shutoff, the employee removed the walk and continued the trench about 8 feet toward the house. He was assisted in his search by another employee of defendant, who was more familiar with the premises. As they were unable to locate the stopcock by quitting time, the men concluded to abandon the work for the day. Mrs. Meindersee's attention was called to the work the men had done, with an explanation by them as to why they were quitting work, and was asked if it would be all right to leave the "ditch open" until the following day. She replied, according to the testimony of the defendant's employee, that "it was all right." The men then went away and left the open excavation unprotected by any barriers, and without warning lights, or other danger signals to indicate its presence.

Mr. Meindersee returned from his work about 5 o'clock, and was told by his wife that the defendant was installing a meter for the house. He walked out as far as the front gate, and, according to his testimony, casually glanced at the excavation, and went away. Some time later in the day both of the plaintiffs, according to their testimony, saw the defendant and one of his employees spend some time in front of the house. They also went away, leaving the trench open and unguarded.

Later in the evening Mrs. Meindersee and a neighbor, Mrs. Betzer, went to a moving picture show, going out by the back way. About 11 o'clock they returned. On alighting from the street car, Mrs. Meindersee took a path or trail across the block leading to the front of the house which, she testified, she always used, intending to go over the board walk to the front gate, and around to the back of her house. The night was dark, and, there being no lights or obstructions to guard the excavation, she fell into the trench and was badly hurt. No point is made on this appeal as to the extent or duration of her injuries.

[1, 2] The defendant, in his answer to the second amended complaint, denied specifically many of the essential allegations of the plaintiffs, and set up, as a defense, contributory negligence on the part of Mrs. Meindersee in carelessly putting herself in position to fall into the excavation, notwithstanding that she had actual knowledge of its existence. Thereafter the defendant sought leave of the court to file an amended answer containing some minor amendments, and setting out as a further defense that the plaintiffs were guilty of contributory negligence, in that they had erected and were maintaining an unlawful structure in a public street, to wit, the fence about the front of their lot, which enclosed part of the highway, and that such unlawful structure proximately contributed to the injuries sustained by Mrs. Meindersee. The request for leave to amend was accompanied by an affidavit on the part of the defendant wherein he alleged that he did not know of the existence of the fence until at or about the time of making such application. The plaintiffs objected to the amended answer, and the court permitted it to be filed only so far as the minor changes were concerned. Appellant contends that he was prejudicially injured by this ruling in that he was thereby deprived of the right to set up the maintenance of the fence in the street as one of the contributing causes of Mrs. Meindersee's injuries. His theory is, in brief, that but for the enclosure of a portion of the street within the fence, there would have been an open passageway along the sides of the excavation, where the open sidewalk should have been. We are unable to discover how that fact sheds any light upon the proximate cause of the accident to Mrs. Meindersee. She followed the usual path in going from the car to her home, and walked into the excavation which had been left in an unsafe condition by reason of the digging of the trench, and the removal of the board walk at that point. It is quite apparent that the proximity of the fence in the street had nothing to do with the accident. Notwithstanding that there might have been all sorts of ways for avoiding the pitfall by going around it if Mrs. Meindersee had known or appreciated its presence, the fact remains that the usual pathway used by her on such occasions led directly to the board walk and the gate in the fence. The defendant's employees removed the sidewalk and dug a deep hole in the path. They negligently left it open, unguarded, and unmarked, not only in violation of the ordinary rules of precaution in such matters, but also in direct contravention of an ordinance of the city of Richmond, which requires that every person making any excavation in the public streets shall place and maintain barriers at such places as may be necessary to prevent accidents, and shall protect such dangerous places with proper lights between sunset and sunrise, which latter fact, in addition, constituted negligence per se. Consequently we are unable to see how any ultimate prejudice was suffered by the appellant by reason of the action of the court in refusing him permission to set up the existence of the fence as a contributory cause of the injury to Mrs. Meindersee. He has shown no causal connection between the existence of the fence and the accident, on which to predicate the defense of contributory negligence. Hence he was not harmed by the ruling. Barrett v. Metropolitan Co., 172 Cal. 116, 120, 155 Pac. 645; Vallejo, etc., Ry. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

[3] The appellant contends that the evidence conclusively shows that Mrs. Meindersee knew of the existence of the excavation and the danger attendant upon the use of the street in proximity thereto; that she was bound by such knowledge as matter of law, and voluntarily assumed the risk attendant to the use of the street, there being another and safer means of access to and from her home by a back way. In the same connection appellant contends that the husband had knowledge of the dangerous condition of the walk, and the excavation, and was guilty of negligence in not warning his wife, and that both plaintiffs are barred from recovery thereby. There was evidence from which the jury might well have inferred that both Mrs. Meindersee and her husband had obtained considerable knowledge of the work being done by appellant's employees, and of the dangerous condition in which the pathway had been left. On the other hand, Mrs. Meindersee testified that when appellant's employees told her that the trench would be left open, a point on which appellant places much stress, the conversation took place just outside the screen door of her house, and that she took no notice of what had actually been done. The husband had apparent opportunity for a more extended observation of the unsafe condition of the pathway, but contended that his examination was of but a casual nature. There was considerable testimony by both of the plaintiffs, and minute cross-examination of them on that subject. The employees of defendant were also closely examined touching the same matter. While no particularly glaring conflicts are present, different conclusions as to the knowledge and conduct of the plaintiffs may be reasonably drawn by different minds from the same evidence, thus presenting a case peculiarly within the province of the jury to determine. Whether or not the information possessed by the plaintiffs was sufficient to impress upon their minds the danger incident to a use of the accustomed pathway in the dark, was a question for it to decide. We are unable to say, as matter of law, and against the testimony of the plaintiffs, that they had such notice, and did appreciate such danger. Even assuming that their observation of the work done was more or less extensive during the day it was for the jury to say whether it was a want of ordinary care for Mrs. Meindersee not to have the open excavation in mind when she returned home at 11 o'clock that night, for it has been repeatedly held that, even with full knowledge of such danger, one may be injured and yet be in the exercise of due care. Giraudi v. Electric Imp. Co., 107 Cal. 120, 126, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; Dwyer v. Salt Lake, etc., Co., 19 Utah, 521, 57 Pac. 535; Kelly v. Blackstone, 147 Mass. 448, 451, 18 N. E. 217, 9 Am. St. Rep. 730; Lowell v. Township of Watertown, 58 Mich. 568, 569, 25 N. W. 517; Maloy v. City of St. Paul, 54 Minn.

398, 402, 56 N. W. 94; Waltemeyer v. Kansas City, 71 Mo. App. 354, 358.

[4, 5] Appellant seeks to bring this case within the rule of those decisions which hold that momentary forgetfulness of a danger, which forgetfulness is not induced by some sudden and adequate disturbing cause, is itself, as matter of law, contributory negligence barring a recovery for personal injuries. See Reynolds v. L. A. Gas & Elec. Co., 162 Cal. 227, 122 Pac. 962, 39 L. R. A. (N. S.) 896, Ann. Cas. 1913D, 34, and Jacobson v. Oakland Meat Co., 161 Cal. 425, 119 Pac. 653, Ann. Cas. 1913B, 1194, and the cases cited therein. But, as was said by the court in the Jacobson Case, 161 Cal. 430, 119 Pac. 655, Ann. Cas. 1913B, 1194, "undoubtedly there was one element in all of those cases which is missing in this one, and that is the plaintiff's familiarity with the danger which he forgot." So here the evidence of both Mr. and Mrs. Meindersee tended strongly to negative any theory of familiarity with the condition in which the street in front of their house was finally left by defendant and his employees, or of appreciation of the dangerous condition created thereby. Mrs. Meindersee's observation, according to her testimony, was made from a point some distance from the work being done. She paid but little attention to what was going on in the street, and there is evidence that the fence and shrubbery in the yard to some degree obstructed her view. Both of the plaintiffs saw the defendant and an employee doing something later in the evening near the place where the men had been working. They had a right to assume that the defendant would not leave the trench in such an unguarded and dangerous condition, but would take the ordinary precaution to render the street and passageway safe for those having occasion to use it when the men were not working there. Furthermore, even forgetfulness of a known danger will not always operate to prevent such recovery for to forget is not negligence unless it shows a want of ordinary care. Generally the question is one for the jury (Roseberry v. Edward F. Niehaus & Co., 166 Cal. 481, 483, 137 Pac. 232), and the present case comes well within the rule.

[6, 7] The alleged contributory negligence of the husband in not warning his wife of the dangers incident to the unsafe condition of the street was a matter of affirmative defense, and should have been pleaded. No offer or attempt to plead it was made by appellant. Some evidence appears in the record, without objection on the part of the plaintiffs, to the effect that the husband did not so warn his wife, but it seems to have been offered in connection with the general issue as to the knowledge the plaintiffs had of the condition of the street, and is not sufficient to support appellant's contention that it was in response to an issue assumed to have been made, even though the rule of pleading should be so extended as to permit such a course. Consequently the appellant was not in position to, and apparently did not, urge the point in the court below, and certainly may not do so here. Crabbe v. Mammoth Channel Gold Mining Co., 168 Cal. 500, 504, 505, 143 Pac. 714; Hughes v. Warman Steel Casting Co., 174 Cal. 556, 562, 163 Pac. 885.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

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56 Cal. [illegible]

PARSHALL v. PARSHALL et al.
(Civ. 4161.)

(District Court of Appeals, First District, Division 1, California. Feb. 17, 1922. Hearing Denied by Supreme Court April 17, 1922.)

1. Trusts 🔑103(2)—Husband cannot claim conveyance by himself to wife and daughter was constructive fraud where he had no interest in the property.

A husband and father cannot claim that his daughter stood in a fiduciary relationship to him so as to render a conveyance by himself to the wife and daughter constructively fraudulent so as to have a trust declared where the trial court found upon sufficient evidence that he had no interest in the property conveyed, but that it belonged to the wife, and that he merely joined in the conveyance as the husband of the owner.

2. Appeal and error 🔑1011(1)—Trial court's findings on conflicting evidence are controlling.

Where the evidence is conflicting, the determination of the facts was a question for the trial court, and its findings are controlling on appeal.

Appeal from Superior Court, Los Angeles County; Henry C. Gesford, Judge.

Action by Alfred F. Parshall against Mary T. Parshall and others, to establish a trust and to compel conveyance. Judgment for defendants, and plaintiff appeals. Affirmed.

J. H. Ryckman, of Los Angeles, for appellant.

Wm. J. Variel, of Los Angeles, for respondents.

TYLER, P. J. This is an action to declare a trust in certain real and personal property, and to compel a conveyance thereof to plaintiff. An accounting is also asked for. By a fourth amended complaint it is alleged in substance that plaintiff and defendant Mary

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

T. Parshall intermarried in September, 1885, and ever since have been husband and wife; that defendant Leonora B. Parshall is the daughter of plaintiff and defendant Mary, she having been adopted by them in the year 1888, when a child but a few months old; that defendant T. N. Fierce is a nephew of defendant Mary; that in the year 1894 one Harriet E. Carleton, the mother of plaintiff, died and left the sum of $13,547.70 in real and personal property to defendant Mary, but nevertheless in trust, and upon the express understanding and agreement that she would hold the same, together with the rents, issues, and profits thereof, for plaintiff's benefit and support during his lifetime, and that upon his death the funds remaining in her hands should be distributed by Mary to the heirs at law of plaintiff or those designated by him; that Mary entered into possession of the property, and managed and controlled the same; that during the 29 years since their marriage plaintiff earned and placed in the possession of Mary sums of money with the understanding and agreement that the necessary proportion should be used for household expenses, and that the remainder should be held in trust by her for investment subject to the direction of plaintiff during his lifetime, and upon his death remainder over to his heirs; that said trust funds, together with the funds derived from plaintiff's mother, were commingled by Mary, and thereby formed one trust fund, with which she purchased and took title in her own name certain real property, described in the complaint; that prior to the 24th day of July, 1913, plaintiff demanded an accounting, and requested defendant Mary to deliver and convey to plaintiff said trust property, but that she failed and refused to account or convey as demanded, whereupon plaintiff filed an action to compel her so to do; that subsequently the parties agreed to settle and compromise the suit upon the following conditions: It was agreed, so it is alleged, that they should join in the execution of a deed to defendant Leonora B. Parshall of the real property involved in the suit, and that said Leonora should hold the title to the same, together with the rents, issues, and profits thereof, for the use and benefit of plaintiff, and subject to his direction, and, in the event of his death, that she should distribute it to his heirs at law or to those designated by him. It is then alleged that plaintiff was induced to enter into this compromise agreement through the fraudulent misrepresentations of all of the defendants, which misrepresentations were to the effect that the lawyers employed by plaintiff to enforce the terms of the alleged trust would rob plaintiff of his property, and that, if the same was left with defendants Mary and Leonora, it would still be his and subject to his control and dominion, and that upon his death all expenses of administration would be avoided; that at the time plaintiff entered into the agreement he was aged and infirm and unable to properly care for his interests, and that he relied upon the promises of his wife and daughter on account of the fiduciary relationship existing between them. Further allegations recite that defendant Mary, without the consent of plaintiff, conveyed certain of the personal property belonging to the trust fund to defendant Fierce without consideration, and that he is still in possession of the same. An accounting and conveyance of such trust property is prayed for.

Defendants, answering, admit that plaintiff's mother left to Mary the real and personal property described in plaintiff's complant, but they deny that the same was left in trust, or upon any agreement, express or implied, as alleged by plaintiff, but that, on the contrary, defendant Mary received such property as a specific devise under the last will of plaintiff's mother, absolutely as her sole and separate property, and that the same was distributed to her as such in the mother's estate. Denial is made that defendant Mary ever received any sums of money from plaintiff to be invested by her for the purposes mentioned in the complaint, and in this connection defendants allege that plaintiff, during his entire married life, wholly failed to provide for his wife, Mary, the common necessaries of life, and that he finally deserted her. The answer further denies that plaintiff was ever induced to enter into a compromise agreement through misrepresentation or fraud, and it is alleged that plaintiff at no time had any interest whatever in the real property described in the complaint, but that he joined in the execution of a deed to such property merely as the husband of Mary, and for no other purpose. It is then recited that defendant Mary never received any property of any kind or character from plaintiff, either community or otherwise, but that whatever earnings plaintiff acquired during his married life were spent by him in dissipation.

The case was tried before the court without a jury, and all the allegations contained in plaintiff's complaint were found to be untrue. It appears from the record that plaintiff and his wife have, since the year 1913, been engaged in extensive litigation. About that time plaintiff brought suit against his wife for divorce on the ground of cruelty. In that action he prayed judgment for all the property held by his wife. Defendant answered and cross-complained, and relief was denied both parties.

Plaintiff thereupon brought an action similar to the present one, by which he sought to have all the property held by his wife awarded to him. A few days thereafter the parties compromised their differences and entered into a written agreement concerning the same. This agreement recited the differences between the parties concerning their claims to the property held by defendant Mary, and provided that in settlement thereof such property be conveyed to defendant Leonora in consideration that all claims between plaintiff and his wife concerning their title to the property, and all claims arising by way of alimony or maintenance be forever settled and released. The evidence fails to show, as alleged by plaintiff, that the property so conveyed to defendant Leonora was not absolute and freed from any condition. It does show, however, that about the time of the conveyance of the property to Leonora plaintiff and his wife were sued for attorney's fees. In this suit one-half the property was claimed by such attorneys, who alleged in their complaint that the property transferred by plaintiff and his wife to Leonora was conveyed in trust merely. In that action plaintiff herein made separate appearance by answer and alleged that such property was not held in trust for him or his wife, or either of them, and it here appears, according to his testimony, that the conveyance by him of whatever interest he may have had in the property was for the purpose of defeating the suit brought by the attorneys in their action against himself and wife.

[1, 2] Plaintiff claims that the evidence shows that the conveyance made by him was to one occupying toward him a fiduciary relation, and is for that reason constructively fraudulent, and should be set aside. We see no force in this contention. The trial court found upon sufficient evidence that the plaintiff never owned any of the property which he here seeks to recover. As to the property derived from the estate of plaintiff's mother, the finding is that defendant Mary received the same as her sole and separate property. With reference to any other property, the court found that, while plaintiff had, during his marriage with defendant Mary, earned various sums from time to time from his labor, he had never given any portion of the same to his wife in trust or otherwise. These findings are fully supported by the evidence, and are determinative of the issues in this case. The litigation between the parties presents a sordid tale. The evidence, however, is conflicting, and the determination of the facts was a question for the trial court to determine. Its findings and conclusions in the matter are controlling here.

For the reasons given, the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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56 Cal. App. 553

PARSHALL v. PARSHALL et al.

(Civ. 4173.)

(District Court of Appeal, First District, Division 1, California. Feb. 17, 1922.)

1. Parent and child 🔑4—Obligation of child to support parent is purely statutory.

At common law there was no obligation on the part of the child to support the parent, and such obligation therefore depends entirely upon the statute, and does not exist unless the one from whom support is claimed stands in the relationship of a child within Civ. Code, § 206.

2. Parent and child 🔑4—"Child" raised by plaintiff, but not adopted, is not obliged to support him.

Where plaintiff and his wife had taken a foundling and raised her to maturity, but had never adopted her, though standing in loco parentis, the foundling is not a "child" within Civ. Code, § 206, requiring a child to support an indigent parent if able to do so, even if that section applies to adopted children.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Child—Children.]

3. Adoption 🔑1—Holding out defendant as child of plaintiff is not equivalent to adoption.

The fact that plaintiff and his wife had permitted defendant to be known as their child, and that she lived with them, and bore their name, does not constitute an adoption.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Alfred F. Parshall against Mary T. Parshall and another for maintenance. Judgment for defendants, and plaintiff appeals. Affirmed.

J. H. Ryckman, of Los Angeles, for appellant.

F. G. Tyrrell, of Los Angeles, for respondents.

TYLER, P. J. This action was brought under the provisions of section 206 of the Civil Code to obtain a judgment that defendants pay to plaintiff for his personal permanent maintenance and support the sum of $100 per month, together with costs and counsel fees. It is averred in the complaint that plaintiff and defendant Mary T. Parshall were married in the year 1885, and that they now are husband and wife, and that the defendant Leonora Parshall is their adopted daughter. It is charged that defendants expelled plaintiff from his home, and plaintiff alleges that he is of the age of 76 years and upwards, that he is poor, and has no means of support, but that defendants have real and personal property of the value of $50,000. Defendant Mary T. Parshall, answering, denied that she had any property of value, and defendant Leonora Parshall denied that she was the adopted daughter of plaintiff. The trial court found that, as to Leonora Parshall, while she had resided with plaintiff and his wife for 34 years, and since she was an infant child of some 4 or 5 months of age, she was not the child of plaintiff and Mary, and that she was never adopted by them.

The court further found that prior to February, 1913, plaintiff earned an income of $5,000 annually, and had turned the same over to his wife, but that she had given to plaintiff considerable sums of money. It further found plaintiff to be poor, and physically unable to maintain himself. The findings also show that in July, 1913, and prior to the commencement of this action, plaintiff and his wife had entered into a written contract by the terms of which they had, in settlement of their property differences, including any claim for maintenance or alimony, conveyed all the property they possessed to defendant Leonora Parshall, who is still possessed of the real property so deeded to her, and which is of considerable value. Additional findings show that defendant Mary Parshall is not possessed of any property of any value, she having according to the terms of the settlement agreement had between herself and plaintiff, conveyed all she possessed of value to Leonora. It also appears that plaintiff was not expelled from his home, but, on the contrary, that he abandoned his wife in September, 1913, since which time they have lived separate and apart. As conclusions of law the court then finds that plaintiff is not entitled to any relief against either of the defendants. From this judgment plaintiff appeals, and he claims that under the facts defendant Leonora Parshall is liable for the support of plaintiff under the provisions of section 206 of the Civil Code. That portion of the section applicable to the present case declares in substance that it is the duty of children of any poor person who is unable to maintain himself by work to provide for such person to the extent of their ability.

[1] At common law there was no legal obligation on the part of a child to support a parent. Such obligation, therefore, depends entirely upon statute. Duffy v. Yordi, 149 Cal. 140, 84 Pac. 838, 4 L. R. A. (N. S.) 1159, 117 Am. St. Rep. 125, 9 Ann. Cas. 1017. In many jurisdictions there are statutes similar to ours changing the common law rule, which statutes impose upon children the legal duty to relieve and maintain their indigent parents. In the construction of these statutes it has been held that, unless the person sought to be charged comes within the line of the relation prescribed therein, no duty of support can be imposed upon him. Thus it has been held that the primary sense of the word "child" under statutes of this character is offspring, and that in the sense of that relationship it does not include a grandchild, a son-in-law, mother-in-law, stepchild, or even an adopted child. Adams v. Merrill, 45 Ind. App. 315, 85 N. E. 114, 87 N. E. 36; Selectmen v. Montague, 3 Conn. 507; Commissioners of the Poor v. Gansett, 2 Bailey (S. C.) 320, 23 Am. Dec. 139; Houston v. McKinney, 54 Fla. 600, 45 South. 480. It would appear, therefore, that defendant Leonora is not of the class which, on account of its relationship, is, by the provisions of section 206 of the Code, made liable for the support of a pauper relative, and the mere fact that plaintiff stands in loco parentis to Leonora does not bring her within its purview.

[2, 3] But, even were we to assume that the section in question applies to children by adoption, still it would avail plaintiff nothing, for the reason that the record fully supports the finding that she never was adopted. The evidence upon this subject shows that she was taken from a foundlings' home in Missouri when she was 4 or 5 months of age, and that, while tenderly reared by these parties as a daughter, and generously provided for, she never was formally adopted, appellant himself refusing to execute the deed required by the Missouri statute to create this relationship. It is true that she was known as the child of plaintiff and his wife, and that she lived with them and bore their name, but such facts do not constitute an adoption. Estate of Romero, 75 Cal. 379, 17 Pac. 434; Estate of McCombs, 174 Cal. 211, 162 Pac. 897; 1 Corpus Juris, 1394, § 116. There being no adoption, the status provided for in the statute therefor never existed, and no claim of the character here involved can flow from the relationship here shown.

We are not here dealing with the conscientious or moral duty of defendant Leonora toward her aged benefactor, now poor and in distress. Our powers are restricted by the statute.

Further claim is made that the conveyance by plaintiff of all his property to defendant pursuant to the agreement with his wife was constructively fraudulent. No such issue is here raised. The property rights of the parties are disposed of in Parshall v. Parshall, Civ. 4161 (Cal. App.) 205 Pac. 1081, this day decided.

For the reasons given, the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

52 Cal. App. 788

LOS ANGELES COUNTY FLOOD CONTROL DIST. v. ANDREWS et al.

(Civ. 3528.)

(District Court of Appeal, Second District, Division 2, California. May 24, 1921. Remittitur Issued July 23, 1921.)

1. Vendor and purchaser 🔑3(4)—Instrument held merely an option.

An instrument concerning future sale of land and bearing the notation, "I, said C. H., do hereby accept the option above written together with its conditions," *held* purely unilateral and only an option.

2. Vendor and purchaser 🔑3(4) — Signature of optionee to option does not evidence a contract of sale.

When an option is signed by the optionee, it is not because of that signature to be dignified by a higher name, and does not thereby evidence a contract of sale between the signers.

3. Eminent domain 🔑153—Optionee on condemned land held not entitled to damages.

One holding an option on condemned land was not entitled to an award of damages where at the time of the issuance of summons the property was worth less than the selling price fixed by the option agreement.

4. Eminent domain 🔑155 — Lessee held not entitled to damages.

A lessee in possession at the time summons was issued in a condemnation proceeding was not entitled to damages where permitted to remain unmolested to the end of his term; the rule that damages are to be assessed as of the date of the issuance of summons relating only to property actually taken.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Los Angeles County Flood Control District against Dorsey G. Andrews, the Harbor Lumber Company, and others. Judgment for plaintiff, and the last-named defendant appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, and Vincent Morgan, both of Los Angeles, and Wm. W. Clary, Sp. Counsel, of San Francisco, for Los Angeles County Flood Control Dist.

WORKS, J. This is an action for the condemnation of real property under the right of eminent domain. Plaintiff had judgment, and defendant Harbor Lumber Company appeals.

On May 27, 1916, the Long Beach Savings & Trust Company entered into a writing with Clark Horsford, the trust company being the owner of the property sought to be condemned, and in which appellant claims an interest, and Horsford acting as the agent of appellant. On account of Horsford's peculiar manner of executing the document, which appears below it is to be remarked that both parties signed it the same day. The instrument, in its material parts, after the heading "Offer to Sell and Option," follows:

> "The Long Beach Savings & Trust Company, a corporation, party of the first part, and Clark Horsford of Los Angeles, party of the second part, witnesseth:
>
> "That first party holds title * * * to the lands herein described, and said second party has a wish to become the owner of the same at some future time:
>
> "Therefore it is agreed as follows, and this offer is made to second party by way of an option and not otherwise, and it is especially agreed that time is of the essence of this agreement:
>
> "First party will sell and deliver a grant deed with a certificate of title to the same showing the ability to convey a good title to the property, subject to the taxes for the fiscal year the option is taken up and which buyer assumes. And subject. * * *
>
> "Buyer also agrees to assume any liability or liens for any hereafter public improvements assessed against said property. * * *
>
> "The purchase price for the property is agreed upon at $45,000. * * *
>
> "The first party gives second party and his assigns a three-year option from date hereof to take it up and perform this agreement.
>
> "Buyer to pay in cash at time of going into escrow to perform this agreement to close the sum of $15,000, and the remainder to be paid under this option is to be paid in equal sums in one and two years thereafter, secured by the usual form of mortgage. * * * And said deferred payments are to bear interest at the rate of 7% per year. * * *
>
> "This agreement is subject to a certain lease between the parties hereto. And if this option is taken up lessee named in this lease will surrender the same and it becomes canceled.
>
> "Buyer is to pay the cost of bringing down certificate of title, it to show mortgagee's mortgage to be a first lien. * * *
>
> "And each party takes the property subject to recorded liens as are usually assumed by parties dealing with such property. * * *
>
> "The lands are known as follows: [Here follows a description of the lands sought to be condemned.]
>
> "In witness whereof said Long Beach Savings Bank & Trust Company has caused its corporate name to be hereunto subscribed by its proper officers. * * *
>
> "[Signed]
>
> "Long Beach Savings Bank & Trust Co.,
> "By J. W. Tucker, Secretary.
>
> "I, said Clark Horsford, do hereby accept the option above written together with its conditions. [Signed] Clark Horsford."

On June 1, 1916, appellant took from the trust company a lease for three years on the property described in the above instrument, and was thereafter in possession of the premises under the lease.

In December, 1918, respondent purchased from the trust company the property described in the two instruments, appellant still being in possession of the premises under the lease. The appellant was not molested in its possession by reason of the purchase by respondent, but thereafter it paid to respondent the monthly rent reserved in the lease.

The complaint in this action was filed March 20, 1919, and summons was thereupon issued. The pleading alleges that appellant claims some interest in or lien upon the property, but that it has no valid or legal interest in or claim to or lien upon it. Appellant, in response, set up the instrument from which quotation is above made, terming it an option, and also pleaded the lease. It also claimed damages for certain structures it had placed on the land, under allegations that they could not be removed without being destroyed

The trial of the action was commenced on July 24, 1919. Meanwhile, on June 1, 1919, the term under the lease had ended, appellant having continued, during the term, to pay the monthly rentals to respondent. Also appellant held over until during the trial, as a month to month tenant, continuing to pay the monthly rental to respondent.

The trial court found that the agreement between the trust company and Horsford was but an option; that the option provided that time was of the essence of the agreement; that appellant did not exercise the option; that it did not within three years, or at all, accept the option, or offer the purchase price according to the terms of the option; that appellant had no right, title, or interest in the property; that on March 20, 1919, the date of the issuance of summons, the property was worth less than $45,000, the purchase price fixed by the option agreement; that appellant was not entitled to damages for expenses of removal of its structures from the land or for expenses of relocation; and that the option had not on March 20, 1919, any market value.

[1, 2] Appellant contends that at the time of the issuance of summons, that being the time as to which values in condemnation cases are to be fixed (Code Civ. Proc. § 1249), it was an equitable owner of the land sought to be condemned. This claim is made because of the unusual manner in which Horsford indicated his execution of the option agreement. It is evident from the terms of the instrument that he was to be a signer of it. In the introductory paragraph he is referred to by name as the party of the second part. His name is not found again in the agreement, but the second party is referred to continually. Couched as the instrument was, his signing in the manner in which he did placed him in no different position than if he had merely appended his name after that of the secretary of the trust company. And his being a party to the paper was of no significance whatever. It was purely unilateral, for he made no promises above his signature; he covenanted to do nothing. In short, and without dissection of the instrument, it is plain to be seen that it was nothing but an option; and when an option is signed by the optionee it is not because of that signature to be dignified by a higher name. It does not thereby evidence a contract between the signers. Menzel v. Primm, 6 Cal. App. 204, 91 Pac. 754; Johnson v. Clark, 174 Cal. 582, 163 Pac. 1004.

Forgetting, for the moment, the construction we have placed on Horsford's act in signing the statement at the bottom of the option agreement, that construction being based upon the fact that he was intended to be the party of the second part to it, there is another view of the situation which concludes appellant's claim that the act amounted to an acceptance of the option. Conceding, which we do not decide, that an option may be accepted, in the sense that a binding obligation is assumed by the optionee, by a statement such as Horsford appended to the instrument now before us, it is certain that the parties intended nothing of the sort in this instance. It is to be remembered that Horsford wrote his contribution to the paper on the same day that the corporation executed it, thus apparently making the two acts but parts of one transaction. Under these circumstances, and considering the language employed throughout the option agreement, it is plain that the parties never intended Horsford's signature to operate as an acceptance of the option. The argument on this point is forcefully presented in a series of questions set forth in the brief of counsel for respondent. These questions are, with the italics of counsel:

> "If it was intended by Horsford * * * that the so-called acceptance * * * was to be deemed a complete and binding acceptance of the offer to purchase [sell] so as to constitute a contract of sale, why did not the parties prepare and sign a contract of sale instead of that which is manifestly a mere offer to sell? Why is it that the instrument is so specifically termed an '*Offer to Sell and Option*'? Why is it that the 'offer is made to second party by way of an option, and not otherwise'? Why is it that the instrument specifies that 'said second party has *a wish to* become the owner of same *at some future time*'? Why is it that reference is made therein to a lease to be surrendered if the option is taken up? Why is it that in the offer it is recited that 'the first party gives second party and his assigns *a three-year option from date hereof to take it up and perform this agreement*' if, as appellant now contends, the signature of Horsford constituted a full and complete acceptance of the option so as to transform it *immediately* into a contract for the sale of the lands?"

There is but one answer to these questions, and that answer we have stated in advance of the questions. We conclude that appellant never had any interest in the property under the option agreement.

[3] Suppose, however, that appellant did acquire an equitable interest in the land under the so-called acceptance of Horsford. There is yet a ground upon which the claims of appellant are concluded. The trial court found that, at the time of the issuance of the summons, the property was worth less than $45,000, the selling price fixed by the option agreement, and the propriety of that finding is not questioned. Under such a finding there could have been, of course, no possible award of damages to appellant for the taking of its interest through the condemnation. If we concede an existence of the interest, we must assert that it was but a nominal one, for under the finding of the court it was utterly without value.

[4] Appellant contends, upon the asserted claim that it was in possession of the property under both the option and the lease, that it was entitled to damages for expenses of removal and relocation of its structures and for other items of a like character. The assertion that it held under the option goes for naught after what we have said above; and even if we concede, yet once again, that Horsford's signature amounted to an acceptance of the option, the situation is unchanged, for there is nothing in the option agreement which gave to appellant any right to the possession of the land. Its possession was referable alone to the lease, executed four days after Horsford had appended his signature to the agreement. That being so, appellant was not entitled to damages in the particulars mentioned. Its structures were placed on the land with knowledge of the fact that its leasehold interest was to expire on June 1, 1919, under the terms of the lease itself, and it did so expire. The leasehold interest was not taken nor molested by the decree of condemnation. Appellant contends that its right to the damages in question is established by the fact that its leasehold was interrupted, in contemplation of law, on March 20, 1919, the date when summons was issued; but the rule that damages are to be assessed in condemnation cases as of the date of the issuance of summons relates only to property actually taken. An anomalous and unbearable condition would be presented if, under that rule, the public could be required to pay for a leasehold interest not taken, but which the lessee held unmolested to the end of the term, or for the cost of the removal of structures which the lessee must have removed before the expiration of the term, or must have lost altogether. Fortunately, such a condition does not exist under the law. Schreiber v. Chicago & E. R. Co., 115 Ill. 340, 3 N. E. 427.

Respondent presents a number of other arguments in opposition to the claims of appellant, but we need pursue the subject no further.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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56 Cal. App. 503

SHEVLIN v. JOHNSTON. (Civ. 2429.)

(District Court of Appeal, Third District, California. Feb. 20, 1922.)

1. Appeal and error ⟹907(3)—Want of evidence to support issues upon which court failed to make findings presumed on appeal on the judgment roll.

On appeal on the judgment roll, it will be assumed that no evidence was given in support of issues upon which the court failed to make findings.

2. Adjoining landowners ⟹5 — Required to prevent roots from trees near boundary from injuring trees and crops on adjoining land.

Where roots of eucalyptus and cottonwood trees on defendant's land near boundary injured trees and crops on plaintiff's land, plaintiff was entitled to a judgment requiring defendant to abate such nuisance and was not restricted to an action at law for damages, as the injury was of a continuing and increasing nature.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by F. C. Shevlin against A. O. Johnston. Judgment for plaintiff, and defendant appeals. Affirmed.

R. R. Fowler, James C. Nichols, and Fowler & Nichols, all of Turlock, for appellant.

Andrew R. Schottky, of Merced, for respondent.

FINCH, P. J. The defendant appeals on the judgment roll from a judgment in favor of the plaintiff.

The complaint alleges and the court finds that the parties are adjoining landowners, their common boundary being 1,300 feet in length; that along said boundary line, from 1 to 10 feet therefrom, there is growing a row of eucalyptus and cottonwood trees on defendant's land, spaced from 6 to 8 feet apart; that the roots of the eucalyptus trees extend laterally a distance of 62 feet and upwards, and those of the cottonwood trees 30 feet and upwards into plaintiff's land; that on plaintiff's land, adjacent to the division line, are growing grapevines for a distance of 450 feet, peach trees for a distance of 485 feet, and that plaintiff grows corn, beans, and other crops along 355 feet of said line; that the roots of defendant's trees greatly injure plaintiff's vines, trees, and crops and cause cottonwood sprouts and shoots to spring up; that the plaintiff's land is rich and valuable for agricultural and fruit-raising purposes. The court found that plaintiff has suffered damage in the sum of $25, and that the damage from the growth of the roots of defendant's trees into plaintiff's land is of a continuing nature, and that said growth constitutes a nuisance. The court found against defendant on his pleas of acquiescence, estoppel, and the statute of limitations, and his claim that the row of trees was necessary as a windbreak and in accordance with the custom of the neighborhood. The court further found that at the time of the commencement of the action the neighborhood was thickly settled and was "dotted with many homes and covered with innumerable orchards and vineyards, which render and rendered said trees not indispensable as a windbreak for defendant."

The judgment requires:

> "That the defendant shall abate said nuisance, either by removing said trees entirely or by constructing a trench or by building barriers sufficient to prevent the roots of said eucalyptus and cottonwood trees and the shoots and sprouts of said cottonwood trees from entering, penetrating, or growing into or upon the land of plaintiff; * * * that said abatement shall be permanent in its nature, and that the roots, sprouts, and shoots of said trees shall not hereafter, be permitted to enter, penetrate, or grow into or upon the land of plaintiff."

[1] Appellant urges that the findings are insufficient to support the judgment, and that the court failed to find on certain issues tendered by the answer. There can be no doubt as to the sufficiency of the findings. If the issues on which the court failed to make findings be conceded to be material, it must be assumed on this appeal on the judgment roll that no evidence was given in support of such issues.

[2] In his opening brief appellant says:

> "The plaintiff certainly has the right to cut off the roots at the line. But, under the findings of the court, he has no other right."

The precise question here presented was decided adversely to appellant's contention in Stevens v. Moon (Cal. App.) 202 Pac. 961. In addition to the cases cited therein, the following are in point: Ackerman v. Ellis, 81 N. J. Law, 1, 79 Atl. 883; Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188; Brock v. Connecticut & P. R. Co., 35 Vt. 373; Gostina v. Ryland (Wash.) 199 Pac. 298.

Appellant contends that under the doctrine of "comparative injury" the plaintiff should have been left to an action at law for damages because the injury suffered was slight in comparison with the benefit of the windbreak to the defendant. The injury was of a continuing nature and naturally would increase with the growth of the trees. The fact that the damage already suffered is slight is no reason for denying the relief given. Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 327, 187 Pac. 1056. It is reasonably within the power of the defendant to prevent the injury without destroying his trees, if he desires to preserve them. Under such circumstances, if it be conceded that the doctrine relied on is ever applicable to a case of the character under consideration, the party causing the nuisance should bear the expense of abating it.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

56 Cal. App. 612

SMITH v. CROWE et al. (Civ. 3621.)

(District Court of Appeal, Second District, Division 1. California. Feb. 24, 1922.)

1. Landlord and tenant 🔑128(2)—Assignor of lease held not to lose right to recover balance due from assignee because subtenant held over.

Assignor of lease did not lose his right to recover the consideration because a subtenant did not vacate at time assignor agreed to vacate the premises, where defendants voluntarily assumed the relation of landlord toward such subtenant, putting them constructively into possession at the date fixed.

2. Landlord and tenant 🔑128(1)—Evidence held to show vacation of premises in accordance with agreement.

In an action by an assignor of a lease for unpaid balance due on the assignment, evidence *held* sufficient to warrant a finding that assignor vacated the premises on the day agreed under the contract.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Ed. R. Smith against Margaret R. Crowe and others to recover money due on an assignment of a lease. Judgment for the defendants, and the plaintiff appeals. Reversed.

Carroll Allen and Robert F. Shippee, both of Los Angeles, for appellant.

Rosecrans & Emme, of Los Angeles, for respondents.

CONREY, P. J. The plaintiff was the owner of a lease on real property for a two-year term expiring on the 16th day of December, 1920, with the option to continue in possession for an additional two years; all at the monthly rental of $35. On the 16th day of April, 1920, plaintiff assigned this lease to the defendants. At the same time an agreement in writing was made between the assignor and the assignees, which recited that the sum of $1,000 has been paid for the assignment, and stated:

"That the $600.00 balance due for the assignment of lease, shall be paid to E. R. Smith, on or before June 1, 1920, provided he vacates the premises by that date."

This action to recover said sum of $600 was commenced on the 15th day of July, 1920. After trial of the action, judgment was entered in favor of the defendants. The plaintiff appeals from that judgment.

It is to be inferred from the written agreement, and the fact is not disputed, that the total purchase price for the assignment of lease was $1,600. It was found by the court that the defendants agreed to pay said price, and that the balance of $600 was to be paid as stated in said writing. The court further found that the plaintiff did not vacate the premises described in the complaint on or before June 1, 1920, and that the defendants are not indebted to the plaintiff in said sum of $600, or in any sum whatever. The judgment, however, was not based upon this finding, but upon an order granting a motion for nonsuit.

At the time of the assignment and contract, the plaintiff was occupying and residing in the first story of the leased house. His subtenant, one Dr. Thatcher, was in possession of the upper story. On June 1, 1920, the plaintiff moved out of the rooms actually occupied by him, and the defendants took possession thereof a day or two later. Dr. Thatcher claimed the right to remain in possession under his sublease, which ran until September 30, 1920. The plaintiff paid to the defendants (who had purchased the property from the owner) the sum of $35, rent for the month of May. Thatcher moved out late in September. It was stipulated that the defendants filed an action against Thatcher and obtained judgment against him for the sum of $350 on account of rental from the 8th day of May, 1920, to the 7th day of October, 1920, being the amount stated in a notice of date September 20, 1920, wherein the defendants required Thatcher to pay the demanded rent within three days of the service of that notice, or deliver up possession of the premises to them.

[1] Assuming it to be true, as contended by the defendants, that by reason of said possession retained by Thatcher, the plaintiff did not actually and completely vacate the leased premises on the 1st day of June, 1920, it does not follow that he lost his right to recover the unpaid balance of $600 agreed to be paid him for the assignment of the lease. They voluntarily assumed the relation of landlord and tenant toward Thatcher, and claimed, and successfully asserted, the right to recover rent from him. By their own act they were, at least constructively, in possession of the entire premises on and after June 1, 1920. Therefore, for all practical purposes of the agreement, Smith did vacate the premises on the 1st day of June.

[2] As before suggested the judgment rests upon an order for nonsuit made by the court at the close of the evidence introduced on the part of the plaintiff. Although findings of fact were signed and filed, the judgment refers solely to the order of nonsuit, and does not mention the findings. Construing the evidence most favorably to the plaintiff, as we must do in determining the merits of an order of nonsuit, we think that the evidence would have warranted the court in finding that the plaintiff did vacate the premises on the 1st day of June, in accordance with the conditions of the contract.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.